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PROCEDURAL RULES GOVERNING THE ADMISSIBILITY OF EVIDENCE

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Evidence rules are inextricably intertwined with procedure. Far from being a "brooding omnipresence,"[1] evidence rules lie dormant until activated by the procedural requirement of a timely objection and a request for a ruling from the trial judge. That interconnection between procedure and evidence is often described by the trial lawyers during jury selection. Assuring the venire panel that they have no intent to hide evidence, lawyers often explain that objections may be lodged to inform the judge that the opponent may not be following the rules. As lawyers tend to emphasize, it is the judge, rather than the objecting lawyer, who decides whether to admit or exclude the evidence by applying the governing rules. In making those evidentiary rulings, the trial judge acts in the same way as the umpire who calls the balls and strikes at our national pastime — with one exception. The umpire at the bench does not have to make a call unless a player requests one.

The procedural components of evidence rules are the subject of this article. Specifically, this article discusses the 1999 revisions of the Uniform Rules of Evidence[2] insofar as they relate to procedural aspects within the rules. After discussing and analyzing those revisions in evidence procedure, this article compares these new rules to their counterparts in the Federal Rules of Evidence. The discussion of procedure in this article can be divided into two broad topics — rulings on evidence and the treatment of inflammatory evidence. The first topic follows from the consideration of revisions to Uniform Rules 103 and 104. The former rule concerns both pretrial and trial rulings, while the latter rule concerns preliminary rulings. The second topic follows from the consideration of Uniform Rules 404, 412, and 609, each of which concerns evidence of a sensitive nature.

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1. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

2. Unless otherwise indicated, all textual references and citations to the "Uniform Rules" or "Uniform Rules of Evidence" refer to the Uniform Rules of Evidence as last revised in 1999.

Rule 404 addresses character evidence, Rule 412 addresses evidence of sexual behavior, and Rule 609 addresses evidence of prior criminal convictions.

I. Rule 103 — Rulings on Evidence

A. Uniform Rule 103 as Revised in 1999

Uniform Rule 103 describes the process for admitting and excluding evidence. Unless lawyers follow that process, they will not be able to complain on appeal about an unfavorable evidentiary ruling. When lawyers oppose evidence, they must make a timely, specific objection and then obtain a ruling from the court. When lawyers seek to introduce evidence that the trial judge has excluded, they must make an offer of proof so the appellate court can consider the excluded evidence in deciding whether to reverse.

Those rules are nothing new. Instead, the primary change to Uniform Rule 103 is the inclusion of a new paragraph on the effect of pretrial rulings.[3] All other changes to the prior version of Uniform Rule 103[4] are stylistic. The added

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3. The full text of Uniform Rule 103, as revised in 1999, reads as follows:

RULE 103. RULINGS ON EVIDENCE.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected, and:

(1) if the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) if the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other further statement that shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Effect of pretrial ruling. If the court makes a definitive pretrial ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof at trial to preserve a claim of error for appeal.

UNIF. R. EVID. 103.

4. The full text of the prior version of Uniform Rule 103 reads as follows:

RULE 103. RULINGS ON EVIDENCE.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the

paragraph, subdivision (c), reads as follows:

> (c) Effect of pretrial ruling. If the court makes a definitive pretrial ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof at trial to preserve a claim of error for appeal.[5]

The new subdivision relieves the lawyer from renewing pretrial objections in order to preserve an appellate complaint, so long as the pretrial ruling is "definitive."

B. Analysis of Uniform Rule 103

1. Renewing Pretrial Objections

The new provision on definitive pretrial rulings was the subject of considerable debate during the Drafting Committee's deliberations. The debate split along trial judge/trial lawyer lines. On the one hand, a trial judge is justifiably concerned about being "sandbagged" — that is, being coaxed into making a premature evidentiary ruling that assures reversal of the case on appeal if the party who elicited the ruling suffers an adverse outcome at trial. The trial lawyer, on the other hand, is concerned about waiver. Often, an evidentiary point is discussed extensively before trial, and the judge clearly decides whether to admit or exclude the evidence. In those circumstances, the trial lawyer sees no reason to repeat the objection, or to continue to offer the evidence throughout the trial. In many instances, the trial lawyer justifiably believes that the jury may grow weary of such repeated objections or offers. Nevertheless, the trial lawyer does not want to waive the evidentiary point just because, at some juncture in the trial, the lawyer forgets to object yet again.

Motions in limine are the typical vehicle for pretrial evidentiary rulings. Generally, motions in limine preserve nothing for appeal.[6] As many federal courts have held, pretrial motions in limine do not relieve the lawyer from repeating an objection at trial or from making an offer of proof at trial.[7] The requirement of repeating such procedures at trial was explained by the Fifth Circuit in *Rojas v. Richardson*:[8]

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hearing of the jury.

(d) Errors affecting substantial rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

UNIF. R. EVID. 103 (revised 1999), 13A U.L.A. pt. 1A, at 46 (2000).

5. UNIF. R. EVID. 103.

6. *See, e.g.*, Goulah v. Ford Motor Co., 118 F.3d 1478, 1483 (11th Cir. 1997); United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993); United States v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987).

7. *See, e.g.*, Kelly v. City of Oakland, 198 F.3d 779, 786 (9th Cir. 1999); Dupre v. Fru-Con Eng'g Inc., 112 F.3d 329, 336 (8th Cir. 1997); Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997); Marcel v. Placid Oil Co., 11 F.3d 563, 567 (5th Cir. 1994); Fusco v. Gen. Motors Corp., 11 F.3d 259, 262 (1st Cir. 1993).

8. 703 F.2d 186 (5th Cir. 1983).

> Motions in limine are frequently made in the abstract and in anticipation of some hypothetical circumstance that may not develop at trial. When a party files numerous motions in limine, the trial court may not pay close attention to each one, believing that many of them are purely hypothetical. Thus, a party whose motion in limine has been overruled must object when the error he sought to prevent with his motion is about to occur at trial. This will give the trial court an opportunity to reconsider the grounds of the motion in light of the actual — instead of hypothetical — circumstances at trial.[9]

A number of federal courts, however, have departed from that majority rule, excusing the failure to object at trial when it is clear the trial judge made an unconditional ruling.[10] Those courts recognize that requiring a renewed objection or offer would be a waste of time. The Tenth Circuit has adopted a three-part test to determine whether a party must renew objections made in a motion in limine. The reviewing court must be satisfied that (1) the issue was adequately presented; (2) the issue was of the type that could be finally decided before trial; and (3) the court's ruling was definitive and no change in circumstances indicated any need to repeat the objection or offer of proof.[11]

State courts mirror their federal counterparts on this issue, typically holding that a motion in limine is insufficient to preserve an appellate complaint. Therefore, if the motion in limine is overruled, the party must ordinarily renew its objection when the evidence in question is about to be introduced at trial.[12] Nevertheless, state courts, like the federal courts, have also granted exceptions to this rule when the ruling on the motion in limine appears to be unconditional.[13]

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9. *Id.* at 189 (citing Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980)).

10. *See* Wilson v. Williams, 182 F.3d 562, 566 (7th Cir. 1999) (en banc); Walden v. Ga.-Pac. Corp., 126 F.3d 506, 517-18 (3d Cir. 1997); Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186, 1193 n.10 (10th Cir. 1997); Favala v. Cumberland Eng'g Co., 17 F.3d 987, 991 (7th Cir. 1994); Palmerin v. City of Riverside, 794 F.2d 1409, 1412-13 (9th Cir. 1986).

11. Pandit v. Am. Honda Motor Co., 82 F.3d 376, 380 (10th Cir. 1996); *accord* Richardson v. Mo. Pac. R.R. Co., 186 F.3d 1273, 1276-77 (10th Cir. 1999); *see also* 1 JACK B. WEINSTEIN & MARGARET BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 103.21(2) (Joseph McLaughlin ed., 2000) (citing Fusco v. Gen. Motors Corp., 11 F.3d 259, 262-63 (1st Cir. 1993), McQuaig v. McCoy, 806 F.2d 1298, 1301-02 (5th Cir. 1987), and Allen v. County of Montgomery, 788 F.2d 1485, 1488-89 (11th Cir. 1986)).

12. *See, e.g.*, Alabama, Evans v. Fruehauf Corp., 647 So. 2d 718, 720 (Ala. 1994); Florida, Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994); Illinois, Lundquist v. Nickels, 605 N.E.2d 1373, 1387 (Ill. App. Ct. 1992); Kansas, Brunett v. Albrecht, 810 P.2d 276, 282 (Kan. 1991); Maine, State v. Naoum, 548 A.2d 120, 125 (Me. 1988); Maryland, United States Gypsum Co. v. Mayor of Baltimore, 647 A.2d 405, 419 (Md. 1994); Massachusetts, Adoption of Carla, 623 N.E.2d 1118, 1121 (Mass. 1993); Missouri, Vermillion v. Pioneer Gun Club, 918 S.W.2d 827, 834 (Mo. Ct. App. 1996); Nebraska, Molt v. Lindsay Mfg. Co., 532 N.W.2d 11, 15 (Neb. 1995); New York, People v. Alleyne, 545 N.Y.S.2d 943, 944 (N.Y. App. Div. 1989); Ohio, State v. Maurer, 473 N.E.2d 768, 788 (Ohio 1984); Oklahoma, Braden v. Hendricks, 1985 OK 14, ¶ 9, 695 P.2d 1343, 1349; Oregon, State v. Lockner, 663 P.2d 792, 794 (Or. Ct. App. 1983); South Carolina, State v. Mueller, 460 S.E.2d 409, 410 (S.C. Ct. App. 1995); Texas, Keene Corp. v. Kirk, 870 S.W.2d 573, 581 (Tex. App. 1993); Vermont, State v. Hooper, 557 A.2d 880, 882 (Vt. 1988).

13. *See, e.g.*, Arizona, State v. Burton, 697 P.2d 331, 333 (Ariz. 1985); Arkansas, Massengale v.

Uniform Rule 103(c) adopts the reasoning of courts that dispense with repetitive objections or offers of proof after the trial judge has made a final ruling. An evaluation of changes in the trial process itself provides a backdrop for Rule 103(c). As cases have become more complex, judges have sought to streamline trials. For example, when many thousands of exhibits will be introduced at trial, no one will tolerate a trial procedure that requires a separate predicate to be laid for each exhibit. While trials with voluminous exhibits still last too long from the jurors' perspective, they take much less time because of pretrial proceedings and pretrial orders designed to resolve all evidentiary disputes before the jury is even selected. Thus, an important function of the modern pretrial order is to dispense with the necessity of tedious evidentiary predicates. Pretrial orders, however, have also engendered time-consuming pretrial proceedings concerning evidentiary objections. Perhaps the most time-consuming of all such pretrial proceedings is the *Daubert*[14] motion to strike all or part of the opinion testimony being offered through an expert witness. *Daubert* hearings may last several days and involve the calling of numerous witnesses, including expert witnesses who are concerned solely with the methodology of the testifying experts and who are never expected to testify before the jury.

When an extensive *Daubert* hearing results in a pretrial ruling that admits or excludes a witness's testimony, or certain testimony by that witness, it does seem wasteful to require the parties to repeat the same objections or offers of proof during the trial itself. Indeed, requiring that repetition may considerably prolong the trial. One approach has been to adopt and incorporate prior objections and arguments in shorthand fashion during the trial. But even that seems unnecessary when the trial court has made a "definitive ruling" that admits or excludes certain evidence. In that situation, the new subdivision to Uniform Rule 103 requires no further objection or offer of proof during trial.

The difficulty in applying the rule will be defining what constitutes a "definitive" ruling. Even after an extensive *Daubert* hearing, the trial judge may not be ready to rule on the evidence without knowing more information and facts. Many other important evidentiary issues will not result in extensive pretrial hearings, and the trial judge may not feel comfortable making a definitive ruling. Sometimes the definitiveness of a ruling will be clear. Other times, it will not.

State, 894 S.W.2d 594, 595 (Ark. 1995); Idaho, State v. Higgins, 836 P.2d 536, 542 (Idaho 1992); Louisiana, State v. Harvey, 95-26613 (La. App. 2 Cir. 1/25/95), 649 So. 2d 783, 794; North Dakota, Fischer v. Knapp, 332 N.W.2d 76, 82 (N.D. 1983); Pennsylvania, Miller v. Peter J. Schmitt & Co., 592 A.2d 1324, 1329 (Pa. Super. Ct. 1991); Wisconsin, Schultz v. Am. Family Mut. Ins. Co., No. 92-3115, 1993 Wisc. App. LEXIS 977, at *2 (Wis. Ct. App. Aug. 3, 1993); Wyoming, Sims v. Gen. Motors Corp., 751 P.2d 357, 362 (Wyo. 1988). At least six states excuse a renewal of the objection where "the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final." *See, e.g.*, California, People v. Morris, 807 P.2d 949, 968-69 (Cal. 1991); Hawaii, Lussier v. Mau-Van Dev., Inc., 667 P.2d 804, 826 (Haw. Ct. App. 1983); Maryland, Simmons v. State, 542 A.2d 1258, 1260 (Md. Ct. Spec. App. 1988); Tennessee, State v. Brobeck, 751 S.W.2d 828, 833 (Tenn. 1988); Utah, State v. Dibello, 780 P.2d 1221, 1229 n.9 (Utah 1989); Washington, Sturgeon v. Celotex Corp., 762 P.2d 1156, 1163-64 (Wash. Ct. App. 1988).

14. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

When the definitiveness of the ruling is not clear, trial lawyers must be careful to develop a full and candid record. In such a situation, following the language in Uniform Rule 103(c), a trial lawyer should specifically ask whether the judge's evidentiary ruling is or is not definitive. If the judge indicates that it is definitive, the trial lawyer should clearly establish on the record that no further objection or offer of proof is required during the trial. If the judge chooses not to make a definitive ruling or qualifies the ruling in any way, the trial lawyer should renew the objection or offer of proof at each appropriate point in the trial. If the objection or offer would always require a considerable amount of time, the trial lawyer should seek to establish a shorthand procedure — with the consent and approval of the judge and opposing counsel — such as adoption or incorporation of prior arguments.

2. The Luce Rule

Lurking behind Rule 103 is the Supreme Court's decision in *Luce v. United States*.[15] In *Luce*, the Court held that the accused in a criminal trial must testify at trial in order to preserve his right to appeal any alleged error in admitting evidence of his prior convictions under Rule 609.[16] In other words, if the trial judge decides to allow the prosecutor to ask the accused about a prior conviction, the accused cannot complain on appeal about that ruling unless the accused actually takes the stand and is cross-examined about the conviction.

