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Determining Relevancy: Article IV of the Federal Rules of Evidence

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DETERMINING RELEVANCY: ARTICLE IV OF THE FEDERAL RULES OF EVIDENCE

Article IV of the Federal Rules of Evidence deals with relevancy, the fundamental concept underlying the admissibility of any evidence. Notwithstanding any other rules or considerations, an item of evidence is inadmissible unless it meets the test of relevancy.[1] The principle that relevant evidence is generally admissible, while non-relevant evidence is excluded, is "a presupposition involved in the very conception of a rational system of evidence."[2] Article IV consists of two major parts. Rules 401 through 403 provide uniform, working definitions of the concepts of relevancy and probative value and articulate the basic principle of relevance underlying admission and exclusion of evidence in the federal scheme.[3] Rules 404 through 411 concern specific provisions affecting the admissibility of common types of circumstantial evidence.[4] The purpose of this comment is to examine the policy considerations underlying the Federal Rules of Evidence regarding the determination of relevant evidence, to evaluate the effectiveness of their expression, and to briefly compare the posture of the Federal Rules with the rules presently applied in Louisiana.[5]

Relevancy and Its Exclusionary Counterweights

Definition of Relevant Evidence

The concept of relevancy eludes exact definition,[6] thus any attempt to define it with precision will be necessarily

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1. Weinstein & Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43, 45 (1969).

2. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 264 (1898) [hereinafter cited as THAYER].

3. Schmertz, *Relevancy and Its Policy Counterweights: A Brief Excursion through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1 (1974).

4. *Id.*

5. For a discussion of Louisiana law concerning relevancy, *see* Comment, *Louisiana Evidence: Relevant and Material Aspects*, 21 LOY. L. REV. 476 (1975).

6. J. WEINSTEIN & M. BERGER, COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, ¶ 401[01] at 401-08 (1975) [hereinafter cited as WEINSTEIN & BERGER].

unsatisfactory. Recognizing that mechanistic resort to legal formulae cannot resolve questions of relevancy, Rule 401[7] of the Federal Rules of Evidence makes no attempt to furnish a mechanical formula for the determination of relevancy. However, a working definition of relevancy is necessary since evidence is admissible only when it is relevant. Relevant evidence may be defined as that evidence which, when tested by the processes of legal reasoning, possesses sufficient probative value to justify its receipt at trial;[8] if evidence has any tendency to prove or disprove any proposition, it is relevant to that proposition.[9] The existence of this relationship is determined through the logical application of principles evolved from experience or science.[10] Thus, relevancy appears more a matter of logic and common sense than a matter of law.[11]

Rule 401 provides that evidence is relevant if it has "any tendency to make the existence" of the fact to be proved "more probable or less probable."[12] The language of Rule 401 indicates that the Advisory Committee adopted Thayer's concept of logical relevancy rather than the legal relevancy theory espoused by Wigmore.[13] According to Thayer, "the law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience."[14] Wigmore, on the other hand, rejected the logical relevancy test as insufficient, preferring instead a test of legal relevance; he urged the requirement of a higher degree of probative value for admissibility than

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7. FED. R. EVID. 401: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence."

8. FED. R. EVID. 401, Adv. Comm. Note. *See* LA. R.S. 15:441 (1950): "Relevant evidence is that [evidence] tending to show the commission of the offense and the intent . . . , or tending to negative the commission of the offense and the intent." *See also* Vignes-Bombet Co. v. Rowe, 288 So. 2d 889 (La. App. 1st Cir. 1973) ("For evidence to be relevant it must have some probative value and be reasonably connected to the transaction in question.").

9. "Relevancy . . . is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a proposition sought to be proved." James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 690 (1941).

10. *Id.* at 696 n.15.

11. *Id.* at 694.

12. FED. R. EVID. 401.

13. 1 WEINSTEIN & BERGER ¶ 401[06] at 401-19-20.

14. THAYER at 265.

would normally be required in ordinary reasoning.[15] The Advisory Committee felt that any standard requiring more than an apparent altering of probabilities was unworkable and unrealistic.[16] Thus it provided that all logically relevant evidence is prima facie admissible regardless of the degree of its probative value, and should be excluded only because of recognized policy considerations.[17] The reason for adopting the logical relevancy approach is that a single standard is easier to apply, and although logical relevance does not provide the sole test of admissibility, it provides an appropriate starting point under the Federal Rules.[18]

An important aspect of Rule 401 is its specification of the kind of fact to which proof may properly be directed. Rather than referring to "material facts," the Rule identifies as properly provable any fact "of consequence to the determination of the action."[19] In rejecting the term "material" the Advisory Committee adopted the view of the California Law Revision Commission which stated that "the term had acquired an artificial meaning in the legalistic sense that makes

15. 1 J. WIGMORE, EVIDENCE § 29 at 409 (3d ed. 1940) [hereinafter cited as 1 WIGMORE].

16. WEINSTEIN & BERGER ¶ 401[06] at 401-18.

17. The importance of Thayer's approach is that the exclusion of evidence on policy grounds is relegated to a completely separate step from the actual determination of its relevancy. The court first determines whether the evidence is logically relevant. If it is, the court, *in the context of trial* can determine if the prejudicial effect of the evidence outweighs its probative value. *See* Comment, *Relevancy and Its Limits in the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 167, 168 (1969).

18. For a further discussion of logical relevance versus legal relevance, *see* Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952) [hereinafter cited as Trautman]; James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941); Peterfreund, *Relevancy and Its Limits in the Proposed Rules of Evidence for the United States District Courts: Article IV*, 25 RECORD OF N.Y.C.B.A. 80 (1970) [hereinafter cited as Peterfreund].

19. Louisiana requires that "evidence must be relevant to the material issue." LA. R.S. 15:435 (1950). LA. R.S. 15:442 (1950) provides: "The relevancy of evidence must be determined by the purpose for which it is offered; and when evidence has been excluded when offered for one purpose, but admitted when offered for another, its effect must be restricted to the purpose for which admitted, but no one can be heard to establish a fact for one purpose and deny it for another." *See generally* State v. Davis, 311 So. 2d 860 (La. 1975); State v. Devore, 309 So. 2d 325 (La. 1975); State v. Rogers, 241 La. 841, 132 So. 2d 819, *cert. denied* 370 U.S. 963 (1961); State v. Washington, 225 La. 1021, 74 So. 2d 200 (1954). *See also* State v. Senegal, 316 So. 2d 124 (La. 1975); State v. Henry, 196 La. 217, 198 So. 910 (1940).

it of little value in precise statutory drafting."[20] Courts, including those in Louisiana, have often confused the concept of materiality with that of relevancy.[21] If an item of evidence tends to prove or disprove any proposition, it is relevant to that proposition;[22] however, in order for that evidence to be admissible the proposition must be properly provable, though it need not be "in dispute."[23] If the proposition is not properly provable the evidence is immaterial, or under the theory of Rule 401, inconsequential, not irrelevant. Materiality or consequentiality is determined primarily by substantive law and pleadings.[24] Though crucial for analytical purposes, the concept of materiality, or consequentiality, is contained within the definition of relevancy in Rule 401 and need not be made the basis of a separate objection when evidence fails to relate a consequential fact.[25]

Ultimately, whether an item of evidence has sufficient tendency to make a consequential fact more or less probable under the test of Rule 401 rests in the discretion of the trial judge.[26] The judge's own experience and conceptions rather than legal precedent will often furnish the basis for the determination.[27]

Application of the Relevancy Rule

Rules 402 and 403 are designed to aid the judge in his determination of admissibility *vel non* of proffered evidence. These rules recognize that the favored policies of judicial efficiency and fairness to the parties dictate that certain evidence must be excluded from the fact finder even though it meets the test of relevance expressed in Rule 401.