After debating the propriety of that procedure, the Drafting Committee decided not to adopt or endorse the *Luce* rule, primarily because the states are divided on the issue.[17] Many states require the accused to testify in order to preserve his right to appeal a ruling on the admissibility of prior-conviction impeachment evidence under Rule 609 or under similar provisions.[18] Others do not.[19] Further,

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15. 469 U.S. 38, 43 (1984); *see also* United States v. DiPaolo, 804 F.2d 225, 233 (2d Cir. 1986) (applying *Luce* where uncharged misconduct is ruled admissible if the defendant pursues a certain defense); United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (applying *Luce* where defendants may be impeached with evidence offered under Rule 608).

16. *Luce*, 469 U.S. at 39-40; FED. R. EVID. 609(a).

17. UNIF. R. EVID. 103 reporter's notes.

18. *See, e.g.*, Arizona, State v. Gonzales, 892 P.2d 838, 844 (Ariz. 1995); Arkansas, Smith v. State, 778 S.W.2d 947, 949-50 (Ark. 1989); California, People v. Rowland, 841 P.2d 897, 909 (Cal. 1992); Colorado, People v. Brewer, 720 P.2d 596, 597 (Colo. Ct. App. 1985); Idaho, State v. Garza, 704 P.2d 944, 949 (Idaho App. Ct. 1985); Illinois, People v. Whitehead, 508 N.E.2d 687, 694 (Ill. 1987); Michigan, People v. Finley, 431 N.W.2d 19, 25 (Mich. 1988); Ohio, State v. Utley, No. L-84-434, 1985 Ohio App. LEXIS 6956, at *2-*3 (Ohio Ct. App. July 19, 1985); Tennessee, State v. Moffett, 729 S.W.2d 679, 681 (Tenn. Crim. App. 1986); Texas, Morgan v. State, 891 S.W.2d 733, 735 (Tex. App. 1994); Utah, State v. Gentry, 747 P.2d 1032, 1036 (Utah 1987); Virginia, Reed v. Commonwealth, 366 S.E.2d 274, 277 (Va. 1988); Washington, State v. Brown, 782 P.2d 1013, 1024-25 (Wash. 1989), *clarified on reconsideration*, 787 P.2d 906 (Wash. 1990); Wyoming, Tennant v. State, 786 P.2d 339, 342 (Wyo. 1990).

19. *See, e.g.*, Massachusetts, Commonwealth v. Cordeiro, 519 N.E.2d 1328, 1335 (Mass. 1988); Minnesota, State v. Ford, 381 N.W.2d 30, 32 n.1 (Minn. Ct. App. 1986); New Jersey, State v. Whitehead, 517 A.2d 373, 376-77 (N.J. 1986); New York, People v. Moore, 548 N.Y.S.2d 344, 346 (N.Y. App. Div. 1989); North Carolina, State v. Lamb, 353 S.E.2d 857, 863 (N.C. Ct. App. 1987);

some states do not obligate a defendant to testify but still require an adequate record to permit appellate review.[20]

Similar issues exist under Rule 103. For example, in *Ohler v. United States*,[21] the Supreme Court upheld another waiver rule concerning prior convictions. Sometimes a criminal defendant preemptively introduces evidence of a prior conviction on direct examination in an attempt to remove its sting, rather than awaiting its potential introduction on cross-examination. When an accused adopts that strategy, however, one result is to waive any appellate complaint that the admission of such evidence was erroneous.[22] That is simply one of the many choices that parties must make during the course of a trial.[23] The majority rule is that waiver occurs.[24]

C. Comparison with Federal Rule 103

Federal Rule 103,[25] as amended in 2000, does not contain a subdivision on

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Pennsylvania, Commonwealth v. Richardson, 500 A.2d 1200, 1203-04 (Pa. Super. Ct. 1985).

20. *See, e.g.*, Massachusetts, Commonwealth v. Gonzalez, 493 N.E.2d 516, 520 (Mass. App. Ct. 1986); Mississippi, Hansen v. State, 592 So. 2d 114, 130-31 (Miss. 1991); Oregon, State v. McClure, 692 P.2d 579, 583-84 (Or. 1984).

21. 529 U.S. 753 (2000).

22. *Id.* at 760.

23. *But see* United States v. Fisher, No. 95-10733, 1997 U.S. App. LEXIS 12671, at *15-*17 (5th Cir. Feb. 13, 1997) (holding that when the prosecution obtains, over objection, a ruling that it may use evidence, a defendant who introduces evidence of prior conviction should not be deemed to have waived his objection to the erroneous introduction of such evidence); Wilson v. Groaning, 25 F.3d 581, 586 n.10 (7th Cir. 1994) (stating that the rule requiring a defendant to reveal his prior convictions on direct examination or waive any claim of error is harsh).

24. *See* United States v. Hatchett, 31 F.3d 1411, 1425 (7th Cir. 1994); Wactor v. Spartan Transp. Corp., 27 F.3d 347, 350 (8th Cir. 1994); United States v. Williams, 939 F.2d 721, 723-25 (9th Cir. 1991); United States v. Davis, 929 F.2d 554, 558-59 (10th Cir. 1991). *But see* Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997).

25. The full text of Federal Rule 103, as amended in 2000, reads as follows:

RULE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

pretrial rulings, but it does add a similar provision on "definitive rulings" to subdivision (a) of the rule: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[26] That new provision applies not only to pretrial rulings, discussed above, but also to rulings made during trial. The question whether trial judges require renewed objections during trial is often phrased in terms of whether the trial judge will allow a "running" or "continuing" objection. Trial courts often grant running or continuing objections, and federal appellate courts have approved of such objections.[27] Many states generally recognize running or continuing objections as well.[28]

Like Uniform Rule 103(c), the new amendment to Federal Rule 103 is a helpful extension of a common-sense rule that relieves a party from having to make endless objections after a definitive ruling has been made.[29] Of course, under either rule, the trial judge may always qualify a ruling, particularly if the ruling is made early in the trial. For example, the trial judge may preliminarily admit certain evidence at the beginning of the trial but state that the ruling is not "definitive" because the matter will be considered again, if raised, after the court has had an opportunity to hear more facts.

(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

FED. R. EVID. 103.

26. FED. R. EVID. 103(a)(2).

27. *See, e.g.*, Foy v. Donnelly, 959 F.2d 1307, 1311 (5th Cir. 1992); United States v. Rivera-Santiago, 872 F.2d 1073, 1083 (1st Cir. 1989). There are a few civil cases discussing the issue as well. *See, e.g.*, Robertson v. Norton Co., 148 F.3d 905, 907 (8th Cir. 1998); Jenkins v. Whittaker Corp., 785 F.2d 720, 723 (9th Cir. 1986). *But see* Bailey v. S. Pac. Transp. Co., 613 F.2d 1385, 1389 (5th Cir. 1980) (holding an objection must be repeated each time the evidence is offered).

28. *See, e.g.*, Alabama, *In re* Powers, 523 So. 2d 1079, 1082 (Ala. Civ. App. 1988); Arizona, State v. Wood, 881 P.2d 1158, 1167 n.4 (Ariz. 1994); California, People v. Yarbrough, 278 Cal. Rptr. 703, 706 (Cal. Ct. App. 1991); Colorado, People v. Dunlap, 975 P.2d 723, 742 (Colo. 1999); Connecticut, State v. Girolamo, 496 A.2d 948, 954 n.10 (Conn. 1985); Georgia, State v. Larocque, 489 S.E.2d 806, 807-08 (Ga. 1997); Indiana, Smith v. State, 565 N.E.2d 1059, 1061 (Ind. 1991); Kansas, McKissick v. Frye, 876 P.2d 1371, 1384 (Kan. 1994); Minnesota, Briggs v. Chi. Great W. Ry. Co., 57 N.W.2d 572, 584 (Minn. 1953); Mississippi, Hughes v. State, 470 So. 2d 1046, 1048 n.1 (Miss. 1985); Montana, Palmer v. Farmers Ins. Exch., 861 P.2d 895, 907 (Mont. 1993); New York, Kulak v. Nationwide Mut. Ins. Co., 351 N.E.2d 735, 738-39 (N.Y. App. Div. 1976); North Carolina, Badgett v. Davis, 411 S.E.2d 200, 203 (N.C. Ct. App. 1991); Ohio, State v. Henness, 679 N.E.2d 686, 693 (Ohio 1997); Oklahoma, Hall v. State, 1973 OK CR 98, ¶ 6, 507 P.2d 591, 593; South Dakota, State v. Novaock, 414 N.W.2d 299, 302 (S.D. 1987); Texas, State v. Baker, 574 S.W.2d 63, 65 (Tex. 1978); Washington, State v. Ramirez, 730 P.2d 98, 102 (Wash. Ct. App. 1986); Wisconsin, State v. Lamprey, 496 N.W.2d 172, 175 (Wis. Ct. App. 1992). *But see* Iowa, State v. Jeffs, 246 N.W.2d 913, 916 (Iowa 1976) ("While a standing objection may save trial time and be convenient for both court and counsel, it makes appellate review infinitely more difficult and, for the litigants, more uncertain. We renew our disapproval of this practice.").

29. *See* Am. Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) (applying similar reasoning to conclude that a pretrial objection was sufficient because the court made a final, not tentative, ruling).

II. Rule 104 — Preliminary Questions

A. Uniform Rule 104 as Revised in 1999

Uniform Rule 104[30] concerns preliminary questions that must be decided in determining whether to admit evidence. An example of a preliminary question is found in the *Daubert* context, discussed above. Some courts require Rule 104 hearings on *Daubert* issues before the trial,[31] while others allow a Rule 104 hearing during trial.[32]

Another example of a preliminary ruling is the conditional admission of evidence. As revised, Uniform Rule 104(c) gives the trial judge discretion to (1) admit evidence based on a representation that a fact necessary to the evidence's admissibility will be proved later in the trial; or (2) withhold any ruling on the evidence until the conditional fact is proved.

The jury's presence is not required when such preliminary questions arise, and Rule 104 gives guidance on whether the jury should actually be shielded from the preliminary questions. Rule 104 requires hearings on the admissibility of confessions in a criminal case to be conducted outside the jury's presence. In other

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30. The full text of the current version of Uniform Rule 104 reads as follows:

RULE 104. PRELIMINARY QUESTIONS.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of an individual to be a witness, the existence of a privilege, or the admissibility of evidence must be determined by the court, subject to subdivision (b). In making its determination, the court is not bound by the rules of evidence except the rules with respect to privileges.

(b) Determination of privilege. A person claiming a privilege must prove that the conditions prerequisite to the existence of the privilege are more probably true than not. A person claiming an exception to a privilege must prove that the conditions prerequisite to the applicability of the exception are more probably true than not. If there is a factual basis to support a good faith belief that a review of the allegedly privileged material is necessary, the court, in making its determination, may review the material outside the presence of any other person.

(c) Relevancy conditioned on fact. If the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon or, in the court's discretion, subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(d) Hearing of jury. A hearing on the admissibility of a confession in a criminal case must be conducted out of the hearing of the jury. A hearing on any other preliminary matter must be so conducted if the interests of justice require or, in a criminal case, an accused is a witness, and so requests.

(e) Testimony by accused. An accused, by testifying upon a preliminary matter, does not become subject to cross-examination as to other issues in the case.

(f) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

UNIF. R. EVID. 104.

31. *See e.g.*, Hose v. Chi. Northwestern Transp. Co., 70 F.3d 968, 973 n.3 (8th Cir. 1995); Robinson v. Mo. Pac. R.R. Co., 16 F.3d 1083, 1089 (10th Cir. 1994); MANUAL FOR COMPLEX LITIGATION § 21.642 (Fed. Judicial Ctr., 3d ed. 2000).

32. *See, e.g.*, United States v. Johnson, 28 F.3d 1487, 1496 (8th Cir. 1994). *See generally* Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 1133, 1142-44 (1999).

situations, the trial judge has discretion to hear preliminary issues outside the jury's presence, and that is the usual practice of most courts, particularly when the evidence in question is highly prejudicial. Instructing the jury to disregard such evidence is unlikely to have its intended effect. In a criminal case, there is yet another reason to separate the preliminary question from the trial itself — namely, the accused's right not to testify. Thus, under Uniform Rule 104, when an accused testifies on a preliminary issue, the accused does not subject himself to cross-examination on other subjects.

The 1999 revisions to Uniform Rule 104 substitute the word "individual" for "person" in subdivision (a), eliminate the gender-specific language in subdivisions (d) and (e), and make certain other technical changes to the rule. Those changes to the prior version of Rule 104[33] are stylistic rather than substantive.

The major change to Uniform Rule 104 is the addition of subdivision (b), which establishes new procedural rules for determining whether an evidentiary privilege exists. The new subdivision reads as follows:

> (b) Determination of privilege. A person claiming a privilege must prove that the conditions prerequisite to the existence of the privilege are more probably true than not. A person claiming an exception to a privilege must prove that the conditions prerequisite to the applicability of the exception are more probably true than not. If there is a factual basis to support a good faith belief that a review of the allegedly privileged material is necessary, the court, in making its determination, may review the material outside the presence of any other person.[34]

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33. The full text of the prior version of Uniform Rule 104 reads as follows:

RULE 104. [PRELIMINARY QUESTIONS].

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions in criminal cases shall be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases, shall be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

UNIF. R. EVID. 104 (revised 1999), 13A U.L.A. pt. 1A, at 155 (2000).

34. UNIF. R. EVID. 104(b).

B. Analysis of Uniform Rule 104

1. Burden of Proof

Under Uniform Rule 104(b), the party claiming the privilege bears the burden of proving the existence of the privilege, and the burden of proof is "preponderance of the evidence" — more probably true than not. The same burden of proof applies to a party who opposes the privilege by asserting an exception to it. Those specific burdens are codified, demonstrating the importance of the determination of whether a privilege exists. Without that codification, the trial judge might simply weigh all the evidence together, without specifically earmarking the purpose of the evidence and who is offering it.

The burden of proof required to establish a privilege is an unsettled question of federal law. In *United States v. Zolin*,[35] the Supreme Court deferred a decision on the issue. Many states, however, have applied the preponderance of the evidence standard in determining whether a privilege exists.[36] Other states have required parties to satisfy the stricter "clear and convincing" standard to rebut the privilege to defame a public official absent actual malice.[37]

2. In Camera Review

In camera hearings to determine the existence of a privilege are widely used in state courts.[38] Uniform Rule 103(b) continues to authorize in camera review of

35. 491 U.S. 554, 563 (1989).

36. *See, e.g.*, Florida, Am. Tobacco Co. v. State, 697 So. 2d 1249, 1251 (Fla. Dist. Ct. App. 1997); Indiana, Mayberry v. State, 670 N.E.2d 1262, 1266 (Ind. 1996); Louisiana, State v. Bright, 96-0280 (La. App. 4 Cir. 6/12/96), 676 So. 2d 189, 193; Maryland, Whittington v. State, 262 A.2d 75, 77 (Md. Ct. Spec. App. 1970); Massachusetts, Purcell v. District Attorney, 676 N.E.2d 436, 439 (Mass. 1997); New Jersey, United Jersey Bank v. Wolosoff, 483 A.2d 821, 826 (N.J. Super. Ct. App. Div. 1984); Oregon, State *ex rel.* Or. Health Sci. Univ. v. Hass, 942 P.2d 261, 264 (Or. 1997); Wisconsin, Kurzynski v. Spaeth, 538 N.W.2d 554, 558 (Wis. Ct. App. 1995).

37. *See, e.g.*, Alabama, Mead Corp. v. Hicks, 448 So. 2d 308, 313 (Ala. 1983); California, Fletcher v. San Jose Mercury News, 264 Cal. Rptr. 699, 704 (Cal. Ct. App. 1989); Colorado, Kuhn v. Tribune-Republican Publ'g Co., 637 P.2d 315, 318 (Colo. 1981); Indiana, Moore v. Univ. of Notre Dame, 968 F. Supp. 1330, 1337 (N.D. Ind. 1997); Kentucky, Ball v. E.W. Scripps Co., 801 S.W.2d 684, 690 (Ky. 1990); Louisiana, Neuberger, Coerver & Goins v. Times Picayune Publ'g Co., 597 So. 2d 1179, 1183 (La. Ct. App. 1992); Minnesota, Rose v. Koch, 154 N.W.2d 409, 427 (Minn. 1967); Pennsylvania, Sprague v. Walter, 516 A.2d 706, 720 (Pa. Super. Ct. 1986); *see also* New Jersey, Abella v. Barringer Res., Inc., 615 A.2d 288, 293 (N.J. Super. Ct. Ch. Div. 1992) (rebuttal of auditor's qualified privilege as to defamation); Ohio, Doyle v. Fairfield Mach. Co., 697 N.E.2d 667, 684 (Ohio Ct. App. 1997) (rebuttal of qualified privilege for report made to government official that may result in interference with employment relationship); Tennessee, State *ex rel.* Gerbitz v. Curriden, 738 S.W.2d 192, 192 (Tenn. 1987) (divestiture of newscaster's qualified privilege against disclosure of information relating to commission of crime); Virginia, Southeastern Tidewater Opportunity Project, Inc. v. Bade, 435 S.E.2d 131, 132 (Va. 1993) (rebuttal of qualified privilege of executive of Head Start agency).

38. *See, e.g.*, Alabama, Assured Investors Life Ins. Co. v. Nat'l Union Assocs., Inc., 362 So. 2d 228, 233 (Ala. 1978); Alaska, Cent. Constr. Co. v. Home Indem. Co., 794 P.2d 595, 599 (Alaska 1990); California, People v. Superior Court, 44 Cal. Rptr. 2d 734, 740 (Cal. Ct. App. 1995); Colorado, People v. Salazar, 835 P.2d 592, 594-95 (Colo. Ct. App. 1992); Illinois, *In re* Marriage of Decker, 606 N.E.2d

material that a party claims to be privileged, but it does not make in camera review automatic. Instead, there must be a factual basis supporting a good-faith belief that a review of the privileged material is necessary. In some situations, privileged material may be so inflammatory that it could influence the trial judge. There is no reason to risk such an effect if the existence of the privilege is clear. Lawyers seeking to avoid that risk can rely upon subdivision (b) as support for opposing in camera review as being unnecessary.

Thus, Rule 104(b) does not grant courts unfettered discretion in reviewing material claimed to be privileged. As the Supreme Court observed in *Zolin*, Rule 104(a) of the Federal Rules of Evidence limits the use of in camera review: "There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents."[39] Consequently, the Court established the following threshold requirement for in camera review:

> We think that the following standard strikes the correct balance. Before engaging in *in camera* review . . . "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.[40]

If that threshold requirement is satisfied, then the trial judge has the discretion to conduct an in camera review, that discretion being dependent on a number of factors:

> The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings.[41]

That approach to granting review outside the presence of any other person is equally applicable in determining the existence of a privilege under state law and would

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1094, 1108 (Ill. 1992); Louisiana, Campo v. Dupre, 470 So. 2d 234, 236 (La. Ct. App. 1985); Massachusetts, Purcell v. District Attorney, 676 N.E.2d 436, 439 (Mass. 1997); Michigan, People v. Stanaway, 521 N.W.2d 557, 562 (Mich. 1994); New Jersey, Kinsella v. Kinsella, 696 A.2d 556, 569 (N.J. 1997); New York, LeVien v. La Corte, 640 N.Y.S.2d 728, 733-34 (N.Y. Sup. Ct. 1996); North Carolina, Myers v. Liberty Lincoln-Mercury, Inc., 365 S.E.2d 663, 665 (N.C. Ct. App. 1988).

39. United States v. Zolin, 491 U.S. 554, 571 (1989).

40. *Id.* at 572 (citation omitted).

41. *Id.*

promote uniformity among the states in deciding whether to grant this type of review.

Revised Uniform Rule 104 also addresses an anomaly in the prior version of Uniform Rule 104(a), which arguably permitted the disclosure of privileged material. Prior Uniform Rule 104(a) stated that, in determining the existence of a privilege, "the court is not bound by the rules of evidence with respect to privileges." That provision is unexceptional in itself because the content or subject matter of allegedly privileged information may need to be revealed during the preliminary procedure of determining the validity of the asserted privilege. If the jury is included in that preliminary process, the proverbial skunk will be in the jury box, even if the judge upholds the privilege. Further, if the privileged information is revealed to opposing counsel, then opposing counsel may be able to formulate cross-examination questions that will lead to exposure of the privileged information. The 1999 revision of Rule 104 provides for the disclosure of the privileged matter "outside the presence of any other person," rather than referring to an "in camera," proceeding. The phrase "in camera" is often used to describe a court's private review of files,[42] but it sometimes describes only a hearing in the judge's chambers or outside the presence of unnecessary spectators.[43]

C. Comparison with Federal Rule 104

Federal Rule 104,[44] which was not amended in 2000, does not have a provision similar to Uniform Rule 104(b). As a result, Federal Rule 104 does not state the burden of proof for establishing a privilege, nor does it address in camera proceedings. Some courts, however, have held that a prerequisite to in camera review is that the party opposing the privilege present sufficient evidence to support

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42. *See* State v. Warren, 746 P.2d 711, 714 (Or. 1987).

43. *See* Wofford v. State, 903 S.W.2d 796, 798 (Tex. App. 1995).

44. Federal Rule 104 reads as follows:

RULE 104. PRELIMINARY QUESTIONS

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

FED. R. EVID. 104.

a reasonable belief that the review may yield evidence establishing the applicability of an exception to the privilege.[45]

Further, Federal Rule 104 differs from Uniform Rule 104 on the subject of hearing a preliminary question outside the jury's presence. Federal Rule 104 provides that a hearing on the admissibility of a criminal confession must occur outside the jury's presence in all cases, whereas the Uniform Rule requires that in criminal cases only.

III. Rule 404 — Character Evidence Not Admissible to Prove Conduct, Exceptions; Other Crimes

Uniform Rule 404,[46] as revised in 1999, establishes a general rule that evidence of a person's character or character trait is not admissible to prove that the person acted in conformity with that character or character trait on the occasion in question. That widely accepted rule was also present in the prior version of Uniform Rule

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45. *See Zolin*, 491 U.S. at 562-63; 1 WEINSTEIN & BERGER, *supra* note 11, § 104.13[2][e].

46. The full text of Uniform Rule 404, as revised in 1999, reads as follows:

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT, EXCEPTIONS; OTHER CRIMES.

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

(1) evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut that evidence;

(2) evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut that evidence, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; and

(3) evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrong, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show the person acted in conformity therewith. However, it may be admissible for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) Determination of admissibility. Evidence is not admissible under subdivision (b) unless:

(1) the proponent gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of the evidence the proponent intends to introduce at trial;

(2) if offered against an accused in a criminal case, the court conducts a hearing to determine the admissibility of the evidence and finds:

(A) by clear and convincing evidence, that the other crime, wrong, or act was committed;

(B) that the evidence is relevant to a purpose for which the evidence is admissible under subdivision (b); and

(C) that the probative value of the evidence outweighs the danger of unfair prejudice; and

(3) upon the request of a party, the court gives an instruction on the limited admissibility of the evidence pursuant to Rule 105.

UNIF. R. EVID. 404.

404.[47] The controversies over Rule 404 arise not in contesting the general rule, but in applying Rule 404's exceptions to the general rule.

The 1999 revisions of Rule 404(a) and (b) eliminate the gender-specific language in the prior rule, with no change in substance intended. The term "alleged" has also been inserted before each reference to "victim" to make the rule consistent with Uniform Rule 412. Those changes are largely stylistic rather than substantive.

The substantive change to Uniform Rule 404 is the addition of subdivision (c). The new subdivision establishes a procedure for determining whether character evidence is admissible:

> (c) Determination of admissibility. Evidence is not admissible under subdivision (b) unless:
>
> (1) the proponent gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of the evidence the proponent intends to introduce at trial;
>
> (2) if offered against an accused in a criminal case, the court conducts a hearing to determine the admissibility of the evidence and finds:
>
> (A) by clear and convincing evidence, that the other crime, wrong, or act was committed;
>
> (B) that the evidence is relevant to a purpose for which the evidence is admissible under subdivision (b); and
>
> (C) that the probative value of the evidence outweighs the danger of unfair prejudice; and

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47. The full text of the prior version of Uniform Rule 404 reads as follows:

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT, EXCEPTIONS; OTHER CRIMES.

(a) Character evidence generally. 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) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or 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) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. 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.

UNIF. R. EVID. 404 (revised 1999), 13A U.L.A. pt. 1A, at 613 (2000).

(3) upon the request of a party, the court gives an instruction on the limited admissibility of the evidence pursuant to Rule 105.[48]

A. Analysis of Revised Uniform Rule 404

There are three components to the procedural amendments enclosed in new Uniform Rule 404(c): (1) a notice provision; (2) a required hearing on admissibility with certain mandated procedures; and (3) a provision for the issuance of limiting instructions. These components are discussed below.

1. The Notice Provision

The notice provision in Uniform Rule 404(c)(1) applies to any party seeking to offer evidence under the rule. The provision applies in civil and criminal cases, and it requires the accused or any other party to provide information regarding the general nature of the evidence he intends to offer at trial. Several states already require a party to give notice of its intent to offer evidence of other crimes, wrongs, or acts.[49] The notice requirement is qualified in some state jurisdictions,[50] while a number of jurisdictions do not appear to require any notice.[51]

The reasons for a notice rule are apparent in *Gray v. Netherland*.[52] In that case, the Supreme Court declined to adopt what it considered to be a new constitutional rule that an accused *has* a due process right to receive more than one day's notice of any other crimes evidence that the prosecution seeks to present during the penalty phase of a trial.[53] Gray was on trial for capital murder. The prosecution had informed him of its intent to present certain other crimes evidence the evening before the trial's penalty phase. Gray complained that without more notice of the prosecutor's intent to use the evidence, he could not adequately defend himself. The

48. UNIF. R. EVID. 404(c).

49. *See, e.g.*, Alaska, Moor v. State, 709 P.2d 498, 505-06 (Alaska Ct. App. 1985); Minnesota, State v. Slowinski, 450 N.W.2d 107, 113 (Minn. 1990); State v. Spreigl, 139 N.W.2d 167, 169 (Minn. 1965); Montana, State v. Just, 602 P.2d 957, 963-64 (Mont. 1979). *But see* State v. Powell, No. 467, 1993 Ohio App. LEXIS 1346, at *7 n.1 (Ohio Ct. App. Mar. 2, 1993) (intimating that absent an amendment to Ohio Rule of Evidence 404(b) requiring notice, notice of intent to introduce "other acts" evidence will not be required).

50. For example, in Oklahoma, the requirement of notice under *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, is unnecessary where (1) the other crime evidence is a part of the res gestae of the crime charged (Brogie v. State, 1985 OK CR 2, ¶ 20, 695 P.2d 538, 543); (2) the other crime evidence is offered during the presentation of rebuttal evidence (Freeman v. State, 1984 OK CR 60, ¶ 3, 681 P.2d 84, 85); (3) the State introduces the other crime evidence during cross or recross-examination (Smith v. State, 1985 OK CR 17, ¶ 14, 695 P.2d 864, 868); or (4) "the State was not aware of the [other crime] evidence in time to have afforded pretrial notice" (*Brogie*, 1985 OK CR 2, ¶ 20, 695 P.2d at 543).

51. In each of the following jurisdictions, Rule 404, or its equivalent, does not have a notice requirement for "other crimes" evidence: Arizona, Arkansas, California, Colorado, Connecticut (Code of Evidence § 4-5), Delaware, Iowa, Kansas, Maine, Maryland, Mississippi, Nebraska (Rule 27-404), Nevada, New Jersey, New Mexico (Rule 11-404), North Carolina, Oregon, Rhode Island, South Carolina, South Dakota (S.D. LAWS § 19-12-5), Tennessee, Utah, Washington, Wisconsin (Rule 904.04), and Wyoming.

52. 518 U.S. 152 (1996).

53. *Id.* at 167.

Supreme Court denied relief, holding that the absence of such a right at the time of the petitioner's conviction was sufficient to deny the petitioner habeas relief.[54] Consequently, the Court did not decide whether due process requires that a party receive adequate or reasonable notice of the nature of other crimes evidence that the proponent of such evidence intends to present at trial. That decision engendered a bitter dispute, in which the dissent argued that the right of criminal defendants to know the evidence against them was hardly a new right.[55]

2. The Required Hearing

If character evidence is offered against an accused in a criminal case, subdivision (c)(2) requires the trial judge to conduct a hearing to determine the evidence's admissibility and to make three findings. First, the court must find by clear and convincing evidence that the other crime, wrong, or act was committed. Second, it must find that the evidence is relevant for a purpose for which the evidence is admissible under subdivision (b). Third, it must find that the probative value of the evidence outweighs the danger of unfair prejudice.