Rule 402[28] provides that "all relevant evidence is admis-

20. *Tentative Recommendations and Studies Relating to the Uniform Rules of Evidence (Art. I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. AND STUDIES 10-11 (1964).

21. *See, e.g.*, State v. Birdsell, 232 La. 725, 95 So. 2d 290 (1957); State v. Borde, 209 La. 905, 25 So. 2d 736 (1946).

22. Peterfreund at 81.

23. *Id.* For example, if a party attempts to introduce an item of evidence tending to establish a proposition beyond the scope of the matter pleaded in his petition, the proposition is not properly provable.

24. Peterfreund at 81.

25. WEINSTEIN & BERGER ¶ 401[03] at 401-13.

26. *Id.* ¶ 401[08] at 401-29.

27. *Id.* ¶ 401[01] at 401-7. *See* Peterfreund at 82.

28. FED. R. EVID. 402: "All relevant evidence is admissible, except as

sible . . . . Evidence which is not relevant is not admissible." The Rule also recognizes that even though an item of evidence is logically relevant under Rule 401, it may not be admitted if prohibited "by the Constitution of the United States,[29] by Act of Congress,[30] by these rules,[31] or by other rules prescribed by the Supreme Court pursuant to statutory authority."[32] Rule 402 reflects Congress's belief that the more information the trier of fact receives, the greater will be its ability to discover the truth; however, ascertainment of truth is not necessarily served by indiscriminate admission of all evidence.[33] Rule 402 makes no attempt to enumerate the underlying policies which may dictate exclusion, but these policies find expression in two traditional classes of exclusionary rules that have different objectives. One class, which Wigmore called "auxiliary rules of probative force," includes evidence that is excluded, although relevant, in the hope of improving the quality of proof and strengthening the probability of ascertaining the truth.[34] The second class limits ad-

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otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Rule 402 is a further extension of the concept of relevancy envisioned by Thayer: "[R]ules of evidence should be simplified, and should take on the general character of principles, to guide the sound judgment of the judge, rather than the minute rules to bind it. The two leading principles should be brought into conspicuous relief: (1) That nothing is to be received which is not logically probative of some matter required to be proved; and (2) That everything which is thus probative should come in unless a clear ground of policy of law excludes it." THAYER at 530.

29. *E.g.*, relevant evidence could not be admitted if to do so would violate an individual's constitutional right to be protected against unreasonable searches found in the fourth amendment, or his right to due process protected by the fifth amendment.

30. *E.g.*, 8 U.S.C. § 1202(f) (records of refusal of visas or permits to enter the United States are confidential, subject to the discretion of the Secretary of State to make them available to a court upon certification of need); 10 U.S.C. § 3693 (replacement certificate of honorable discharge from the Army is not admissible in evidence).

31. *E.g.*, FED. R. EVID. 404-411.

32. Added by Congress. The original version promulgated by the Supreme Court read: "or by other rules adopted by the Supreme Court." Fed. R. Evid. 402 (Sup. Ct. Draft 1972). *E.g.*, FEDERAL RULES OF CRIMINAL PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE.

33. WEINSTEIN & BERGER ¶ 402[01] at 402-5.

34. *See generally* 7 J. WIGMORE, EVIDENCE §§ 1171-2169 (McNaughten ed. 1961). *E.g.*, rules pertaining to hearsay, opinion evidence and the best evidence rule.

missibility in order to further some extrinsic policy which the law considers more important than ascertaining the truth in the particular case.[35]

Rule 403[36] is an application of Thayer's view that although an item of evidence is probative, it should be inadmissible if a clear ground of policy or law dictates its exclusion.[37] Although the Rule enumerates certain risks that must be weighed against the probative value of the proffered evidence to determine its admissibility, the Rule provides no absolute test and is instead designed as a guide for handling situations for which no specific rules have been formulated.[38] The trial judge must balance probative value against the prejudicial effect of admitting the evidence.[39] In an attempt to aid the judge in the balancing process the Advisory Committee defined "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[40]

The discretion of the trial judge[41] to exclude logically

35. *E.g.*, rules recognizing certain privileges and rules prohibiting the use of illegally obtained evidence. *See generally* 8 J. WIGMORE, EVIDENCE §§ 2175-2396 (McNaughten ed. 1961).

36. FED. R. EVID. 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

37. THAYER at 530. Rule 403, like Rule 401 and Rule 402, applies to all forms of evidence: direct, circumstantial, testimonial, documentary, real and demonstrative. WEINSTEIN & BERGER ¶ 403[01] at 403-4.

38. WEINSTEIN & BERGER ¶ 403[02] at 403-13.

39. The trial judge may, of course, refer to case law as precedent when engaging in this balancing process. Ultimately, however, admissibility rests in the trial judge's discretion.

40. FED. R. EVID. 403, Adv. Comm. Note.

41. As originally drafted, Rule 403 made exclusion mandatory if the probative value of offered evidence was "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or misleading the jury." Fed. R. Evid. 403 (Sup. Ct. Draft 1972); WEINSTEIN & BERGER ¶ 403[01] at 403-4. The intention was to mitigate opposition from those who believe mechanical non-discretionary rules of evidence can be drafted. WEINSTEIN & BERGER ¶ 403[02] at 403-12. Ultimately, however, the drafters were persuaded that the better practice was to make the entire rule discretionary. The differences between the mandatory and discretionary subdivisions of the Rule as originally drafted were of emphasis rather than kind because inclusion of such terms as "substantially outweighed," "danger" and "unfair prejudice" indicated the broad powers of the judge to characterize the evidence and thus determine its admissibility. WEINSTEIN & BERGER ¶ 403[01] at 403-5.

relevant evidence because of policy considerations cannot be ruled by whim and caprice, nor by mechanical rules; the Rules formulate a rational standard by which his determinations can be measured to avoid abuse of discretion.[42] Professor Trautman suggests that the judge first determine whether a logical relation exists between the evidence offered and a proposition before the court, and then decide whether the relation is such that, when measured by "policies of judicial administration," the evidence should be submitted to the fact finder.[43] Thus the trial judge may exclude an item of evidence for one of two reasons—because the offered evidence is not logically relevant,[44] or to effectuate stated policy considerations.[45] Generally the sounder approach, when the likelihood of unfair prejudice, confusion, undue delay, or needless presentation of cumulative evidence is unclear, is to admit the evidence, taking necessary precautions by way of appropriate instructions to the jury.[46] Therefore, Rule 403 should be applied to exclude evidence only infrequently and cautiously, and when it is used, a clear statement of reasons for exclusion should be made for the record.[47]

Notably, Rule 403 does not give the court discretion to exclude relevant evidence on the basis of surprise. The position reflected in the Rule is contrary to that favored by McCormick,[48] and that found in the Model Code of Evidence[49] and the Uniform Rules of Evidence,[50] and follows instead the

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42. Trautman at 393.

43. *Id.* at 387. The procedure utilized by Louisiana courts is not unlike that suggested by Professor Trautman. *See* State v. Moore, 278 So. 2d 781, 788 (La. 1973) (the judge must resolve two preliminary questions in determining admissibility of evidence: "(1) Was it relevant to an issue of the case? (2) If relevant, was it too prejudicial?"). For other cases recognizing the necessity for weighing probative value against prejudicial effect, *see* State v. Davis, 311 So. 2d 860 (La. 1975); State v. Foss, 310 So. 2d 573 (La. 1975); State v. Grant, 295 So. 2d 168 (La. 1973); State v. Pettle, 286 So. 2d 625 (La. 1973).

44. The effect of Rule 402 is to render inadmissible evidence which is not logically relevant.

45. Rule 403 anticipates exclusion of logically relevant evidence where policy considerations make its admission undesirable on balance. *See generally* Trautman at 397-98.

46. WEINSTEIN & BERGER ¶ 403[01] at 403-7.

47. *Id.* ¶ 403[02] at 403-14.

48. C. MCCORMICK, EVIDENCE § 185 at 440 (Cleary ed. 1972) [hereinafter cited as MCCORMICK].

49. MODEL CODE OF EVID. rule 303(1)(c) (1942).

50. UNIFORM RULE OF EVID. 45(c) (1953).

common law rule which rejected surprise as a ground for exclusion of otherwise relevant evidence.[51] However, surprise may still be a factor bearing on exclusion of evidence if the court determines that a continuance is necessary if the evidence is admitted. If the evidence is without high probative value, the delay caused by a necessary continuance may justify exclusion of the evidence as a "waste of time" or because it would result in "undue delay" of the trial.[52]

Character Evidence

In general, character evidence[53] may be used for two fundamentally different purposes: first, character may itself be an element of a crime, claim, or defense; second, it may be used circumstantially to establish that a person acted in conformity therewith on a particular occasion.[54] The first use of character is commonly referred to as "character in issue";[55] the possession of a particular character trait is an operative fact which under substantive law determines the legal rights and liabilities of the parties.[56] Rule 404[57] makes no provision

51. 6 J. WIGMORE, EVIDENCE § 1849 (3d ed. 1940). The Advisory Committee cites with approval the conclusion of the California Law Revision Commission that "surprise should not be a ground for inadmissibility. Surprise frequently is an essential tool for uncovering the truth. The trial judge may protect a party from any unfairness by granting a continuance." *Tentative Recommendations and Studies Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. AND STUDIES 612 (1964).

52. WEINSTEIN & BERGER ¶ 403[06] at 403-41.

53. Character and habit are not synonymous concepts, although they are closely related. "Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance or peacefulness. 'Habit' . . . describes one's regular response to a repeated specific situation." MCCORMICK § 195 at 462. Character must also be distinguished from reputation, which is but one method of proving character under Rule 404.

54. FED. R. EVID. 404, Adv. Comm. Note.

55. MCCORMICK § 187 at 443.

56. *Id.* Illustrations of instances in which character is in issue are the chastity of the victim under a state statute specifying her chastity as an element of the crime of seduction, or in a defamation suit where the slander charged bad character and defendant pleads truth. MCCORMICK § 187 at 443 n.8.

57. FED. R. EVID. 404: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) . . . [e]vidence of a

for the use of character evidence where character is in issue because no general problem of relevancy arises in connection with evidence offered for this purpose.[58] Rule 404 is exclusively concerned with the second purpose for which character evidence is used: to prove circumstantially that a person acted in conformity with his character in a specific instance.

Circumstantial use of character evidence raises questions of admissibility since, though arguably relevant, such evidence may be of little probative value and may be objectionable under Rule 403 as unduly prejudicial. Consequently, Rule 404(a) provides that character evidence may not ordinarily be used to establish that a person acted in conformity with his character on a particular occasion; the Rule then lists particular exceptions to the general exclusionary rule. Significantly, when Rule 404 allows circumstantial use of character evidence, only pertinent traits of character, and not general moral character, may be proved.[59]

Use of Character Evidence in Criminal Cases

The rationale of the general exclusionary rule articulated in Rule 404(a)[60] is that the probative value of character evi-

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pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; (2) . . . [e]vidence 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 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; (3) . . . [e]vidence of the character of a witness, as provided in rules 607, 608, and 609. . . . Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he 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."

58. While Rule 404 does not address the use of character evidence where character is properly in issue, Rule 405, which specifies the allowable methods for proving character, governs not only those situations in which character is used circumstantially but also those in which character is in issue. *See* FED. R. EVID. 405, Adv. Comm. Note.

59. FED. R. EVID. 404(a)(1) & (2). Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 FLA. ST. U. L. REV. 191, 215 (1973) [hereinafter cited as Ladd]. *See* LA. R.S. 15:480 (1950) which provides that evidence of the good character of a defendant "must be restricted to showing character as to such moral qualities as have pertinence to the crime with which he is charged." LA. R.S. 15:481 (1950) restricts the proof of defendant's bad character by the state to a rebuttal of defendant's evidence of good character. *See also* State v. Kelly, 237 La. 991, 112 So. 2d 687 (1959) (proof of character is restricted to moral qualities which have pertinence to the crime charged).

60. *See* text of Rule 404 in note 57, *supra*.

dence is usually outweighed by its prejudicial effect on the fact finder. Character evidence offered solely to show an accused's propensity to commit a crime is excluded because it creates a danger that a jury will punish the accused for offenses other than those charged or will convict him though unsure of his guilt because it is convinced that he is a bad man.[61] The introduction of such evidence against a criminal defendant could lead to convictions on insufficient evidence because the character evidence is given greater probative value than it deserves.[62]

By express exception to the exclusionary principle of Rule 404(a), an accused may introduce particularly relevant character traits as circumstantial evidence of his innocence, and the prosecution is then permitted to rebut this evidence by introduction of pertinent bad character traits of the accused.[63] Additionally, an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal.[64] The Rule also permits the prosecution to

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61. Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 436 (1964).

62. *Id.*

63. Louisiana is in accord. LA. R.S. 15:480-81 (1950); State v. Kelly, 237 La. 991, 11 So. 2d 687 (1959). *See The Work of the Louisiana Supreme Court for the 1958-1959 Term—Evidence*, 20 LA. L. REV. 335 (1960). *See also* State v. Jackson, 309 So. 2d 318 (La. 1975); State v. Flood, 301 So. 2d 637 (La. 1974); State v. McGuffey, 301 So. 2d 582 (La. 1974).

64. Unlike Rule 404(a)(2), in Louisiana, evidence of the dangerous character of the victim is not admissible without first establishing evidence of a hostile demonstration or overt act on the part of the victim. LA. R.S. 15:482 (Supp. 1952). Proof of the requisite hostile demonstration or overt act must be to the satisfaction of the trial judge, subject to judicial review for abuse of discretion. The trial judge's decision will not be overruled unless it is manifestly erroneous. State v. Groves, 311 So. 2d 230 (La. 1975); State v. Jackson, 308 So. 2d 265 (La. 1975); State v. Weathers, 304 So. 2d 662 (La. 1974); State v. Foreman, 240 So. 2d 736 (La. 1970); State v. Terry, 221 La. 1109, 61 So. 2d 888 (1952). In *State v. Groves* (Tate, J. concurring) and *State v. Weathers* (Tate, J. dissenting), Justice Tate pointed out that an amendment to LA. R.S. 15:482 in 1952 changed the language from "*proof* of hostile demonstration . . ." to "*evidence* of hostile demonstration." Because of this change, he states it is no longer the trial judge's function to determine the credibility of evidence submitted to establish a hostile demonstration or overt act because this is a jury function. Justice Tate believes the majority's reliance on pre-1952 jurisprudence is erroneous. *See The Work of the Louisiana Supreme Court for the 1952-1953 Term—Evidence*, 14 LA. L. REV. 220, 226 (1953). *See*

introduce evidence of a character trait of peacefulness of the victim to rebut the defendant's allegation that the victim was the first aggressor. Finally, the Rule authorizes examination of the character of a witness insofar as it bears on his credibility.[65]

Rule 404(b) prohibits the use of other crimes, wrongs, or acts to prove the character of a person in order to establish guilt circumstantially. The Rule makes it clear, however, that the evidence may be admitted for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[66] Even

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also State v. Harding, 307 So. 2d 338 (La. 1975) (the supreme court found abuse of discretion by the trial judge).

65. LA. R.S. 15:495 (1950) requires that a proper foundation be laid before a witness can be impeached. Rule 404(a)(3) has no such requirement. *See* Comment, *Article VI of the Federal Rules of Evidence: Witnesses*, 36 LA. L. REV. 99, 113 (1975).