A few states require that such a hearing be conducted in camera. A hearing is required by statute in Tennessee[56] and by judicial decision in West Virginia.[57] In Oklahoma, an in camera hearing is also required in the event the prosecution attempts to use other crimes, wrongs, or acts evidence in rebuttal.[58]

Under subdivision (c)(2), whether "the other crime, wrong or act was committed" is a preliminary question of fact for the court, not the jury. That role departs from the Supreme Court's holding in *Huddleston v. United States.*[59] In *Huddleston*, the Supreme Court held that the admissibility of other crimes, wrongs, or acts is a question of conditional relevancy under Rule 104(b) of the Federal Rules of Evidence.[60] The trial court examines all of the evidence in the case and decides whether the jury could reasonably find that the accused committed the act by a preponderance of the evidence.[61] If so, the judge admits the evidence and the jury ultimately determines whether the accused was the actor. Departing from such a view, revised Uniform Rule 404(c) adopts what many consider to be the preferred approach of insulating the jury from hearing the inflammatory evidence until the trial court ultimately has decided that the other crime, wrong, or act was, in fact,

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54. *Id.* at 170.

55. Four members of the Court dissented, arguing that the petitioner's failure to receive fair notice of the other crimes evidence in question violated the petitioner's due process right to be afforded a "meaningful" opportunity to challenge the "accuracy or materiality" of the prosecution's penalty-phase evidence. *Id.* at 185 (Ginsberg, J., dissenting).

56. *See* TENN. R. EVID. 404(b)(1).

57. *See* State v. McGhee, 455 S.E.2d 533, 539 (W. Va. 1995).

58. *See* Burks v. State, 1979 OK CR 10, ¶ 18, 594 P.2d 771, 775, *overruled on other grounds by* Jones v. State, 1989 OK CR 7, 772 P.2d 922.

59. 485 U.S. 681 (1988).

60. *Id.* at 689.

61. *Id.* at 690; *see also* Edward J. Imwinkelried, *"Where There's Smoke, There's Fire": Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404?*, 42 ST. LOUIS U. L.J. 813, 817 (1998).

committed.[62] Moreover, that ultimate decision must be reached under the clear and convincing evidence standard under amended Uniform Rule 404(c). A number of states have adopted the same burden.[63]

Uniform Rule 404(c) imposes two more requirements. Subdivision (c)(2)(B) requires the trial judge to find that the evidence is relevant for a purpose for which the evidence is admissible under subdivision (b). A number of states have adopted this requirement as well.[64] Finally, Subdivision (c)(2)(C) requires the court to engage in a balancing test to determine if the evidence's probative value outweighs the danger of unfair prejudice.

The balancing test in Uniform Rule 404 favors the admission of evidence of other crimes, wrongs, or acts. A number of jurisdictions follow that approach.[65] Other jurisdictions, however, have adopted a balancing test under which the evidence is presumptively inadmissible.[66] The states are almost evenly divided on which

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62. *See* Imwinkelried, *supra* note 61, at 845-46 (advocating departure from *Huddleston* rule "[w]hen the prosecution offers testimony from several different witnesses about multiple, uncharged acts similar to the charged offense" because "even if the jury finds insufficient evidence of the accused's commission of the uncharged 'acts,' the fact of multiple accusations may influence the jury's deliberations").

63. *See, e.g.*, Delaware, Getz v. State, 538 A.2d 726, 734 (Del. 1988); Maryland, Harris v. State, 597 A.2d 956, 960 (Md. 1991); Minnesota, State v. Slowinski, 450 N.W.2d 107, 114 (Minn. 1990); Nevada, Cipriano v. State, 894 P.2d 347, 352 (Nev. 1995), *overruled on other grounds by* State v. Sixth Judicial Dist. Court, 964 P.2d 48 (Nev. 1998); New Hampshire, State v. Dushame, 616 A.2d 469, 473 (N.H. 1992); Oklahoma, Burks v. State, 1979 OK CR 10, ¶¶ 11-18, 594 P.2d 771, 774-75, *overruled on other grounds by* Jones v. State, 1989 OK CR 7, 772 P.2d 922; South Carolina, State v. Raffaldt, 456 S.E.2d 390, 392 (S.C. 1995); South Dakota, State v. Sieler, 397 N.W.2d 89, 94 (S.D. 1986).

64. *See, e.g.*, Arkansas, Henry v. State, 828 S.W.2d 346, 350 (Ark. 1992); California, People v. Balcom, 867 P.2d 777, 781 (Cal. 1994); Colorado, State v. McKibben, 862 P.2d 991, 992-93 (Colo. Ct. App. 1993); Connecticut, State v. Santiago, 618 A.2d 32, 39 (Conn. 1992); District of Columbia, Campbell v. United States, 450 A.2d 428, 430 (D.C. 1982); Illinois, People v. Davis, 617 N.E.2d 1381, 1385 (Ill. App. Ct. 1993); Kansas, State v. Searles, 793 P.2d 724, 730 (Kan. 1990); Maryland, Harris v. State, 597 A.2d 956, 960 (Md. 1991); Nebraska, State v. Carter, 524 N.W.2d 763, 771 (Neb. 1994), *overruled on other grounds by* State v. Freeman, 571 N.W.2d 276 (Neb. 1997); Nevada, Cipriano v. State, 894 P.2d 347, 352 (Nev. 1995); New Jersey, State v. Stevens, 558 A.2d 833, 839 (N.J. 1989); New Mexico, State v. Aguayo, 835 P.2d 840, 844 (N.M. Ct. App. 1992); New York, People v. Alvino, 519 N.E.2d 808, 812 (N.Y. 1987); Pennsylvania, Commonwealth v. Seiders, 614 A.2d 689, 691 (Pa. 1992); Rhode Island, State v. Brown, 626 A.2d 228, 233 (R.I. 1993); West Virginia, State v. McGhee, 455 S.E.2d 533, 537-38 (W. Va. 1995); Washington, State v. Peerson, 816 P.2d 43, 55 (Wash. Ct. App. 1991).

65. *See, e.g.*, Arizona, State v. Barr, 904 P.2d 1258, 1264 (Ariz. Ct. App. 1995); Connecticut, State v. Santiago, 618 A.2d 32, 39 (Conn. 1992); Kansas, State v. Searles, 793 P.2d 724, 731 (Kan. 1995); Massachusetts, Commonwealth v. Brousseau, 659 N.E.2d 724, 726 (Mass. 1996); Montana, State v. Paulson, 817 P.2d 1137, 1141 (Mont. 1991); Nebraska, State v. Carter, 524 N.W.2d 763, 773 (Neb. 1994), *overruled in part on other grounds by* State v. Freeman, 571 N.W.2d 276 (Neb. 1997); Nevada, Cipriano v. State, 894 P.2d 347, 352 (Nev. 1995); New Hampshire, State v. Dushame, 616 A.2d 469, 473 (N.H. 1992); Rhode Island, State v. Brown, 626 A.2d 228, 233 (R.I. 1993); South Dakota, State v. Floody, 481 N.W.2d 242, 254 (S.D. 1992); Wisconsin, State v. Landrum, 528 N.W.2d 36, 41 (Wis. Ct. App. 1995).

66. *See, e.g.*, California, People v. Balcom, 867 P.2d 777, 781 (Cal. 1994); Colorado, People v. McKibben, 862 P.2d 991, 992-93 (Colo. Ct. App. 1993); Delaware, Getz v. State, 538 A.2d 726, 731 (Del. 1988); District of Columbia, Campbell v. United States, 450 A.2d 428, 430 (D.C. 1982); Illinois, People v. Davis, 617 N.E.2d 1381, 1385 (Ill. App. Ct. 1993); New Jersey, State v. Stevens, 558 A.2d

balancing test to apply.

If the result of the admissibility hearing is to admit the evidence, one more step is required before the evidence actually reaches the jury. Uniform Rule 404(c)(3) provides that, upon a party's request, the trial judge shall give an instruction on the limited admissibility of the evidence pursuant to Uniform Rule 105. As with the notice requirement under Rule 404(c)(1), the limiting instruction provision is also applicable in civil cases. Several jurisdictions have adopted the requirement that a trial judge give such a limiting instruction, with or without a party's request.[67]

A limiting instruction about a party's request is preferable for two reasons. First, the party against whom the evidence is being admitted should have the discretion to weigh the benefit of a limiting instruction against the risk of unnecessarily emphasizing the limited purpose for which the evidence is admitted. Second, Uniform Rule 105 also provides for limiting instructions at the party's request. In any event, the inclusion of a specific provision on limiting instructions in Uniform Rule 404 emphasizes the importance of limiting the use of such evidence and specifically counsels the party against whom the evidence is offered to weigh the benefits and risks of giving such instructions to the jury.

3. No "Lustful Disposition" Exception

The Drafting Committee considered whether to revise Uniform Rule 404(b) to add a "lustful disposition" or *"modus operandi"* exception to the rule regarding other crimes, wrongs, or acts evidence. That exception has been accepted in some jurisdictions as one of the permissible purposes for which other crimes, wrongs, or acts evidence may be admitted. In those states, the defendant's lustful disposition is admissible directly to show action in conformity therewith under special circumstances.[68] Other states recognize a similar exception but describe it

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833, 840 (N.J. 1989); New Mexico, State v. Aguayo, 835 P.2d 840, 848 (N.M. Ct. App. 1992); New York, People v. Alvino, 519 N.E.2d 808, 812 (N.Y. App. Div. 1987); Pennsylvania, Commonwealth v. Seiders, 614 A.2d 689, 691 (Pa. 1992).

67. *See, e.g.*, Arizona, State v. Barr, 904 P.2d 1258, 1264 (Ariz. Ct. App. 1995) (if requested); Delaware, Getz v. State, 538 A.2d 726, 734 (Del. 1988) (required); Minnesota, State v. Fallin, 540 N.W.2d 518, 520 (Minn. 1995) (required); Nebraska, State v. Carter, 524 N.W.2d 763, 771 (Neb. 1994) (if requested); New Jersey, State v. Loftin, 670 A.2d 557, 568 (N.J. Super. Ct. App. Div. 1996) (if not requested, must demonstrate failure to give instruction was capable of producing unjust result); Ohio, State v. Jurek, 556 N.E.2d 1191, 1196 (Ohio Ct. App. 1989) (if requested); Oklahoma, Burks v. State, 1979 OK CR 10, ¶ 17, 594 P.2d 771, 775, *overruled on other grounds by* Jones v. State, 1989 OK CR 7, 772 P.2d 922 (required); Pennsylvania, Commonwealth v. Billa, 555 A.2d 835, 841 (Pa. 1989) (required); Rhode Island, State v. Brown, 626 A.2d 228, 233 (R.I. 1993) (required); Utah, State v. Smith, 700 P.2d 1106, 1110 (Utah 1985) (if requested); West Virginia, State v. McGhee, 455 S.E.2d 533, 539 (W. Va. 1995) (required); Wyoming, Goodman v. State, 601 P.2d 178, 184 (Wyo. 1979) (if requested).

68. *See, e.g.*, Georgia, Gable v. State, 476 S.E.2d 66, 68 (Ga. Ct. App. 1996); Idaho, State v. Moore, 819 P.2d 1143, 1145 (Idaho 1991); Indiana, IND. CODE ANN. § 35-37-4-15 (West 1997) (if it relates to the sexual abuse of a child); Iowa, State v. Maestas, 224 N.W.2d 248, 251 (Iowa 1974); Kentucky, McDonald v. Commonwealth, 569 S.W.2d 134, 138 (Ky. 1978); Louisiana, State v. Coleman, 95-1890 (La. App. 4 Cir. 5/1/96), 673 So. 2d 1283, 1288; Mississippi, Lovejoy v. State, 555 So. 2d 57, 59 (Miss. 1989); Oklahoma, Landon v. State, 77 Okl. Cr. 90, 140 P.2d 242, 244 (Okla. Crim. App. 1943) (a pre-Code case cited in dictum in Hawkins v. State, 1989 OK CR 72, ¶ 10, 782 P.2d 139, 141); Rhode Island,

differently.[69] For example, Nebraska characterizes the exception as "*modus operandi*."[70] Several states, however, do not recognize a lustful disposition exception at all.[71]

Arguments have been advanced for and against the exception. In abandoning the "lustful disposition" or "depraved sexual instinct" rule, the Indiana Supreme Court in *Lannan v. State*[72] focused upon the following rationales for recognition of the rule: (1) high recidivism, and (2) the need to bolster the testimony of victims (i.e., to lend credence to a victim's accusations or testimony that describes acts that would otherwise "seem improbable standing alone"). In responding to those arguments, the court observed:

> We do not allow the State to introduce previous drug convictions in its case-in-chief in a prosecution for selling illegal drugs, however, even though it can hardly be disputed that such evidence would be highly probative. . . . If a high rate of recidivism cannot justify a departure from the propensity rule for drug defendants, logic dictates it does not provide justification for departure in sex offense cases.
>
> . . . .
>
> . . . [T]here remains what might be labeled the "rationale behind the rationale," the desire to make easier the prosecution of child molesters, who prey on tragically vulnerable victims in secluded settings, leaving behind little, if any, evidence of their crimes.
>
> . . . .
>
> The emotional appeal of such an argument is powerful, given the special empathy that child victims of sexual abuse evoke. But even this cannot support continued application of an exception which allows the prosecution to accomplish what the general propensity rule is intended to prevent.[73]

The Drafting Committee decided not to add a lustful disposition exception for at least three reasons. First, a lustful disposition exception flies in the face of the general rule that character evidence cannot be admitted for the purpose of showing action in conformity with character on a particular occasion. Second, as a practical

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State v. Jalette, 382 A.2d 526, 533 (R.I. 1978); Washington, State v. Ray, 806 P.2d 1220, 1229-30 (Wash. 1991); West Virginia, State v. Edward, 398 S.E.2d 123, 133 (W. Va. 1990), *overruled in part by* State v. Graham, 541 S.E.2d 341 (W. Va. 2000).

69. *See, e.g.*, Alabama, *Ex parte* Register, 680 So. 2d 225, 227 (Ala. 1994) ("unnatural sexual passion"); Alaska, Burke v. State, 624 P.2d 1240, 1250 (Alaska 1980) ("lewd disposition"); Arizona, State v. Treadaway, 568 P.2d 1061, 1063-64 (Ariz. 1977) ("emotional propensity"); Arkansas, Mosley v. State, 929 S.W.2d 693, 695 (Ark. 1996) ("depraved sexual instinct"). Massachusetts admits prior acts of sexual activity "to prove an inclination to commit the [acts] charged in the indictment." Commonwealth v. King, 441 N.E.2d 248, 251 (Mass. 1982) (alteration in original).

70. *See* State v. Craig, 361 N.W.2d 206, 213 (Neb. 1985).

71. *See, e.g.*, People v. Balcolm, 867 P.2d 777, 782 n.2 (Cal. 1994) (with one dissenting judge arguing for recognition of a lustful disposition exception).

72. 600 N.E.2d 1334 (Ind. 1992).