66. *See* text of Rule 404 in note 57, *supra*. *Cf.* LA. R.S. 15:495 (1950): "Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source than the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; and no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

In *State v. Prieur*, 227 So. 2d 126 (La. 1973), the Louisiana Supreme Court imposed certain procedural prerequisites to the use of prior crimes evidence to establish knowledge, intent, and system, including prior notice in writing to the defendant, specification of the exception under which it is offered, assurance that the evidence is necessary rather than merely cumulative, and appropriate instructions to the jury concerning the purpose for the introduction of the evidence. *See* Comment, *Other Crimes Evidence in Louisiana—I. To Show Knowledge, Intent, System, Etc. in the Case in Chief*, 33 LA. L. REV. 614 (1973). *See also* Comment, *Other Crimes Evidence in Louisiana—II. To Attack the Credibility of the Defendant on Cross-Examination*, 33 LA. L. REV. 630 (1973). The Louisiana Supreme Court appears committed to enforcement of the *Prieur* requirements. State v. Pearson, 296 So. 2d 316 (La. 1974) (*Prieur* rule cannot be circumvented by introduction of other crimes evidence on cross-examination or rebuttal; guidelines must be followed); State v. Ghoram, 290 So. 2d 850 (La. 1974) (same effect). Some recent cases have limited *Prieur*. State v. Davis, 311 So. 2d 860 (La. 1975) (*Prieur* notice is not necessary when the prior crimes proved constitute part of the *res gestae*); State v. Banks, 307 So. 2d 594 (La. 1975) (notice pursuant to *Prieur* guidelines failed to specify the exception under which it was offered). The Louisiana Supreme Court in *Banks* declared that "[t]he rules of *Prieur* were not meant to be used as additional, technical procedures sacramental to a valid conviction. Substan-

though evidence of prior acts is admissible for these other purposes, the trial judge should resort to the balancing test of Rule 403 to insure that the danger of unfair prejudice does not outweigh the probative value of the evidence.[67] The obvious danger of character evidence is that a jury may exaggerate its value because the crime charged is similar to a prior offense, because it appears that the defendant is generally bad, or even because the evidence makes him look so bad that his witnesses should not be believed. Therefore, even though "other crimes" evidence may be logically relevant to show motive, opportunity, intent and the like, the court should exclude it if other means are available to prove such issues.[68]

Use of Character Evidence in Civil Cases

Rule 404 reflects the general rule prevailing in most jurisdictions, including Louisiana, which rejects evidence of character in civil actions when offered as a basis for inferring an act.[69] The Advisory Committee rejected the argument that circumstantial use of character should be allowed in civil cases to the same extent as in criminal cases under Rule 404.[70] In criminal cases the defendant must raise the issue of character and by tradition is entitled to the consequences

tial compliance with this procedure designed to insure a fair trial when 'other offenses' are involved will not be penalized." 307 So. 2d at 597. Also in *Banks* the court permitted prior crimes evidence to be used in rebuttal of defendant's testimony without *Prieur* notice having been given—contrary to the earlier position in *Pearson* and *Ghoram*. For cases excluding prior crimes evidence because the prejudice outweighed the probative value, *see* State v. Foss, 310 So. 2d 573 (La. 1975); State v. Hicks, 301 So. 2d 357 (La. 1974); State v. Moore, 278 So. 2d 781 (La. 1973). *See also* State v. Grant, 295 So. 2d 168 (La. 1973); State v. Feazal, 278 So. 2d 64 (La. 1973). Although LA. R.S. 15:495 (1950) lists only knowledge, intent and system as matters properly provable by other crimes evidence, other matters have been proved by receipt of such evidence. State v. Banks, 307 So. 2d 594 (La. 1975) (identity); State v. Moore, 277 So. 2d 141 (La. 1973) (identity); State v. Dowdy, 217 La. 773, 47 So. 2d 496 (1950) (motive).

67. FED. R. EVID. 404, Adv. Comm. Note.

68. Peterfreund at 87.

69. WEINSTEIN & BERGER ¶ 404[03] at 404-18. Louisiana is in accord. Gould v. Bebee, 134 La. 123, 63 So. 848 (1913) (evidence of the character of a party is ordinarily inadmissible in a civil case). *See also* Mutual Life Ins. Co. v. Treadwell, 79 F.2d 487 (5th Cir. 1935) (the character of a party who is not a witness is generally irrelevant unless the nature of the issue directly involves character).

70. FED. R. EVID. 404, Adv. Comm. Note.

that may accrue.[71] The Advisory Committee concluded that the bases for exceptions found in Rule 404 for criminal cases lie more in history and experience than in logic, and that those who wished to extend these exceptions to civil cases had not met the burden of persuasion.[72] However, Rule 404 does not prohibit the use of character evidence in civil cases when character is in issue, when offered to attack the credibility of a witness, or when offered to prove something other than that the defendant acted in conformity with his character on a particular occasion.[73]

Methods of Proving Character

Rule 405[74] specifies three permissible methods of proving character: by testimony as to reputation, by testimony in the form of opinion, and by evidence of specific instances of conduct.[75] The relevancy of character in a particular case determines the method of proof which may be used.[76] Evidence of specific instances of conduct is the most convincing of the three methods of proof, but it also possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to waste time. Therefore, the Rule confines the use of specific instances of conduct to cases where character is in issue and hence deserving of a searching inquiry. When character is used circumstantially to establish guilt or innocence, it may be proved only by reputation or opinion. These latter methods of proof are also available when character is in issue.[77]

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71. Ladd at 216.

72. FED. R. EVID. 404, Adv. Comm. Note.

73. WEINSTEIN & BERGER ¶ 404[03] at 404-18-19. The same rule would apply in Louisiana to civil trials. For example, a trial for defamation would allow use of character evidence to prove action in conformity therewith because character is in issue. Note that although Rule 404(b) would allow the use of other crimes, wrongs or acts to show "absence of mistake or accident," Louisiana law is to the contrary. Cassanova v. Paramount—Richards Theatres, Inc., 204 La. 813, 16 So. 2d 444 (1943).

74. FED. R. EVID. 405: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

75. LA. R.S. 15:479 (1950) provides that only evidence of reputation may be used to establish character.

76. WEINSTEIN & BERGER ¶ 405[01] at 405-14.

77. FED. R. EVID. 405, Adv. Comm. Note.

In Louisiana, as in a majority of American jurisdictions, evidence of reputation is the only method by which character may be proved when it is being used circumstantially.[78] The justification for restricting proof of character to reputation testimony is that the aggregate judgment of a community is considered generally more reliable than the personal opinion of a witness whose testimony might reflect his own feelings and biases.[79] The assumption is that the cumulative opinion of many people affords a degree of trustworthiness which could not be obtained by an individual opinion of a single witness regardless of how well acquainted he is with the party's character.[80]

Rejecting the traditional arguments, the Advisory Committee elected to allow proof of character by means of personal opinion.[81] It recognized that "the persistence of reputation evidence is due to its largely being opinion in disguise."[82] The danger of opinion evidence can almost always be avoided by efficient cross-examination which may expose personal hostility on the part of the witness or reveal that the opinion is based on a single isolated instance.[83] Furthermore, in an urban society a person may have no general reputation in the community, while it is usually possible to find individuals with sufficient association with a person to have formed an opinion about him.[84]

Rule 405 permits proof of character by specific instances of conduct, but only in limited situations.[85] The main objection

78. LA. R.S. 15:479 (1950). *See, e.g.*, State v. Boudreaux, 221 La. 1078, 61 So. 2d 878 (1952) (prior conviction inadmissible to prove the bad character of the victim); *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Evidence*, 14 LA. L. REV. 220 (1953).

79. Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 513 (1939).

80. *Id.* Furthermore it was feared that opinion evidence might be used as a subterfuge to prove character by means of specific conduct where such proof was prohibited. *Id.* at 511.

81. Louisiana law does not permit proof of character by opinion. State v. Chapman, 251 La. 1089, 208 So. 2d 686 (1968); State v. Howard, 230 La. 327, 88 So. 2d 387 (1956); *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Evidence*, 29 LA. L. REV. 310, 316 (1969); *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Evidence*, 17 LA. L. REV. 421 (1957). *See* Comment, *Opinion and Expert Evidence Under the Federal Rules*, 36 LA. L. REV. 123, 124 (1975).

82. FED. R. EVID. 405, Adv. Comm. Note.

83. Ladd, *supra* note 79 at 511.

84. Ladd at 218.

85. Specific instances of conduct may not be used to prove character when character is being offered as circumstantial evidence of conduct. Peter-

to use of specific acts to prove character is "based largely on the time it would take and the confusion which would result from going into the many collateral issues which would arise."[86] However, most jurisdictions permit inquiring on cross-examination whether a witness testifying as to reputation has heard of particular instances of conduct pertinent to the trait in question.[87] Accordingly, Rule 405(a) allows inquiry into specific instances of conduct on cross-examination. However, Rule 405(b) also permits this method of proof on direct examination when character is in issue. Since inquiry into specific instances of conduct is limited to these instances, Rule 405 clearly contemplates that testimony of specific instances of conduct is not generally permissible on the direct examination of an opinion witness to character.[88]

Habit and Routine Practice

Habit "describes one's regular response to a repeated specific situation."[89] Unlike character evidence, habit or routine practice is generally considered relevant to prove circumstantially that conduct on a particular occasion conformed to the habit.[90] The reason for the acceptance of a rule allowing evidence of habit is the belief that the probative value of habitual conduct is great.[91] Unlike the rule prevail-

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freund at 89. Louisiana law is in accord. Proof of character by specific instances of conduct is not permitted. *See, e.g.*, State v. Foreman, 240 So. 2d 736 (La. 1970).

86. Ladd, *supra* note 79 at 508.

87. FED. R. EVID. 405, Adv. Comm. Note. *See, e.g.*, Michelson v. United States, 335 U.S. 469 (1948); State v. Banks, 307 So. 2d 594 (La. 1975) (court allowed the prosecutor to ask the defendant's character witness about his *knowledge* of the defendant's prior arrests under the theory that it was a reasonable inquiry into the witness's knowledge of facts upon which his opinion could be based; *i.e.*, the court allowed the prosecutor to frame his questions to the defendant's character witness in the "did you know?" form rather than the "have you heard?" form); Louisiana apparently does not require that the particular instances of conduct inquired of on cross-examination be pertinent to the trait in question. For example, in *Banks* the defendant was charged with distribution of heroin and the Louisiana Supreme Court allowed cross-examination concerning the character witness's knowledge of convictions for theft and an arrest for burglary.

88. FED. R. EVID. 405, Adv. Comm. Note.

89. MCCORMICK § 195 at 462. *See* note 53, *supra* concerning the distinction between character and habit.

90. WEINSTEIN & BERGER ¶ 406[01] at 406-6.

91. "Unquestionably the uniformity of one's response to habit is far

ing in many jurisdictions, Federal Rule 406[92] requires neither corroboration nor lack of eyewitnesses as conditions precedent to admissibility of habit evidence; the Advisory Committee suggested that these factors relate to the sufficiency of the evidence rather than its admissibility.[93]

As originally submitted to Congress, Rule 406 contained a subdivision (b) which stated that the method of proof for habit or routine practice could be "in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."[94] Reputation was not included because it was thought extremely unlikely that a person would have a reputation for a specific habit.[95] Congress deleted subdivision (b) believing that the method of proof should be left to the discretion of the trial judge and decided on a case by case basis subject to Rule 403.[96] A major difficulty in accepting evidence of habit involves the determination of the degree of proof necessary to establish its existence.[97] Subject to the limitations of Rule 403, the determination must ultimately be made by the trial judge in his discretion.

Subsequent Remedial Measures

Rule 407[98] reflects both the prevailing common law position and the Louisiana view excluding evidence of subsequent

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greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it." MCCORMICK § 195 at 463.

92. FED. R. EVID. 406: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

93. FED. R. EVID. 406, Adv. Comm. Note.

94. FED. R. EVID. 406 (Sup. Ct. Draft 1972); H.R. REP. NO. 650, 93d Cong., 1st Sess. 5 (1973).

95. WEINSTEIN & BERGER ¶ 406[04] at 406-18.

96. *Id. See also* 1 WIGMORE § 92 at 520. The House Judiciary Committee observed, however, that this deletion should not be construed as sanctioning a general authorization of opinion evidence in this area. FED. R. EVID. 406 Adv. Comm. Note. H.R. REP. NO. 650, 93d Cong., 1st Sess. 5 (1973).

97. WEINSTEIN & BERGER ¶ 406[01] at 406-07.

98. FED. R: EVID. 407: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence

remedial measures as proof of an admission of fault,[99] and is designed to bring within its scope any post-accident change, repair, or precaution.[100] The rationale of Rule 407 is based upon two grounds. First, the subsequent conduct is not an admission, because improvement of the condition which caused the injury merely indicates a recognition that it was in fact capable of causing injury, not that the risk of injury was reasonably foreseeable. Subsequent remedial conduct is not necessarily inconsistent with the conclusion that a particular injury was the result of mere accident or contributory negligence.[101] To admit subsequent remedial conduct as evidence of culpability would be to conclude that "because the world gets wiser as it gets older, . . . it was foolish before."[102] Under a liberal theory of relevancy, this reason alone would not support exclusion of evidence of subsequent remedial measures since its admission would have some tendency to sustain an inference of culpability.[103] The other, and more persuasive ground for exclusion, is the policy of encouraging, or at least not discouraging, safety precautions.[104]

Rule 407 precludes the use of evidence of subsequent remedial measures only when it is offered "to prove negli-

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of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

99. Borst, *Article IV—Relevancy*, 23 FEDERATION OF INS. COUNSEL QTR. 27, 34 (1973). *See* Givens v. De Soto Bldg. Co., 156 La. 377, 100 So. 534 (1924); Galloway v. Employers Mutual, 286 So. 2d 676 (La. App. 4th Cir. 1973) (evidence of subsequent remedial measures is not admissible even to show that the defendants had sufficient authority to order remedial action); Gauche v. Ford Motor Co., 226 So. 2d 198 (La. App. 4th Cir. 1969) (evidence of subsequent remedial measures is not admissible to prove negligence but may be considered as corroboration of other evidence of the existence of a defect); Currier v. Saenger Theaters Corp., 10 So. 2d 526 (La. App. 1st Cir. 1942).