73. *Id.* at 1337-38.

matter, evidence admitted as proof of a lustful disposition would be admissible under one of the permissible purposes for which prior acts of physical or sexual abuse could be admitted — for example, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Third, some members of the Committee found the Indiana Supreme Court's reasoning persuasive. The recidivism rationale could emasculate the general rule that character evidence should not be admitted to prove guilt. Some members of the Committee also believed that while the emotional appeal of relaxing the propensity rule in the case of child victims of sexual abuse is powerful, it does not support the creation of an exception allowing the prosecution to accomplish indirectly what the general propensity rule is intended to prevent directly.[74]

B. Comparison with Federal Rule 404

Under both Uniform Rule 404 and Federal Rule 404, as amended in 2000,[75] the

74. One of the authors of this article, Reagan Simpson, has first-hand knowledge of the potential for character evidence's misuse, having once served as the presiding juror in an attempted capital murder case. The main question was whether the accused had fired shots at pursuing police officers during a car chase. The prosecutor's key evidence of guilt was "other crimes evidence" — namely, the accused's conduct in firing the same gun earlier on the day of the car chase. The trial judge admitted the evidence on the issue of intent, but instructed the jury to consider it only on intent and not on whether the defendant had committed attempted capital murder. Several times during jury deliberations, other jurors referred to the defendant's prior conduct. Each time, the author repeated the judge's limiting instruction. Only then did the other jurors begrudgingly acknowledge the instruction, and an acquittal resulted. While the author cannot say certainly whether the verdict would have been the same if he had not been on the jury, it is likely the jury would have voted to convict based on the prosecutor's persuasive argument that the accused's earlier conduct indicated that he was the one who had fired at the police officers. After the trial, the defense lawyer explained that he had left the author on the jury based on the hope that a lawyer would keep the jury from misusing the other bad acts evidence admitted on the issue of intent. The basis for the lawyer's concern is well-documented in similar contexts. *See generally* Robert D. Dodson, *What Went Wrong With Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 31-44 (1999) (citing studies indicating that juries, when considering prior-conviction evidence admitted under Rule 609, do not understand or deliberately ignore limiting instructions regarding proper use of such evidence).

75. Federal Rule 404 reads as follows:

> RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES
>
> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
>
> (2) *Character of Alleged Victim.* Evidence of a pertinent trait of character of the alleged 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 alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

accused may offer evidence of his or her own pertinent character trait, in which event the prosecution may offer evidence to rebut the accused's character evidence. Federal Rule 404, however, goes one step further than Uniform Rule 404. When the accused offers evidence concerning a character trait of the alleged victim, Federal Rule 404 allows the prosecution to respond by offering rebuttal evidence pertaining to that same character trait of the accused. Prior law did not allow the prosecution to introduce negative character evidence of the accused unless the accused first introduced evidence of his or her good character.[76]

The rationale for permitting such rebuttal is to provide a balanced presentation of evidence. For example, in a murder case with a claim of self-defense, the accused might offer evidence of the alleged victim's violent disposition. If the prosecution cannot offer corresponding evidence of the accused's violent character, the jury will have only part of the information it arguably needs to identify the initial aggressor. After extended discussion, the Drafting Committee declined to enlarge the scope of the prosecutor's rebuttal evidence, given the potential for misuse of such character evidence.

With respect to the notice requirement under Rule 404, both Federal Rule 404(b) and Uniform Rule 404(c)(1) require the prosecution, upon the accused's request, to provide reasonable notice in advance of trial of the general nature of any evidence it intends to introduce at trial concerning other crimes, wrongs, or acts by the accused.[77] The notice requirement in Uniform Rule 404(c)(1) is substantially broader than its counterpart in Federal Rule 404(b). Specifically, Uniform Rule 404(c)(1) applies to any party seeking to offer evidence under the rule (not just the accused) and applies in civil as well as criminal cases. Finally, the amendment to Federal Rule 404(b) did not add the procedural provisions found in Uniform Rule 404(c).

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(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

76. *See, e.g.*, United States v. Fountain, 768 F.2d 790, 795 (7th Cir. 1985) (holding that when an accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness but does not permit proof of the accused's character trait for violence).

77. *See, e.g.*, United States v. Vega, 188 F.3d 1150, 1152-54 (9th Cir. 1999); United States v. Roper, 135 F.3d 430, 432-33 (6th Cir. 1998); United States v. Lamb, 945 F. Supp. 441, 466 (N.D.N.Y. 1996); 2 WEINSTEIN & BERGER, *supra* note 11, § 404.23.

IV. Rule 412 — Sexual Behavior

A. Uniform Rule 412 as Revised in 1999

Uniform Rule 412[78] deals with the delicate subject of sexual behavior. The rule was substantially revised in 1999. As revised, the rule effectively replaces the former version.[79] Generally speaking, Uniform Rule 412 excludes evidence

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78. The full text of Uniform Rule 412, as revised in 1999, reads as follows:

RULE 412. SEXUAL BEHAVIOR.

(a) Definition. In this rule, 'sexual behavior' means relating to the sexual activities of an individual, including the individual's experience or observation of sexual intercourse or sexual contact, use of contraceptives, history of marriage or divorce, sexual predisposition, expressions of sexual ideas or emotions, and activities of the mind such as fantasies or dreams.

(b) Evidence of sexual behavior generally inadmissible. Except as otherwise provided in subdivisions (c) and (d), in a criminal proceeding involving the alleged sexual misconduct of an accused, evidence is not admissible to prove that the alleged victim engaged in other sexual behavior.

(c) Exceptions. Evidence of specific instances of an alleged victim's sexual behavior, if otherwise admissible under these rules, is admissible to prove:

(1) that a person other than the accused was the source of the semen, injury, disease, other physical evidence, or pregnancy;

(2) that a person other than the accused was the source of the alleged victim's knowledge of sexual behavior;

(3) consent, if the alleged victim's sexual behavior involved the accused or constituted conduct so distinctive and which so closely resembles the accused's version of the sexual behavior of the alleged victim at the time of the alleged sexual misconduct that it corroborates the accused's claim of reasonable belief that the alleged victim consented to the alleged misconduct; or

(4) a fact of consequence whose exclusion would violate the constitutional rights of the accused.

(d) Procedure to determine admissibility. Evidence is not admissible under subdivision (c) unless:

(1) the proponent gives to all parties and to the alleged victim, or the alleged victim's guardian or representative, reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of such evidence the proponent intends to introduce at trial;

(2) the court conducts a hearing in chambers, affords the alleged victim and the parties a right to attend the hearing and be heard, and finds:

(A) that the evidence is relevant to a fact of consequence for which the evidence is admissible under subdivision (c); and

(B) that the probative value of the evidence is not substantially outweighed by the danger of harm to the alleged victim or of unfair prejudice to any party; and

(3) upon request, the court gives an instruction on the limited admissibility of the evidence, pursuant to Rule 105.

UNIF. R. EVID. 412.

79. The full text of the prior version of Uniform Rule 412 reads as follows:

RULE 412. SEXUAL BEHAVIOR.

(a) When inadmissible. In a criminal case in which a person is accused of a sexual offense against another person, the following is not admissible:

concerning the past sexual behavior of the victim of an alleged sex crime. The rule thus provides protection only for "alleged victims." The rule uses the term "alleged" because it will usually be disputed whether a sex crime was committed.

Uniform Rule 412 establishes four exceptions to the general rule excluding evidence of a victim's past sexual behavior. Such evidence is admissible to prove: (1) that someone other than the accused was the source of the semen, injury, disease, other physical evidence, or pregnancy; (2) that someone other than the accused was the source of the alleged victim's knowledge of sexual behavior; (3) consent by the victim, but only if the alleged victim's sexual behavior involved the same accused person or constituted conduct so distinctive and resembled so closely the accused's version of the sexual behavior of the alleged victim at the time that it corroborates the accused's claim of reasonable belief of consent; or (4) a fact of consequence, but only if exclusion would violate the accused's constitutional rights. Nothing in those exceptions would permit reputation or opinion evidence about sexual behavior. At the same time, the language of Rule 412 makes it immaterial whether the sexual behavior took place before or after the alleged offense.

Subdivision (d) details the procedure for determining the admissibility of evidence regarding sexual behavior. Like Rule 404, Rule 412 contains a notice provision. The proponent must give reasonable notice to all parties and to the alleged victim or the alleged victim's guardian and representative in advance of trial of the nature of the evidence that the proponent intends to introduce at trial. The notice may be given at trial, but only if the trial judge excuses pretrial notice for good cause shown. The trial judge is to conduct the hearing in chambers and must afford the alleged victim and the parties a right to attend and participate in the hearing.

In order for the evidence to be admissible, the trial judge must find that (1) the evidence is relevant to a fact of consequence for which the evidence is admissible under subdivision (c); and (2) the probative value of the evidence is not substantially outweighed by the danger of harm to the alleged victim or unfair prejudice to any party.[80] Upon request, the trial judge must give an instruction on the limited admissibility of the evidence pursuant to Rule 105. The limiting instruction, if requested, is actually a precondition to the admissibility of the evidence.

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(1) Reputation or opinion. Evidence of reputation or opinion regarding other sexual behavior of a victim of the sexual offense alleged.

(2) Specific instances. Evidence of specific instances of sexual behavior of an alleged victim with persons other than the accused offered on the issue of whether the alleged victim consented to the sexual behavior with respect to the sexual offense alleged.

(b) Exceptions. This rule does not require the exclusion of evidence of (i) specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease, injury, mistake, or the intent of the accused; (ii) false allegations of sexual offenses; or (iii) sexual behavior with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.

UNIF. R. EVID. 412 (revised 1999), 13A U.L.A. pt. 1B, at 91-92 (2000).

80. UNIF. R. EVID. 412(d).

B. Analysis of Revised Uniform Rule 412

Earlier law left the subject of sexual behavior to other more general rules, like those relating to the credibility and character of victims generally. Thus, it is necessary to clarify Rule 412's relationship with such other rules. The first clarification is that the restrictions in Rule 412 are intended to apply to sexual-behavior evidence, notwithstanding more permissive provisions in any other pertinent rules. The second point of clarification is that Rule 412's exceptions are exceptions only to Rule 412's ban. Thus, any evidence admissible under Rule 412 is still subject to any more restrictive provisions in any other applicable rules.

1. Definition of Sexual Behavior

Uniform Rule 412 adopts the term "sexual behavior" in lieu of "sexual conduct," and includes the following broad definition of "sexual behavior":

> [The] sexual activities of an individual, including the individual's experience or observation of sexual intercourse or sexual contact, use of contraceptives, history of marriage or divorce, sexual predisposition, expressions of sexual ideas or emotions, and activities of the mind such as fantasies or dreams.[81]

Such a broad definition is consistent with the broad definitions used in some states. For example, Alabama defines "sexual behavior" as behavior which "includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress and general reputation for promiscuity, nonchastity or sexual mores contrary to the community standards."[82] Georgia has the same definition of "sexual behavior."[83] Utah excludes "evidence offered to prove any alleged victim's sexual predisposition,"[84] while Washington excludes "[e]vidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards."[85] Wisconsin defines "sexual conduct" as "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior sexual intercourse or sexual contact, use of contraceptives, living arrangement and life style."[86]

2. Application Only in Criminal Cases

Uniform Rule 412 applies only to criminal cases, and then only to cases in which a person is accused of a sexual offense against another. That scope is consistent with the majority rule among the states. All states exclude evidence in criminal

81. UNIF. R. EVID. 412(a).
82. ALA. CODE § 12-21-203(a)(3) (1995).
83. GA. CODE ANN. § 24-2-3(a) (2000).
84. UTAH R. EVID. 412(a)(2).
85. WASH. REV. CODE § 9A.44.020(2) (2000).
86. WIS. STAT. ANN. § 972.11 (West Supp. 2000).

proceedings relating to the past sexual behavior of complaining witnesses in sexual assault cases.[87] By contrast, there is no consistent rule on whether to admit or exclude sexual-behavior evidence in civil cases. The issue has not often arisen in state courts. When it has, the results have varied greatly depending upon the nature of the action, the language of the applicable rule, the interpretive scope given to the rule, and the individual whose sexual behavior is at issue. Consequently, Uniform Rule 412 does not apply to civil cases.

A number of states appear hostile to admitting sexual behavior evidence in civil cases. Massachusetts appears unwilling to admit such evidence in civil cases "unless the proponent of the evidence demonstrates that evidence of a patient's prior sexual conduct is more than marginally relevant to an important issue of fact."[88] North Carolina seems to have adopted a similar position.[89] In Louisiana, a court excluded deposition testimony regarding a plaintiff's previous sexual experiences in a damages action for rape because the evidence "as offered, is inaccurately and poorly phrased, incomplete and vague and would tend to mislead and confuse the jury . . . [and those characteristics] outweigh its probative value."[90] Similarly, a Missouri court excluded evidence of prior sexual victimization because it was collateral evidence that carried the danger of unfair prejudice and surprise.[91]

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87. Alabama, ALA. CODE § 12-21-203 (1995); Alaska, ALASKA STAT. § 12.45.045 (Michie 2000); Arizona, State *ex. rel.* Pope v. Superior Court, 545 P.2d 946, 950 (Ariz. 1976) (judicial rule); Arkansas, ARK. CODE ANN. § 16-42-101 (Michie 1999); California, CAL. EVID. CODE §§ 782, 1103 (West Supp. 2001); Colorado, COLO. REV. STAT. ANN. § 18-3-407 (2000); Connecticut, CONN. GEN. STAT. ANN. § 54-86f (West 1994); Delaware, DEL. CODE ANN. tit. 11, § 3508 (Supp. 2000) (Delaware omitted DEL. R. EVID. 412 because the admissibility of the evidence was adequately provided for in section 3508); Florida, FLA. STAT. ANN. § 794.022 (West 2000); Georgia, GA. CODE ANN. § 24-2-3 (2000); Hawaii, HAW. R. EVID. 412; Idaho, IDAHO R. EVID. 412; Illinois, 725 ILL. COMP. STAT. ANN. 5/115-7 (West Supp. 2000); Indiana, IND. CODE § 35-37-4-4 (1998); Iowa, IOWA R. EVID. 412; Kansas, KAN. STAT. ANN. § 21-3525 (1995); Kentucky, KY. EVID. R. 412; Louisiana, LA. CODE EVID. ANN. art. 412 (West 1995); Maine, ME. R. EVID. 412; Maryland, MD. ANN. CODE art. 27, § 461A (1977); Massachusetts, MASS. GEN. LAWS ANN. ch. 233, § 21B (West 1986); Michigan, MICH. STAT. ANN. § 750.520j (Michie 1990); Minnesota, MINN. R. EVID. 412; Mississippi, MISS. CODE ANN. § 97-3-68 (1986); MISS. R. EVID. 412; Missouri, MO. ANN. STAT. § 491.015 (West 1996); Montana, MONT. CODE ANN. § 45-5-511(2) (1999); Nebraska, NEB. REV. STAT. § 27-404(1) (1995); NEB. R. EVID. 404; Nevada, NEV. REV. STAT. § 48.069 (1999); New Hampshire, N.H. REV. STAT. ANN. § 632-A:6 (1993); N.H. R. EVID. 412; New Jersey, N.J. STAT. ANN. § 2C:14-7 (West Supp. 2000); New Mexico, N.M. R. EVID. 11-413; New York, N.Y. CRIM. PROC. LAW §§ 60.42-.43 (McKinney 1992); North Carolina, N.C. R. EVID. 412; North Dakota, N.D. R. EVID. 412; Ohio, OHIO REV. CODE ANN. § 2907.02(D) (Anderson 1996); Oklahoma, 12 OKLA. STAT. ANN. § 2412 (West Supp. 2001); Oregon, OR. REV. STAT. § 40.210 (1999); Pennsylvania, 18 PA. CONS. STAT. ANN. § 3104 (West 2000); Rhode Island, R.I. R. EVID. 412; South Carolina, S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. Supp. 2000); S.C. R. EVID. 412; South Dakota, S.D. CODIFIED LAWS § 23A-22-15 (Michie 1998); Tennessee, TENN. R. EVID. 412; Texas, TEXAS R. EVID. 412; Utah, UTAH R. EVID. 412; Vermont, VT. STAT. ANN. tit. 13, § 3255 (1998); Virginia, VA. CODE ANN. § 18.2-67.7 (Michie 1988); Washington, WASH. REV. CODE ANN. § 9A.44.020 (Michie 1997); West Virginia, W. VA. CODE § 61-8B-11 (Michie 2000); W. VA. R. EVID. 404(3); Wisconsin, WIS. STAT. ANN. § 972.11 (West Supp. 2000); Wyoming, WYO. STAT. ANN. § 6-2-312 (Michie 1999).