100. WEINSTEIN & BERGER ¶ 407[01] at 407-5.

101. FED. R. EVID. 407, Adv. Comm. Note; 2 WIGMORE § 283 at 151.

102. Hart v. Lancashire & Yorkshire Ry, 21 L.T.R. (n.s.) 261, 263 (1869).

103. FED. R. EVID. 407, Adv. Comm. Note.

104. FED. R. EVID. 407, Adv. Comm. Note. However, this justification is subject to criticism since it assumes that persons will not take remedial actions out of fear that they might be used against them at a subsequent trial. Many defendants will be unaware that remedial actions may be used against them, and if this fact is known, they may make repairs to avoid the possibility of another accident and another suit. WEINSTEIN & BERGER ¶ 407[02] at 407-9-10.

gence or culpable conduct in connection with the event." Evidence of subsequent remedial measures may be admissible to prove consequential, material facts in issue other than negligence or culpable conduct,[105] such as proof of ownership or control,[106] and proof of the feasibility of taking precautionary measures,[107] when these issues are controverted. Additionally, evidence of subsequent remedial conduct is admissible for impeachment purposes. The justification for admission in these situations is that the relevancy of remedial conduct is sufficiently probative to overcome the countervailing effect of the policy considerations.[108] Care should be taken that the permissible uses specified in Rule 407 are not applied mechanically to subvert the policy goals the Rule was designed to promote. For example, the court must use care in admitting evidence to show the feasibility of taking precautionary measures, because the feasibility of precautionary conduct bears on the issue of whether it was negligent not to have taken the precaution.[109] Also care should be taken that use of evidence of subsequent remedial conduct for impeachment purposes does not undercut the policy objective of the general exclusionary rule by allowing the cross-examiner to interject an inference of lack of due care or of negligence.[110]

Since Rule 407 requires that evidence relating to ownership, control, or feasibility be controverted before evidence of subsequent remedial action is admissible, a defendant may decline to contest these issues and thereby prevent admission of evidence of his subsequent remedial activities.[111] Also, the defendant is protected by the requirement of Rule 403 that the likelihood of prejudice, confusion, and delay be considered

105. WEINSTEIN & BERGER ¶ 407[03] at 407-13.

106. *E.g.*, Powers v. J.B. Michael & Co., 329 F.2d 674 (6th Cir. 1964) (subsequent remedial measures used to establish control).

107. *E.g.*, Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961) (where plaintiff alleged defective design, changes in design were admissible to prove that they could have been made). Since the policy for excluding evidence of subsequent remedial conduct is to encourage persons to take safety precautions, remedial measures taken by persons not a party to the suit are not excluded at all by Rule 407. WEINSTEIN & BERGER ¶ 407[02] at 407-7.

108. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 591 (1956).

109. WEINSTEIN & BERGER ¶ 407[03] at 407-14.

110. *See* Daggett v. Atchison, Topeka & Santa Fe Ry., 48 Cal. Rptr. 655, 313 P.2d 557 (1957).

111. WEINSTEIN & BERGER ¶ 407[01] at 407-6-8.

by the trial judge in determining the admissibility of the proffered evidence.[112]

Compromise and Offers to Compromise

Rule 408[113] provides that an offer to compromise a claim is not admissible as an admission of the claim's validity. Two grounds for the exclusion of evidence of an offer of compromise may be advanced: first, it may be irrelevant, and second, its exclusion may be necessary to promote the voluntary settlement of claims which is favored by the law.[114] The evidence may be irrelevant because the offer may be motivated by a desire to buy peace rather than an acknowledgment of the merits of the claim.[115] Wigmore endorsed the latter rationale as the "true reason for excluding an offer of compromise."[116] However, the validity of Wigmore's theory of exclusion will vary as the amount of the offer varies in relation to the claim.[117] Furthermore, automatic exclusion of evidence of offers to settle on the ground that they are irrelevant may be criticized because the mere presence of the motive to buy peace often co-exists with other factors which indicate a belief in the validity of the claim asserted.[118] Also,

112. *Id.* ¶ 407[03] at 407-13.

113. FED. R. EVID. 408: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

114. MCCORMICK § 274 at 663.

115. 4 J. WIGMORE, EVIDENCE § 1061 at 36 (3d ed. 1940) [hereinafter cited as 4 WIGMORE].

116. *Id.*

117. FED. R. EVID. 408, Adv. Comm. Note. *See also* MCCORMICK § 274 at 663.

118. WEINSTEIN & BERGER ¶ 408[02] at 408-16. "Any of the following states of mind may underlie an offer of settlement: (1) a belief that there is no possibility of a successful prosecution of the claim, (2) a belief that the claim is valid up to a certain amount . . . coupled with an unwillingness to pay more than the amount offered, (3) a belief that a valid claim exists with only the amount of the claim in doubt, or (4) a belief that a valid claim may

under the liberal theory embodied in Rule 401, evidence of an offer to compromise may meet the requirements of relevancy without regard to the determination of motive.[119] The more persuasive basis for the exclusion of evidence of offers to compromise is promotion of the public policy favoring the out of court compromise and settlement of disputes.[120]

Rule 408 excludes not only offers of compromise but also completed compromises when offered against a compromiser.[121] Prior to the enactment of the Federal Rules of Evidence courts generally held that, in suits between the parties to a settlement, the completed agreement was admissible.[122] Rule 408, however, makes any evidence of a compromise agreement or its performance inadmissible to prove either the validity or the amount of the original claim.[123] The most common situation involving the use of a completed compromise occurs when the compromise concerns a claim arising out of the same transaction between a third person and a party to the suit being litigated.[124]

Rule 408 also excludes evidence of conduct or statements made in compromise negotiation,[125] departing from the traditional common law rule in which admissions of fact made during negotiations were not protected unless stated hypothetically or unless expressly stated to be "without prejudice."[126] The traditional rule, although apparently precise

possibly exist accompanied by uncertainty whether or not it would be successfully maintained." Bell, *Admissions Arising Out of Compromise—Are They Irrelevant?*, 31 TEX. L. REV. 239, 243-44 (1953).

119. WEINSTEIN & BERGER ¶ 408[02] at 408-17.

120. FED. R. EVID. 408, Adv. Comm. Note. McCormick suggests treating the exclusionary rule for compromise offers as a rule of privilege. MCCORMICK § 274 at 663.

121. WEINSTEIN & BERGER ¶ 408[04] at 408-22. *Accord*, Broussard v. State Farm Mutual Auto Ins. Co., 188 So. 2d 111 (La. App. 3d Cir. 1966), *cert. denied*, 249 La. 713, 190 So. 2d 233 (1966), *cert. denied*, 386 U.S. 909 (1967); *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Evidence*, 28 LA. L. REV. 429, 434 (1968).

122. *See, e.g.*, Huntley v. Snider, 86 F.2d 539 (1st Cir. 1936), *rehearing denied*, 88 F.2d 335 (1937); Harbot v. Pennsylvania R.R., 44 F. Supp. 319 (W.D.N.Y. 1942); Brannam v. Texas Emp. Ins. Ass'n, 151 Tex. 210, 248 S.W.2d 118 (1952).

123. WEINSTEIN & BERGER ¶ 408[04] at 408-23.

124. *Id.* at 408-24.

125. FED. R. EVID. 408, Adv. Comm. Note.

126. MCCORMICK § 274 at 664. Rule 408 as submitted to Congress by the Supreme Court reversed the traditional rule. The House Committee amended the rule to make evidence of facts disclosed during compromise negotiations

and simple, is extremely difficult to apply, resulting in lack of uniformity and arbitrariness largely because the court must determine the motivation of the party in order to rule on admissibility.[127] According to the Advisory Committee, the old rule also created a controversy over whether a given statement fell within the protected offer of compromise.[128] The expansion of coverage under Rule 408 was needed to cure the inevitable effect of the old rule, which was to inhibit freedom of communication with respect to compromise even among lawyers.[129]

To activate the exclusionary effect of Rule 408, the parties must have an actual dispute, or at least an apparent difference of opinion as to the validity or amount of the claim.[130] Thus, an offer to pay an admitted claim is admissible. Since the Rule demands exclusion of offers to compromise only when the purpose is proving the validity or invalidity of a claim or its amount, an offer to compromise for any other purpose is admissible.[131] Evidence of compromise may be used to prove a consequential, or material, fact in issue other than validity or invalidity of the claim or its amount,[132] such as to negative a contention of undue delay,[133] to prove an effort to obstruct criminal investigation or prosecution,[134] or to show bias or prejudice of a witness.[135] However, indiscriminate and mechanistic application of exceptions to Rule 408 should be avoided so that the objective of the Rule is not undermined. The almost unavoidable impact of the disclosure of compromise evidence is that the jury will consider the offer or

admissible, reinstating the traditional rule. The Senate Committee restored the original language of the Supreme Court version on the ground that it would better promote the free communication between the parties which the rule was designed to promote. However, the Senate Committee added a third sentence to Rule 408 to insure that evidence which is otherwise discoverable is not rendered inadmissible merely because it is presented in the course of compromise negotiation. S. REP. NO. 1277, 93d Cong., 2d Sess. 10 (1974). The Rule as eventually passed contained the Senate Committee's version.

127. WEINSTEIN & BERGER ¶ 408[03] at 408-20.

128. FED. R. EVID. 408, Adv. Comm. Note.

129. *Id.*

130. MCCORMICK § 274 at 663.

131. FED. R. EVID. 408, Adv. Comm. Note.

132. WEINSTEIN & BERGER ¶ 408[05] at 408-26-27.

133. 4 WIGMORE § 1061.

134. *See* MCCORMICK § 274 at 665.

135. *See* Annot., 161 A.L.R. 395 (1946).

agreement as evidence of a concession of liability.[136] Therefore, the trial judge must carefully weigh the need for the evidence against the potentiality of discouraging future settlement negotiations.[137]

Payment of Medical and Similar Expenses

Rule 409[138] makes evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury inadmissible to prove liability for that injury. The rationale for the Rule is that the payment or offer is often made from humane impulses rather than as an admission of liability.[139] Although the rationale is subject to doubt, the Rule is desirable for the purpose of encouraging assistance to the injured party by removing the risk that such action will be used in a subsequent trial as an admission of liability.[140] In contrast to Rule 408, Rule 409 does not extend to conduct or statements not a part of the act of furnishing, offering, or promising to pay.[141] The difference in treatment arises from the fundamental difference in nature of the two rules. Communication is essential if compromises are to be effected but this is not so in the case of payments, offers, or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.[142] Therefore, an express admission of liability is admissible even though coupled with an offer of assistance if the admission can be disclosed without mentioning the offer.[143] Non-severable admissions thus remain inadmissible.[144] Finally, Rule 409 is limited to evidence offered to prove *liability* for the injury. An offer of assistance is admissible for other purposes, such as to prove control or identity of the injury-causing apparatus, or the status of the alleged tortfeasor.[145]

136. WEINSTEIN & BERGER ¶ 408[05] at 408-27.

137. *Id.*

138. FED. R. EVID. 409: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."

139. WEINSTEIN & BERGER ¶ 409[01] at 409-3.

140. *Id.* at 409-4.

141. FED. R. EVID. 409, Adv. Comm. Note.

142. *Id.*

143. WEINSTEIN & BERGER ¶ 409[03] at 409-6.

144. *Id. E.g.*, "Don't worry about it; since it's my fault, I'll pay your bills," should generally be excluded.

145. WEINSTEIN & BERGER ¶ 409[02] at 409-5.

Offer to Plead Guilty, Nolo Contendere and Withdrawn Guilty Plea

Federal Rules 410 provides in part:

> Except as otherwise provided by Act of Congress, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case or proceeding against the person who made the plea or offer.[146]

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval v. United States*,[147] in which the court pointed out that for a trial court to admit a withdrawn guilty plea was inconsistent with its previous decision to allow the accused to withdraw it, because "[b]y permitting it to be given weight the court reinstated it *pro tanto*."[148] Another basis for Rule 410 is that it encourages negotiation in criminal cases between defense counsel and the prosecution with respect to pleas by providing needed flexibility without prejudicing the rights of the accused at a subsequent trial.[149]

Pleas of nolo contendere are also protected under Rule 410, although the laws of numerous states are to the contrary.[150] By excluding such pleas the Rule gives effect to the

146. FED. R. EVID. 410. The remainder of Rule provides: "This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement. This rule shall not take effect until August 1, 1975, and shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence." LA. CODE OF CRIM. P. art. 559 states: "When a plea of guilty has been withdrawn or set aside, the plea and the facts surrounding its entry shall not be admissible in evidence against the defendant at a trial of a case." For a discussion of the admissibility of a guilty plea not withdrawn, see *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Evidence*, 28 LA. L. REV. 429, 436 (1968).

147. 274 U.S. 220 (1927).

148. *Id.* at 224.

149. WEINSTEIN & BERGER ¶ 410[02] at 410-16.

150. FED. R. EVID. 410, Adv. Comm. Note. *See* Annot., 18 A.L.R. 2d 1287

traditional purpose of the nolo plea, which is to avoid the admission of guilt inherent in pleas of guilty.[151]

The exclusion of offers to plead guilty or nolo contendere as evidence of guilt promotes disposition of criminal cases by compromise.[152] However, a distinction must be made between an offer to the prosecution in return for leniency and an attempt to bribe an arresting officer or prosecuting witness.[153] Such illicit offers are evidence of a consciousness of guilt, and are admissible as implied admissions.[154]

Rule 410 excludes only evidence of inculpatory pleas offered against the accused,[155] since the possibility of use for or against other persons will not normally impair the freedom of discussion which the Rule is designed to foster.[156] Thus, Rule 410 creates in effect a privilege in favor of the criminal defendant, and his failure to object may constitute a waiver of his right to prevent use of that evidence against him.[157]

The Conference Committee added language to Rule 410 which may in effect render it nugatory. The Committee provided that Rule 419 "shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsis-

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1314 (1950). *See* Louisiana State Bar Ass'n v. Connolly, 206 La. 883, 20 So. 2d 168 (1944) (plea of nolo contendere has no effect beyond the particular case and cannot be employed against defendant as an admission in any civil suit for the same act). *See also* LA. CODE OF CRIM. P. art. 552(4) (Supp. 1972) (sentence imposed after nolo contendere plea for certain traffic offenses is a conviction and provides a basis for prosecution or sentencing under multiple offender laws or for the granting, suspension or revocation of licenses to operate motor vehicles).

151. FED. R. EVID. 410, Adv. Comm. Note.

152. *Id.* "Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises." MCCORMICK § 274 at 665.

153. *See* MCCORMICK § 274 at 665.

154. WEINSTEIN & BERGER ¶ 410[03] at 410-22.

155. Rule 410 makes offers to plead and withdrawn pleas inadmissible "against the person who made the plea or offer." Despite this language, pleas of guilty or of nolo contendere by a codefendant, or alleged co-offender cannot be used as evidence against other individuals charged with the same offense. WEINSTEIN & BERGER ¶ 410[06] at 410-30. Such evidence would amount to an extrajudicial admission which is excluded under the hearsay rule. FED. R. EVID. 804(b)(3) (statements offered against the accused are excluded from the statement against interest exception).

156. FED. R. EVID. 410, Adv. Comm. Note.

157. WEINSTEIN & BERGER ¶ 410[05] at 410-23. *See* Moreland v. United States, 270 F.2d 887, 890 (10th Cir. 1959); Hodge v. United States, 13 F.2d 596, 598-99 (6th Cir. 1926).

tent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence."[158] The Committee anticipated the recent amendment to Federal Rule of Criminal Procedure 11(e)(6),[159] which admits statements made in connection with, and relevant to, the pleas or offers only in "criminal proceeding[s] for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."[160] Rule 410 would admit such statements if "voluntary and reliable . . . and made in court, on the record . . . and offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement."[161] Therefore, since to the extent that Federal Rule of Criminal Procedure 11(e)(6) is inconsistent with Rule 410 the latter has no application,[162] statements made in connection with with-

158. FED. R. EVID. 410.

159. FED. R. CRIM. P. 11(e)(6) provides: "Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel." *See* H.R. REP. NO. 1597, 93d Cong., 2d Sess. 6-7 (1974). Rule 410 was not to become effective until August 1, 1975, the effective date of FED. R. CRIM. P. 11(e)(6), and only then if consistent with the latter rule.