88. Morris v. Bd. of Registration in Med., 539 N.E.2d 50, 53 (Mass. 1989).

89. *See* Wilson v. Bellamy, 414 S.E.2d 347, 354-55 (N.C. Ct. App. 1992).

90. *See* Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70, 75 (La. Ct. App. 1989).

91. *See* Gamble v. Hoffman, 732 S.W.2d 890, 893 (Mo. 1987).

Other states seem more willing to admit sexual-behavior evidence, particularly on the issue of damages. Thus, even though California statutorily excludes sexual-behavior evidence in civil cases,[92] a California court held that sexual-behavior evidence may be admissible in a patient's action against a psychologist for malpractice and infliction of emotional distress through sexual contact, when the psychologist claimed that the plaintiff's injuries resulted from her pretreatment psychosexual history.[93] Likewise, in a civil action for rape brought by a daughter against her father, the Indiana Supreme Court held that the father was entitled to prove the daughter's prior sexual experiences on the issue of damages.[94] The court distinguished criminal actions from civil suits:

> Unlike the victim in a criminal case, the plaintiff in a civil damage action is "on trial" in the sense that he or she is an actual party seeking affirmative relief from another party. Such plaintiff is a voluntary participant, with strong financial incentive to shape the evidence that determines the outcome. It is antithetical to principles of fair trial that one party may seek recovery from another based on evidence it selects while precluding opposing relevant evidence on grounds of prejudice.[95]

To the same effect are decisions in Tennessee[96] and Utah.[97]

3. The Exceptions to the General Rule Protecting Victims

Victims of alleged sexual crimes receive broad protection under Uniform Rule 412. The four exceptions are narrow and necessary, as illustrated by the first exception. The defendants could hardly prove that someone else was the source of the "semen, injury, disease, other physical evidence, or pregnancy" without showing prior sexual behavior.

The second exception, in subdivision (c)(2), allows proof that someone else was the source of the alleged victim's knowledge of sexual behavior. That exception is

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92. Section 1106 of the California Evidence Code, with exceptions, provides that
> [i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery . . . evidence . . . of plaintiff's sexual conduct . . . is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.

CAL. EVID. CODE § 1106 (West Supp. 1995).

93. *See* Patricia C. v. Mark D., 16 Cal. Rptr. 2d 71 (Cal. Ct. App. 1993). At the same time, and without reference to section 1106, the court in *Kelly-Zurian v. Wohl Shoe Co.*, a sexual harassment action brought by the plaintiff against a supervisory employee, sustained the exclusion of evidence of the plaintiff's viewing of adult video tapes, abortions, and prior sexual conduct on the ground that "even assuming the evidence was marginally relevant, given the divisiveness of the issue and extreme potential for prejudice, exclusion of the evidence was proper." Kelly-Zurian v. Wohl Shoe Co., 27 Cal. Rptr. 2d 457, 464 (Cal. Ct. App. 1994).

94. *See* Barnes v. Barnes, 603 N.E.2d 1337, 1344 (Ind. 1992).

95. *Id.* at 1342.

96. *See* Vafaie v. Owens, No. 01A01-9510-CV-00472, 1996 Tenn. App. LEXIS 557, at *26-*27 (Tenn. Ct. App. Sept. 6, 1996).

97. *See* Birkner v. Salt Lake Country, 771 P.2d 1053, 1061 (Utah 1989).

intended to apply when the alleged victim's knowledge of sexual behavior is unusual, given the age, intelligence, or level of ordinary experience of the alleged victim. Absent such unusual knowledge, the prior sexual behavior would not be relevant to prove any material fact and thus would not be "otherwise admissible under these rules" as required by the introductory language to subdivision (c). In other words, the applicability of an exception will not render irrelevant evidence admissible. Further, excepted evidence must still pass the balancing test in subdivision (d)(2)(B) — namely, that the evidence's probative value is not substantially outweighed by the danger of harm to the alleged victim or unfair prejudice to any party.

The exception in subdivision (c)(3) allows proof of consent in two ways. It permits evidence to prove consent if the alleged victim's sexual behavior (1) "involved the accused," or (2) is "so distinctive" and "so closely resembles" the accused's version of the alleged victim's behavior on the occasion in question that it corroborates the accused's "claim of reasonable belief" of consent.[98] Both of those categories of consent evidence should be applied narrowly, in keeping with the spirit of Uniform Rule 412. Thus, sexual behavior with the accused may be so remote or so dissimilar that it is not relevant or cannot meet the balancing test.[99] Likewise, courts should strictly apply the twin requirements of distinctiveness and similarity in the second category of consent evidence relating to conduct not involving the accused.

The fourth and final exception, subdivision (c)(4), provides that specific instances of the alleged victim's sexual behavior are admissible to prove "a fact of consequence the exclusion of which would violate the constitutional rights of the accused." Federal Rule 412(b)(1)(C) contains a similar exception. In *Olden v. Kentucky*,[100] the United States Supreme Court held that a defendant in a rape case had a right to inquire into the alleged victim's cohabitation with another man to prove bias. If such evidence is constitutionally required, then it necessarily follows that such evidence is admissible without regard to the balancing process provided for in Uniform Rule 412(d).

As mentioned above, the applicability of an exception does not render sexual behavior evidence admissible. The evidence must be "otherwise admissible under the rules," as required by the introductory language to subdivision (c). Further, all of the exceptions are subject to the procedures in subdivision (d), which consist of the following: (1) giving notice to all concerned persons; (2) holding a hearing in chambers to determine the evidence's admissibility; (3) a finding that the evidence is relevant to a fact of consequence for which such evidence is admissible; (4) a finding that the evidence is not substantially outweighed by the danger of unfair prejudice; and (5) giving an instruction on the limited admissibility of the evidence pursuant to Uniform Rule 105.

98. UNIF. R. EVID. 412(c)(3)

99. *See* State v. Sheline, 955 S.W.2d 42, 48 (Tenn. 1997).

100. 488 U.S. 227, 232-33 (1988) (per curiam).

Most states have provisions regarding the procedures to be followed in determining the admissibility of sexual-behavior evidence. Common procedural requirements adopted by the states include written motions filed with proper notice requesting admission of the evidence,[101] written offers of proof,[102] and in camera hearings to determine the evidence's admissibility.[103]

As to the exceptions to the general rule prohibiting evidence of the alleged victim's prior sexual conduct, considerable variation exists among the states. Specific instances of sexual conduct are admitted under the following exceptions:

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101. *See, e.g.*, Arizona, ARIZ. REV. STAT. § 13-1421 (2001); Arkansas, ARK. CODE ANN. § 16-42-101 (1993); California, CAL. EVID. CODE § 782 (1995); Colorado, COLO. REV. STAT. ANN. § 18-3-407 (2000); Connecticut, CONN. GEN. STAT. ANN. § 54-86f (West 1994); Delaware, DEL. CODE ANN. tit. 11, § 3508 (Supp. 2000); Hawaii, HAW. R. EVID. 412; Illinois, 725 ILL. COMP. STAT. ANN. § 5/115-7 (West Supp. 2000); Indiana, IND. CODE § 35-37-4-4 (1998); Iowa, IOWA R. EVID. 412; Kansas, KAN. STAT. ANN. § 21-3525 (1995); Kentucky, KY. EVID. R. 412; Louisiana, LA. CODE EVID. ANN. art. 412 (West 1995); Massachusetts, MASS. GEN LAWS. ch. 233, § 21B (1983); Michigan, Mich. Stat. Ann. § 750.520j (Michie 1991); Minnesota, MINN. R. EVID. 412; Mississippi, MISS. CODE ANN. § 97-3-68 (1999); Missouri, MO. ANN. STAT. § 491.015 (West 1996); New Mexico, N.M. STAT. ANN. § 30-9-16 (1993); New Hampshire, N.H. R. EVID. 412; New Jersey, N.J. STAT. ANN. § 2C:14-7 (1995); North Carolina, N.C. R. EVID. 412; North Dakota, N.D. R. EVID. 412; Oklahoma, 12 OKLA. STAT. ANN. § 2412 (West 1993); Oregon, OR. REV. STAT. § 40.210 (1999); Pennsylvania, 18 PA. CONS. STAT. ANN. § 3104 (West 2000); South Carolina, S.C. R. EVID. 412; Tennessee, TENN. R. EVID. 412; Utah, UTAH R. EVID. 412; Washington, WASH. REV. CODE § 9A.44.020 (2000); Wyoming, WYO. STAT. ANN. § 6-2-312 (Michie 1999).

102. *See, e.g.*, California, CAL. EVID. CODE § 782 (1995); Colorado, COLO. REV. STAT. ANN. § 18-3-407 (1999); Connecticut, CONN. GEN. STAT ANN. § 54-86f; Delaware, DEL. CODE ANN. tit. 11, § 3508 (Supp. 2000); Hawaii, HAW. R. EVID. 412; Illinois, 725 ILL. COMP. STAT. ANN. § 5/115-7 (1992); Indiana, IND. CODE § 35-37-4-4 (1998); Iowa, IOWA R. EVID. 412; Kansas, KAN. STAT. ANN. § 721-3525 (1993); Kentucky, KY. EVID. R. 412; Louisiana, LA. CODE EVID. ANN. art. 412 (West 1995); Massachusetts, MASS. GEN. LAWS ch. 233, § 21B (1983); Michigan, MICH. STAT. ANN. § 750.520j (Michie 1991); Minnesota, MINN. R. EVID. 412; Mississippi, MISS. CODE ANN. § 97-3-68 (1999); Missouri, MO. ANN. STAT. § 491.015 (West 1996); Oregon, OR. REV. STAT. § 40.210 (1999); Pennsylvania, 18 PA. CONS. STAT. ANN. § 3104 (West 2000); South Carolina, S.C. R. EVID. 412; Tennessee, TENN. R. EVID. 412; Washington, WASH. REV. CODE § 9A.44.020 (2000); Wyoming, WYO. STAT. ANN. § 6-2-312 (Michie 1999).

103. *See, e.g.*, Alabama, ALA. R. EVID. 412; Alaska, ALASKA STAT. § 12.45.405 (Michie 2000); Arizona, ARIZ. REV. STAT. § 13-1421 (2001); Arkansas, ARK. CODE ANN. § 16-42-102 (Michie 1993); California, CAL. EVID. CODE § 782 (1995); Colorado, COLO. REV. STAT. ANN. § 18-3-407 (1999); Connecticut, CONN. GEN. STAT. ANN. § 54-86f (West 1998); Delaware, DEL. CODE ANN. tit. 11, § 3508 (Supp. 2000); Hawaii, HAW. R. EVID. 412; Illinois, 725 ILL. COMP. STAT. ANN. § 5/115-7 (1992); Indiana, IND. CODE § 35-37-4-4 (1998); Iowa, IOWA R. EVID. 412; Kansas, KAN. STAT. ANN. § 21-3525 (1995); Kentucky, KY. EVID. R. 412; Louisiana, LA. CODE EVID. ANN. art. 412 (West 1995); Massachusetts, MASS. GEN. LAWS. ch. 233, § 21B (1983); Minnesota, MINN. R. EVID. 412; Mississippi, MISS. CODE ANN. § 97-3-68 (1999); Missouri, MO. ANN. STAT. § 491.015 (West 1996); New Mexico, N.M. STAT. ANN. § 30-9-16 (1993); New Hampshire, N.H. R. EVID. 412; New Jersey, N.J. STAT. ANN. § 2C:14-7 (1995); North Carolina, N.C. R. EVID. 412; North Dakota, N.D. R. EVID. 412; Ohio, OHIO REV. CODE ANN. § 2907.02 (1995); Oklahoma, 12 OKLA. STAT. ANN. § 2412 (West 1993); Oregon, OR. EVID. CODE § 40.210 (1999); Pennsylvania, 18 PA. CONS. STAT. ANN. § 3104 (West 2000); South Carolina, S.C. R. EVID. 412; South Dakota, S.D. CODIFIED LAWS § 23A-22-15 (Michie 1998); Tennessee, TENN. R. EVID. 412; Texas, TEX. R. EVID. 412; Utah, UTAH R. EVID. 412; Washington, WASH. REV. CODE § 9A.44.020 (2000); West Virginia, W. VA. CODE ANN. § 61-8B-11 (Michie 1986); Wyoming, WYO. STAT. ANN. § 6-2-312 (Michie 1982).

the sexual conduct was with the accused;[104] the conduct was with the accused and is offered on the issue of consent;[105] the conduct is part of a common scheme or plan and is offered on consent;[106] the conduct is offered to show an alternative source for such other evidence as semen, pregnancy, injury, or disease;[107] the admission of the evidence is required by the constitution;[108] the evidence is offered to rebut scientific or medical evidence;[109] the evidence shows that someone else committed the act;[110] the evidence is offered to show promiscuous conduct;[111] the evidence is a prior conviction admissible for impeachment;[112] the evidence is part of cross-examination and is in response to the alleged victim's denial of prior sexual activity;[113] the evidence is offered to prove a pattern of conduct to show consent;[114] the evidence shows motive or bias;[115] or the evidence is offered to prove past false accusations of sexual assault.[116]

Most states require a balancing test,[117] but some do not.[118] Finally, some states

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104. *See, e.g.*, Alabama, ALA. R. EVID. 412; Arizona, ARIZ. REV. STAT. § 13-1421 (2001); Arkansas, ARK. CODE ANN. § 16-42-102 (1993); California, CAL. EVID. CODE § 782 (1995); Connecticut, CONN. GEN. STAT. ANN. § 54-86f (West 1994); Indiana, IND. CODE § 35-37-4-4 (1998); New York, N.Y. CRIM. PROC. LAWS § 60.42 (McKinney 1992).

105. *See, e.g.*, Georgia, GA. CODE ANN. § 724-2-3 (1989); Hawaii, HAW. R. EVID. 412; Illinois, 725 ILL. COMP. STAT. ANN. § 5/115-7 (West 1992); IOWA R. EVID. 412; Kentucky, KY. EVID. R. 412; Louisiana, LA. CODE EVID. ANN. art. 412 (West 1995); Maine, ME. R. EVID. 412; Minnesota, MINN. R. EVID. 412; Nebraska, NEB. REV. STAT. ANN. § 28-321 (Michie 1984); Tennessee, TENN. R. EVID. 412; Texas, TEX. R. EVID. 412; Utah, UTAH R. EVID. 412.

106. *See, e.g.*, Minnesota, MINN. R. EVID. 412.

107. *See, e.g.*, Arizona, ARIZ. REV. STAT. § 13-1421 (2001); Connecticut, CONN. GEN. STAT. ANN. § 54-86f (West 1994); Hawaii, HAW. R. EVID. 412; Indiana, IND. CODE § 35-37-4-4 (1998); Iowa, IOWA R. EVID. 412; Kentucky, KY. EVID. R. 412; Louisiana, LA. CODE EVID. ANN. art. 412 (West. 1995); Maine, ME. R. EVID. 412; Minnesota, MINN. R. EVID. 412; Nebraska, NEB. REV. STAT. ANN. § 28-321 (Michie 1984); Utah, UTAH R. EVID. 412.

108. *See, e.g.*, Connecticut, CONN. GEN. STAT. ANN. § 54-86f (West 1994); Iowa, IOWA R. EVID. 412; Oregon, OR. REV. STAT. § 40.210 (1999); Texas, TEX. R. EVID. 412; Utah, UTAH R. EVID. 412.

109. *See, e.g.*, Oregon, OR. REV. STAT. § 40.210 (1999); Tennessee, TENN. R. EVID. 412; Texas, TEX. R. EVID. 412.

110. *See, e.g.*, IND. CODE § 35-37-4-4 (1998).

111. *See, e.g.*, TEX. R. EVID. 412.

112. *See, e.g.*, Idaho, IDAHO CODE § 18-6105 (Michie 1977); New York, N.Y. CRIM. PROC. LAWS § 60.42 (McKinney 1992); Texas, TEX. R. EVID. 412.

113. *See, e.g.*, Arizona, ARIZ. REV. STAT. § 13-1421 (2001); Connecticut, CONN. GEN. STAT. ANN. § 54-86f (West 1994); Maryland, MD. ANN. CODE art. 27, § 461A (1997); Nevada, NEV. REV. STAT. § 50.090 (1977); Virginia, VA. CODE ANN. § 18.2-67.7 (Michie 1981); West Virginia, W. VA. CODE ANN. § 61.8B-11 (Michie 1986).

114. *See, e.g.*, Florida, FLA. STAT. ANN. § 794.022 (West 2000); North Carolina, N.C. R. EVID. 412; Tennessee, TENN. R. EVID. 412.

115. *See, e.g.*, Arizona, ARIZ. REV. STAT. § 13-1421 (2001); Oklahoma, 12 OKLA. STAT. ANN. § 2412 (West 1993); Oregon, OR. EVID. CODE § 40.210; Texas, TEX. R. EVID. 412; Virginia, VA. CODE ANN. § 18.2-67.7 (Michie 1981).

116. *See, e.g.*, Arizona, ARIZ. REV. STAT. § 13-1421 (2001); Oklahoma, 12 OKLA. STAT. ANN. § 2412 (West 1993)

117. See, e.g., Arizona, ARIZ. REV. STAT. § 13-1421 (2001) (also requiring clear and convincing evidence); Maryland, MD. ANN. CODE art. 27, § 461A (1997); Massachusetts, MASS. GEN LAWS. ch. 233, § 21B (1983); Michigan, MICH. STAT. ANN. § 750.520j (Michie 1991); New Hampshire, N.H. R. EVID.

grant very broad discretion to trial courts to admit or exclude such evidence. For example, in Alaska, the court may admit sexual-conduct evidence if it finds that the

> evidence offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and that the probative value of the evidence offered is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness.[119]

Likewise, general standards of materiality and relevancy appear to be employed in Delaware,[120] Kansas,[121] Mississippi,[122] New Mexico,[123] South Dakota,[124] Pennsylvania,[125] Vermont,[126] Idaho,[127] and Rhode Island.[128]

C. Comparison with Federal Rule 412

Federal Rule 412[129] was not amended in 2000. The scope of evidence admis-

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412; New Jersey, N.J. STAT. ANN. § 2C:14-7 (1995); Ohio, OHIO REV. CODE ANN. § 2907.02 (West 1995); Texas, TEX. R. EVID. 412; Wisconsin, WIS. STAT. ANN. § 972.11 (West Supp. 2000); Wyoming, WYO. STAT. ANN. § 6-2-312 (Michie 1982).

118. *See, e.g.*, Louisiana, LA. EVID. CODE ANN. art. 412 (West 1995); Maine, ME. R. EVID. 412; Missouri, MO. ANN. STAT. § 491.015 (West 1996); Montana, MONT. CODE ANN. § 45-5-511 (1991); Rhode Island, R.I. GEN. LAWS § 11-37-13 (1979); Utah, UTAH R. EVID. 412.

119. *See* ALASKA STAT. § 12.45.045(a) (Michie 2000).

120. *See* DEL. CODE ANN. tit. 11, § 3508 (Supp. 2000).

121. See KAN. STAT. ANN. § 21-3525 (1995).

122. *See* MISS. CODE ANN. § 97-3-68 (2000).

123. *See* N.M. STAT. ANN. § 30-9-16 (Supp. 2000).

124. *See* S.D. CODIFIED LAWS § 23A-22-15 (Michie 1995).

125. *See* 18 PA. CONS. STAT. ANN. § 3104 (West 2000).

126. *See* VT. STAT. ANN. tit. 13, § 3255 (1998).

127. See IDAHO CODE § 18-6105 (Supp. 2001).

128. *See* R.I. GEN. LAWS § 11-37-13 (Supp. 1999).

129. Federal Rule 412 reads as follows:

> RULE 412. SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION
>
> (a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions.
>
> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
>
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

sible to prove consent under Federal Rule 412 is slightly narrower than its counterpart under Uniform Rule 412. Federal Rule 412 requires that the evidence of a specific instance be evidence of sexual behavior by the alleged victim with the person accused. It does not contain Uniform Rule 412's exception for sexual behavior that so closely resembles the accused's version of sexual behavior as to corroborate the accused's claim of reasonable belief of consent.

Federal Rule 412 also establishes different procedures for determining the admissibility of sexual-behavior evidence. Subdivision (c) of Federal Rule 412 states:

> (c) Procedure to Determine Admissibility.
> (1) A party intending to offer evidence under subdivision (b) must
> (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and
> (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
> (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.[130]

At least fourteen days before trial, the party offering the evidence must file a written motion specifically describing the evidence and stating the purposes for which it is offered. Once again, good cause is an exception to the pretrial-notice requirement.

In a significant departure from Uniform Rule 412, Federal Rule 412 extends the exclusion of sexual-behavior evidence to civil cases. According to the Advisory

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> (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
>
> (c) Procedure to Determine Admissibility.
>
> (1) A party intending to offer evidence under subdivision (b) must —
>
> (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
>
> (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
>
> (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

FED. R. EVID. 412.

130. FED. R. EVID. 412(c).

Committee Notes for the 1994 amendments to Federal Rule 412, extension of the rule to civil proceedings is necessary "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusing of sexual innuendo into the factfinding process."[131]

V. Rule 609 — Impeachment by Evidence of Conviction of Crime

A. Uniform Rule 609 as Revised in 1999

Uniform Rule 609[132] concerns the use of prior criminal convictions for impeach-

131. See FED. R. EVID. 412 advisory committee notes to 1994 amendments.

132. The full text of Uniform Rule 609, as revised in 1999, reads as follows:

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME.

(a) General rule. For the purpose of attacking the credibility of a witness:

(1) Evidence that a witness other than an accused has been convicted of a crime is admissible, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime is admissible if the court determines that the probative value of the evidence substantially outweighs the danger of unfair prejudice to the accused.

(2) Evidence that a witness has been convicted of a crime of untruthfulness or falsification is admissible, regardless of punishment, if the statutory elements of the crime necessarily involve untruthfulness or falsification.

(b) Time limit. Evidence of a conviction is not admissible under this rule if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for the conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of evidence of the conviction supported by specific facts and circumstances substantially outweighs its unfair prejudicial effect.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if the conviction has been:

(1) the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the individual convicted, and that individual has not been convicted of a subsequent crime punishable by death or imprisonment in excess of one year; or

(2) the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of a juvenile adjudication is generally not admissible under this rule. Except as otherwise provided by statute, however, in a criminal case the court may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission of the evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal from a conviction does not render evidence of the conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(f) Notice. Evidence is not admissible under this rule unless the proponent of the evidence gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of the conviction.

ment purposes. Uniform Rule 609, as revised in 1999, eliminates the gender-specific language in subdivision (a) and makes other stylistic changes. These changes are purely technical and do not change the substance of the rule.

Three notable revisions were made to Uniform Rule 609. First, Uniform Rule 609 requires that the probative value of the prior conviction evidence substantially outweigh the danger of unfair prejudice to the accused. Subdivision (a)(1) previously required that the evidence's probative value simply outweigh its prejudicial effect.

The second notable revision separates the exception for "dishonesty or false statement" into subdivision (a)(2). More importantly, the revision limits the evidence to a conviction for a crime involving untruthfulness or falsification, but only if the statutory elements of the crime necessarily involve untruthfulness or falsification. The purpose of that change was to end the dispute over the scope of the "dishonesty" exception. Some courts interpreted that exception to include any crime involving stealth. Most crimes, of course, involve stealth of some sort, raising the potential that the "dishonesty" exception might swallow the general rules of exclusion.

The third significant revision to Uniform Rule 609 relates to the exclusion of stale prior convictions under subdivision (b). Previously, a trial judge could not admit evidence of a conviction that occurred more than ten years earlier. Under the revised rule, the trial judge is not required to exclude convictions that are more than ten years old if the law determines, in the interest of justice, that the probative value of the evidence — supported by specific facts and circumstances — substantially outweighs its unfairly prejudicial effect.

Consistent with the other Uniform Rules, subdivisions (f), (g), and (h) establish specific procedures for determining the admissibility of prior-conviction evidence. Those provisions add a notice provision as well as other procedural safeguards that were absent in the prior rule.[133] Subdivision (f) bars admission of prior-conviction

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(g) Record. If objection is made to evidence offered pursuant to subdivision (a)(1) or (2), the court shall state on the record the factors it considered in determining admissibility.

(h) Evidence. If admissible, evidence of a conviction may be by testimony of the witness during direct or cross-examination, by the introduction of a public record, or by other extrinsic evidence if the public record is not available and good cause is shown.

UNIF. R. EVID. 609.

133. The full text of the prior version of Uniform Rule 609 reads as follows:

RULE 609. [IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME].

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

evidence unless the proponent of the evidence gives all adverse parties reasonable notice in advance of trial of the nature of the conviction. An exception to that rule again exists on a showing of good cause, in which case the notice may be given during trial.

Subdivision (g) specifically requires a record of the admissibility hearing to be made. The importance of this requirement is that the trial court must state on the record the factors it considered in determining the evidence's admissibility. On appeal, then, the issues will be whether the court identified and applied the proper factors and whether the evidence, while admissible for one purpose, was admitted by the trial judge for an improper purpose.

Subdivision (h) allows different forms of evidence to be introduced. The evidence may be presented by testimony of the witness during direct or cross-examination, by the introduction of a public record, or by other extrinsic evidence if the public record is not available and good cause is shown.

B. Analysis of Revised Uniform Rule 609

1. Convictions for Untruthfulness or Falsification

Uniform Rule 609(a)(2) applies only to convictions for crimes involving untruthfulness or falsification, and moreover, the rule requires that untruthfulness or falsification be statutory elements of the crime in question. Prior Uniform Rule 609(a)(2), a rule that admits convictions for crimes of "dishonesty or false statement, regardless of the punishment," has been widely adopted throughout the United States.[134] However, one problem with the rule is that states significantly

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(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. Except as otherwise provided by statute, however, the court may in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

UNIF. R. EVID. 609 (revised 1999), 13A U.L.A. pt. 1B, at 592 (2001).