160. FED. R. CRIM. P. 11(e)(6).

161. The Senate Judiciary Committee amended Rule 410 as submitted by the Supreme Court to state that its exclusionary effect did not apply to voluntary and reliable statements made in connection with the pleas or offers where offered for "impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement." This was contrary to the rule as adopted by the House Judiciary Committee which would have rendered inadmissible for any purposes statements made in connection with pleas and offers as well. The purpose of the Senate amendment was to reduce the scope of the rule in order to prevent injustice, particularly where "a defendant would be able to contradict his previous statements and thereby lie with impunity." S. REP. NO. 1277, 93d Cong., 2d Sess. 10-11 (1974).

162. *See* 120 CONG. REC. H. 12253 (daily ed. Dec. 18, 1974) wherein Representative William Hungate states that if any rule of the Federal Rules of Criminal Procedure becomes effective after Rule 410 was enacted and is inconsistent with that rule, Rule 410 is rendered "ineffective and inoperable."

drawn pleas of guilty, pleas of nolo contendere, or offers to plead guilty or nolo contendere may not be used for impeachment purposes, they are excluded from all civil cases, and when they are sought to be used in criminal cases charging perjury, they are inadmissible unless made under oath and in the presence of counsel.

Liability Insurance

Rule 411[163] excludes evidence of liability insurance as proof of the insured's fault,[164] recognizing that inferences drawn from the presence or lack of insurance are tenuous at best.[165] Even absent the express language of Rule 411, the low probative value and the possibility of prejudice resulting from the admission of such evidence would probably result in exclusion under Rule 403.[166] The underlying rationale for the exclusion of evidence of insurance is the fear that knowledge of the presence or absence of liability insurance will induce juries to decide cases on improper grounds.[167] The Rule protects not only the defendant, but also the plaintiff from improper inferences concerning contributory negligence or

163. FED. R. EVID. 411: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness."

164. This reflects the uniform practice of virtually all federal and state courts. Annot., 4 A.L.R. 2d 761, 767 (1949).

165. FED. R. EVID. 411, Adv. Comm. Note. Since the rule is based on the premise that evidence of insurance coverage may be used prejudicially by the jury, and in view of the inevitable assumption by jurors today that a defendant is probably insured, a defendant should be permitted to show he is not insured. The courts, however, have held otherwise and have excluded such evidence except in cases where the plaintiff has injected the suggestion that the defendant is insured. MCCORMICK § 201 at 482.

166. WEINSTEIN & BERGER ¶ 411[02] at 411-05.

167. FED. R. EVID. 411, Adv. Comm. Note. *See* MCCORMICK § 201. It has been argued that evidence of insurance should be excluded because the fact-finder may believe that the existence of insurance will make the insured less careful. This rationale is diminished by the fact that in many situations regard for personal safety is of utmost importance regardless of insurance coverage. Also a reverse inference is just as likely to result, since an insured person may be regarded as more prudent and careful than one without insurance. MCCORMICK § 201 at 479.

other fault on his part.[168] Aside from the exclusion of irrelevant evidence, Rule 411 promotes the general public policy favoring insurance;[169] both the insurer and the insured are encouraged to enter into contracts of insurance with the assurance they will not have the agreement used against them at a later time to establish liability.[170]

While evidence of liability insurance is not admissible to prove negligence or other wrongful conduct, such evidence is not excluded by Rule 411 when offered for other purposes. Evidence of insurance may be admissible in vicarious liability cases when the issue of agency is contested, since if the principal has liability insurance covering the person alleged to be his agent or employee, the fact of coverage is strong evidence of the existence of the agency relationship.[171] The fact of insurance may also be used to prove ownership or control of the vehicle or instrumentality involved.[172]

Recognizing that cross-examination for bias or prejudice should generally be freely allowed, Rule 411 does not exclude evidence of liability insurance when it is used to evaluate the credibility of a witness.[173] Yet if the court has good reason to believe that the existence of insurance has little bearing on credibility, and that it will likely be used prejudicially, it should exercise its power under Rule 403 to exclude it.[174] If evidence of insurance is admitted for purposes of impeachment, courts should, if requested, specifically charge the jury that such evidence can only be used on the issue of credibility

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168. FED. R. EVID. 411, Adv. Comm. Note.

169. WEINSTEIN & BERGER ¶ 411[02] at 411-07.

170. *Id.*

171. *E.g.*, Cook-O'Brien Constr. Co. v. Crawford, 26 F.2d 574 (9th Cir. 1928), *cert. denied*, 278 U.S. 630 (1928); WEINSTEIN & BERGER ¶ 411[03] at 411-08.

172. MCCORMICK § 201 at 480. Absence of liability insurance should normally not be admissible since the possible prejudice outweighs any probative force. WEINSTEIN & BERGER ¶ 411[03] at 411-09. But there may be instances where failure to insure is so inconsistent with the claim of control that it should be admitted. WEINSTEIN & BERGER ¶ 411[03] at 411-09.

173. For example, a witness may be employed by a defendant's insurer. MCCORMICK § 201 at 480 n.10; WEINSTEIN & BERGER ¶ 411[04] at 411-10.

174. *E.g.*, Brown v. Walter, 62 F.2d 798, 799 (2d Cir. 1933); Meek v. Miller, 38 F. Supp. 10, 12 (M.D.Pa. 1941); Coble v. Phillips Petroleum Co., 30 F. Supp. 39, 40 (N.D. Tex. 1939); WEINSTEIN & BERGER ¶ 411[04] at 411-10.

and not in determining defendant's liability or in fixing or measuring damages.[175]

Yet another exception to the exclusionary effect of Rule 411 is recognized when the admission of a party, bearing on negligence or damages, includes a reference to the fact of insurance that cannot be severed without substantially lessening the evidentiary value of the admission.[176] Such admissions are highly probative and under the test of Rule 403, the probative value outweighs prejudicial effect.[177] However, if the witness's admission is clear without revealing the existence of insurance, or if the reference to insurance can be easily deleted from documentary evidence, disclosure should be avoided.[178]

A witness may make a non-responsive or inadvertent reference to insurance in response to a proper question by examining counsel.[179] Such references will be stricken on request but should not be a basis for a mistrial or reversal absent any indication of bad faith on the part of the witness or of the examining counsel.[180] Where direct action statutes are in effect, as in Louisiana,[181] the jury cannot be kept unaware of insurance. Rule 411 is, therefore, not applicable to direct actions, but the court may attempt to minimize the possibilities of prejudice by appropriate instructions.[182]

Summary

Familiarity with the structure and scope of Rules 401 through 411 is essential to an understanding of the Federal

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175. *E.g.*, Majestic v. Louisville & N.R.R., 147 F.2d 621, 627 (6th Cir. 1945); WEINSTEIN & BERGER ¶ 411[04] at 411-10.

176. MCCORMICK § 201 at 480.

177. WEINSTEIN & BERGER ¶ 411[05] at 411-11.

178. *Id.*

179. MCCORMICK § 201 at 480.

180. *Id.* at 481; WEINSTEIN & BERGER ¶ 411[10] at 411-17.

181. LA. R.S. 22:655 (1962). Rule 411 is therefore inapplicable in Louisiana cases when an insurer is sued directly.

182. New Amsterdam Cas. Co. v. Harrington, 274 F.2d 323, 325-27 (5th Cir. 1960). An amendment to Rule 411 to add, "Except in jurisdictions or cases where an insurance carrier may be made a party, or sued directly upon a cause of action . . . ," was suggested but not adopted because *the result is the same without it.* WEINSTEIN & BERGER ¶ 411[06] at 411-13 n.9.

Rules of Evidence since relevance is a prerequisite for admissibility of all evidence in every trial. The Rules embody a theoretical cohesiveness expressed in concise and flexible form. Throughout the Rules dealing with relevancy a common ingredient is present: discretion on the part of the trial judge. The redactors recognized that the numerous special factors involved in each case demand a great deal of flexibility and that the trial judge can best assess the variables which determine relevancy.

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