134. *See, e.g.*, Alabama, ALA. R. EVID. 609(a)(2); Alaska, ALASKA R. EVID. 609(a); Arizona, ARIZ. R. EVID. 609(a)(2); Arkansas, ARK. R. EVID. 609(a)(2); Delaware, DEL. R. EVID. 609(a)(2); District of Columbia, D.C. CODE ANN. § 14-305(b)(2)(B) (1995); Florida, FLA. STAT. ANN. § 90.610(1) (West 1999); Hawaii, HAW. R. EVID. 412; Illinois, People v. Montgomery, 268 N.E.2d 695, 700 (Ill. 1971); Indiana, IND. R. EVID. 609(a)(2); Iowa, IOWA R. EVID. 609(a)(2); Kansas, KAN. STAT. ANN. § 60-421 (1994); Louisiana, LA. CODE EVID. ANN. art. 609(A)(2) (West 1995); Maine, ME. R. EVID. 609(a)(2); Michigan, MICH. R. EVID. 609(a)(1); Minnesota, MINN. R. EVID. 609(a)(2); Mississippi, MISS. R. EVID. 609(a)(2); Nebraska, NEB. REV. STAT. § 27-609(1)(b) (1995); New Hampshire, N.H. R. EVID. 609(a)(2);

diverge regarding which crimes fall within the scope of "crimes of dishonesty or false statement." For example, many states treat burglary as a crime of dishonesty.[135] Many states also consistently treat robbery as a crime of dishonesty.[136] Still other states admit evidence of larceny as a crime of dishonesty.[137] Burglary, however, is not considered a crime of dishonesty in some states.[138] Similarly, other states have declined to consider robbery a crime of dishonesty.[139]

A number of states also do not adhere to the statutory standards in Uniform Rule 609(a). A few states permit the general use of felony convictions for impeaching witnesses.[140] Other states generally admit all convictions, including misdemeanors,

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New Mexico, N.M. R. EVID. 11-609(a)(2); North Dakota, N.D. R. EVID. 609(a)(ii); Ohio, OHIO R. EVID. 609(a)(3); Oklahoma, 12 OKLA. STAT. ANN. § 2609(a)(2) (West Supp. 2001); Oregon, OR. REV. STAT. § 40.355(1)(b) (1999); Pennsylvania, Allen v. Kaplan, 653 A.2d 1249, 1254 (Pa. Super. Ct. 1995); Rhode Island, R.I. R. EVID. 609(b); South Carolina, S.C. R. EVID. 609(a)(2); South Dakota, S.D. CODIFIED LAWS § 19-14-12(a)(2) (Michie 1995); Tennessee, TENN. R. EVID. 609(a)(2); Utah, UTAH R. EVID. 609(a)(2); Washington, WASH. R. EVID. 609(a)(2); West Virginia, W. VA. R. EVID. 609; Wyoming, WYO. R. EVID. 609(a).

135. *See, e.g.*, Alaska, Clifton v. State, 751 P.2d 27, 28 (Alaska 1988); Arkansas, Floyd v. State, 643 S.W.2d 555, 556-57 (Ark. 1982); California, People v. Rodriguez, 222 Cal. Rptr. 809, 812 (Cal. Ct. App. 1986); Connecticut, State v. Schroff, 492 A.2d 190, 192 (Conn. App. Ct. 1985); District of Columbia, Bates v. United States, 403 A.2d 1159, 1161 (D.C. 1979); Florida, Hicks v. State, 666 So. 2d 1021, 1023 (Fla. Dist. Ct. App. 1996); Illinois, People v. Burba, 479 N.E.2d 936, 942 (Ill. App. Ct. 1985); Kansas, State v. Thomas, 551 P.2d 873, 876 (Kan. 1976); New Hampshire, State v. Hopps, 465 A.2d 1206, 1209 (N.H. 1983); New Mexico, State v. Wyman, 632 P.2d 1196, 1198 (N.M. Ct. App. 1981); Ohio, State v. Goney, 622 N.E.2d 688, 692 (Ohio Ct. App. 1993); Oregon, State v. Simmonds, 692 P.2d 577, 578-79 (Or. 1984); Pennsylvania, Commonwealth v. Gray, 478 A.2d 822, 825 (Pa. Super. Ct. 1984); South Dakota, State v. Cross, 390 N.W.2d 564, 567 (S.D. 1986); Tennessee, State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995).

136. *See, e.g.*, Alabama, Huffman v. State, 706 So. 2d 808, 814 (Ala. Crim. App. 1997); Alaska, Alexander v. State, 611 P.2d 469, 476 (Alaska 1980); District of Columbia, Bates v. United States, 403 A.2d 1159, 1161 (D.C. 1979); Florida, State v. Page, 449 So. 2d 813, 815 (Fla. 1984); Kansas, State v. Laughlin, 530 P.2d 1220, 1221 (Kan. 1975); New York, People v. Moody, 645 N.Y.S.2d 375, 376 (N.Y. App. Div. 1996); Ohio, State v. Goney, 622 N.E.2d 688, 692 (Ohio Ct. App. 1993); Pennsylvania, Commonwealth v. Kyle, 533 A.2d 120, 123 (Pa. Super. Ct. 1987); Texas, Simpson v. State, 886 S.W.2d 449, 452 (Tex. App. 1994); Washington, State v. Rivers, 921 P.2d 495, 498 (Wash. 1996).

137. *See, e.g.*, Alabama, Huffman v. State, 706 So. 2d 808, 814 (Ala. Crim. App. 1997); Connecticut, State v. Dawkins, 681 A.2d 989, 994 (Conn. App. Ct. 1996); District of Columbia, Bates v. United States, 403 A.2d 1159, 1161 (D.C. 1979); Florida, Reichman v. State, 581 So. 2d 133, 140 (Fla. 1991); Georgia, Witherspoon v. State, 339 S.E.2d 737, 738 (Ga. Ct. App. 1986); Illinois, People v. Elliot, 654 N.E.2d 636, 641 (Ill. App. 1995); Indiana, Geisleman v. State, 410 N.E.2d 1293, 1296 (Ind. 1980); Kansas, Bick v. Peat Marwick & Main, 799 P.2d 94, 104 (Kan. Ct. App. 1990); Maine, State v. Grover, 518 A.2d 1039, 1041 (Me. 1986); Maryland, Jackson v. State, 668 A.2d 8, 12 (Md. 1995); Nebraska, State v. Williams, 326 N.W.2d 678, 679 (Neb. 1982); Ohio, State v. Tolliver, 514 N.E.2d 922, 925-26 (Ohio Ct. App. 1986); Oklahoma, Cline v. State, 1989 OK CR 69, ¶ 6, 782 P.2d 399, 400; Pennsylvania, Commonwealth v. Ellis, 549 A.2d 1323, 1334 (Pa. Super. Ct. 1988); Washington, State v. Ray, 806 P.2d 1220, 1227-29 (Wash. 1991).

138. *See, e.g.*, Arizona, State v. Malloy, 639 P.2d 315, 318-19 (Ariz. 1981); Minnesota, State v. Hofman, 549 N.W.2d 372, 375 (Minn. Ct. App. 1996); Mississippi, Townsend v. State, 605 So. 2d 767, 770 (Miss. 1992); North Dakota, State v. Bohe, 447 N.W.2d 277, 280-81 (N.D. 1989).

139. *See, e.g.*, Utah, State v. Morrell, 803 P.2d 292, 294-95 (Utah Ct. App. 1990); West Virginia, State v. Rahman, 483 S.E.2d 273, 283 (W. Va. 1996).

140. *See, e.g.*, California, CAL. EVID. CODE § 788 (West 1995); Colorado, COLO. REV. STAT. § 13-

for impeachment purposes.[141] Two states require that the conviction be for a felony or a crime of moral turpitude.[142] In Georgia, a witness's credibility can be impeached through evidence of bad character, which includes convictions for crimes involving "moral turpitude."[143] In Maryland, a witness's credibility can be impeached by "an infamous crime or other crime relevant to the witness's credibility."[144] Montana appears to be the only state that does not admit prior convictions for the purpose of impeaching witnesses.[145] Declining to follow such a per se rule, the Drafting Committee used the Vermont rule as its example.

Vermont has adopted the standard of "untruthfulness or falsification." Vermont Rule 609(a)(1) states:

> (1) Involved untruthfulness or falsification regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice. This subsection (1) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification.[146]

The rationale for the Vermont rule is explained in the Reporter's Notes as follows:

> The present language establishes a two-tier test of admissibility. If the prior conviction necessarily involved untruthfulness or falsification — that is, if untruthfulness or falsification were one of the essential elements charged, the conviction falls within the class of convictions for which admissibility is preferred. The rule operates on the assumption that such convictions are of the highest relevance in determining credibility. They are to be admitted unless the court determines that their probative value is not just outweighed but 'substantially' outweighed by the danger of unfair prejudice. See V.R.E. 403. For example, in a criminal trial for forgery, admission of a prior conviction of the defendant for the same offense could be highly prejudicial. *State v. Jarrett*, 143 Vt. 191, 465 A.2d 238 (1983). In effect, once the

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90-101 (2000); Connecticut, State v. Pennock, 601 A.2d 521, 529 (Conn. 1992); Idaho, IDAHO R. EVID. 609(a); Kentucky, KY. EVID. R. 609(a); Nevada, NEV. REV. STAT. § 50.095 (1999).

141. *See, e.g.*, Massachusetts, MASS. GEN. LAWS ch. 233, § 21 (West 1986); Missouri, MO. ANN. STAT. § 491.050 (West 1996); New Jersey, N.J. R. EVID. 609; New York, N.Y. CRIM. PROC. LAW § 4513 (McKinney 1992); North Carolina, N.C. GEN. STAT. § 8C-1 (1999); Wisconsin, WIS. STAT. ANN. § 906.09 (West 2000).

142. *See, e.g.*, Texas, TEX. R. EVID. 609(a); Virginia, Lincoln v. Commonwealth, 228 S.E.2d 688, 691 (Va. 1976); VA. CODE ANN. § 19.2-269 (Michie 2000).

143. *See* James v. State, 286 S.E.2d 506, 507 (Ga. Ct. App. 1981). The misdemeanor offense of issuing a bad check has been held to constitute a crime of "moral turpitude." Paradise v. State, 441 S.E.2d 497, 500 (Ga. Ct. App. 1994).

144. MD. R. EVID. 609.

145. MONT. R. EVID. 609; *see also* Dodson, *supra* note 74, at 4 (advocating adoption of per se prohibition against admission of prior-conviction evidence for impeachment purposes).

146. VT. R. EVID. 609(a)(1).

> proponent of admission satisfies the court that the prior conviction involved untruthfulness or falsification, subdivision (a)(1) shifts the burden to the opponent to show substantial possibility of prejudice.[147]

The Reporter's Notes further observe:

> The amended wording is drafted to emphasize the preferred status of offenses involving untruthfulness, an approach similar to that found in Federal Rule of Evidence 609. But the federal wording has been deliberately avoided. The federal rule speaks of 'dishonesty or false statement,' and the former term in particular has been given a broad interpretation. Some courts have held it to encompass burglary, narcotics offenses, larceny and even shoplifting. 3 J. Weinstein and M. Berger, Weinstein's Evidence P609[04], at 77-85 (1987). None of these offenses would qualify under Vermont Rule of Evidence 609(a)(1). (The falsification of a prescription in order to obtain narcotics would qualify under the Vermont rule, but simple possession of the resulting narcotics would not.) Moreover, the federal rule created substantial uncertainty as to the applicability of the balancing test of Rule 403; some federal courts hold that offenses involving dishonesty are automatically admissible, others hold that such offenses are subject to the test of Rule 403. Weinstein and Berger, supra, at 73-76. The Vermont rule makes explicit the applicability of a balancing test . . . .[148]

As revised in 1999, Uniform Rule 609 would not automatically exclude evidence of convictions for burglary, robbery, or larceny. Such evidence would be admissible under subdivision (a)(1) for impeachment purposes if the crimes were punishable by death or imprisonment in excess of one year. Nevertheless, the evidence would be subject to one or the other of the balancing tests set forth in the rule, depending upon whether the witness was the accused or a person other than the accused.

2. Procedures for Determining Admissibility

Subdivisions (f), (g), and (h) of Uniform Rule 609 establish the procedure to be followed in determining the admissibility of prior convictions to attack a witness's credibility. Subdivision (f) adopts the same notice requirement used in Uniform Rule 404(b) so as to preserve a uniform notice requirement among the Uniform Rules of Evidence, which require the giving of notice as a condition for the admissibility of evidence.

147. VT. R. EVID. 609 reporter's notes.

148. *Id.*

C. Comparison with Federal Rule 609

Federal Rule 609[149] was not amended in 2000. As revised in 1999, Uniform Rule 609 diverges significantly from Federal Rule 609 in two respects.

First, under the prior version of Uniform Rule 609(a), in determining the admissibility of convictions for crimes punishable by death or imprisonment in excess of ten years, the court was required to find "that the probative value of admitting this evidence outweighs its prejudicial effect to a party or the witness." Uniform Rule 609, as revised in 1999, modifies the substance of the rule by providing, in the case of a witness other than the accused, that the witness's conviction is admissible unless, pursuant to Uniform Rule 403, the probative value of the conviction is substantially outweighed by the danger of unfair prejudice. In the case of the accused, the revised rule requires the court to determine "that the

149. Federal Rule 609 reads as follows:

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

FED. R. EVID. 609.

probative value of admitting this evidence substantially outweighs its prejudicial effect to the accused." The term "substantially" is not included in the balancing test used to determine the admissibility of an accused's prior convictions under Federal Rule 609(a)(1). The use of that term in Uniform Rule 609(a)(1) conforms the balancing test applicable to evidence of the accused's prior convictions under that rule to the balancing test applicable to evidence of convictions more than ten years old under Federal Rule 609(b).

Second, Uniform Rule 609 attempts to avoid the confusion surrounding the application of Federal Rule 609(a)(2) to convictions for crimes of "dishonesty or false statement." Rule 609 does this by adding language in subdivision (a)(2) that applies the rule to convictions for crimes of "untruthfulness or falsification" and expressly limits the rule to convictions for crimes that contain statutory elements that necessarily involve untruthfulness or falsification.

In one respect, the 1999 revisions of Uniform Rule 609 bring it in line with Federal Rule 609. Like its federal counterpart, Uniform Rule 609 now allows a trial judge to admit evidence of convictions that occurred more than ten years earlier, if admission of the convictions is warranted under specific circumstances.

Conclusion

The 1999 revisions of the Uniform Rules of Evidence include a number of significant procedural changes. Those changes recognize the changing nature of pretrial and trial procedures. They further recognize a need to add structure to the process of admitting and excluding evidence, as the modern trial judge performs various and expanded gatekeeping functions.

Uniform Rule 103 recognizes the modern trend of deciding important evidentiary questions before trial. When a definitive ruling is made pretrial, Rule 103 rightly relieves the party aggrieved by the ruling from repeating an objection or offer of proof during the trial itself. At the same time, Rule 103 recognizes that a trial judge may not be ready to rule definitively before the trial begins. In this case, a final ruling is necessary during trial in order to raise any appellate complaint.

Procedural changes in Rules 104, 404, 412, and 609 largely consist of new provisions on notice and hearing. Notice provisions are important, particularly when the evidence that a party seeks to admit is inflammatory. Adequate notice of the intent to introduce such evidence gives all parties an opportunity to prepare to argue what may turn out to be one of the most important proceedings in the trial, as well as time to develop trial strategies for reacting to an adverse ruling.

The new procedures for hearings on evidentiary matters have several benefits. First, the trial judge is given needed structure for deciding troublesome questions. Second, the parties clearly know the controlling issues and their burdens of proof. Finally, a better record is developed for any appeal of the issue following the trial.

Important evidentiary rulings are often close questions, and sometimes they are even judgment calls. By improving the procedures for making evidentiary rulings, the 1999 revisions of the Uniform Rules of Evidence should improve not only the decision-making process, but the quality of the decisions themselves.