FINAL DRAFT

Articles I - IV

FOR FINAL DRAFTING COMMITTEE APPROVAL

October 17-19, 1997

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UNIFORM RULES OF EVIDENCE OF 1974, AS AMENDED

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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Drafting Committee to Revise
Uniform Rules of Evidence of 1974, As Amended

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INTRODUCTION

[The following to be included in Introduction to be prepared by C. Arlen Beam, Chair, Drafting Committee]

Congress added Rules 413 through 415 of the Federal Rules of Evidence on September 13, 1994, Pub. L. 103-322, § 320935(a), 108 Stat. 2135, effective July 9, 1995. Rules 413 through 415 permit, respectively, (1) the admissibility of evidence of prior offenses of sexual assault when, in a criminal proceeding, a person is accused of an offense of sexual assault; (2) the admissibility of prior offenses of child molestation when, in a criminal proceeding, a person is accused of an offense of child molestation; and (3) the admissibility of evidence of prior offenses of sexual assault, or of child molestation when, in a civil proceeding, a claim for damages or other relief is sought against a party who is alleged to have committed an act of sexual assault or child molestation.

The overwhelming majority of judges, lawyers, law professors and legal organizations who responded to the Advisory Committee's call for public response opposed the enactment of Rules 413-415 without equivocation. The principal objections expressed were twofold. First, the rules would permit the admission of unfairly prejudicial evidence by focusing on convicting a criminal defendant for what the defendant **is** rather than what the defendant **has done.**

Second, the rules contained numerous drafting problems apparently not intended by their authors. For example, mandating the admissibility of the evidence without regard to the other rules of evidence such as the Rule 403 balancing test and the hearsay rule. In turn, serious constitutional questions would arise in criminal proceedings where the rules were invoked. For these, and related reasons the Advisory Committee on the Federal Rules of Evidence, the Standing Committee on Rules of Practice and Procedure and the Judicial Conference of the United States opposed the enactment of Rules 413-415.

Alternatively, the Standing Committee and the Judicial Conference recommended the adoption of an amendment to Rules 404 and 405 of the Federal Rules of Evidence proposed by the Advisory Committee which would provide for the admission of such evidence under limited conditions. However, Congress elected not to accept the recommendation.

The propriety of including Rules 413 through 415 in the Uniform Rules of Evidence is questionable at best. There is no state which has adopted these rules to date. In Arizona the adoption of these rules has been considered by the Supreme Court of Arizona, but rejected largely for the same reasons they were rejected by the Judicial Conference of the United States. See Robert L. Gottsfield, *We Don't Get It: Improper Admission of Other Acts Under Evidence Rule 404(B) as Needless Cause of Reversal in Civil and Criminal Cases*, 33-APR Ariz. Att'y 24 (1997). Connecticut has reprinted Federal Rules 413 through 415 in its Trial Lawyers' Guide to Evidence, but they are inapplicable in state court proceedings. Indiana has a rule similar to

Federal Rule 414, but it is more carefully drawn with procedural safeguards. See Ind. Code Ann. § 35-37-4-15 (West 1997). Missouri also has a blanket rule admitting evidence of prior acts of child molestation similar to Federal Rule 414. See Mo. Ann. Stat. § 566.025 (Vernon 1978). California also has a statute permitting the introduction of prior acts of domestic violence. See Cal. Evid. Code § 1109 (West 1997).

For the foregoing reasons and apparent lack of support to date among the several states for the enactment of rules similar to Rules 413-415, the Drafting Committee, at its meeting in Cleveland, Ohio, on October 4-6, 1996, voted unanimously not to include Rules 413-415, or the Advisory Committee's proposed amendment to Rule 404 of the Federal Rules of Evidence, in the proposed amendments to the Uniform Rules or to recommend their adoption by the Conference.

Article I

GENERAL PROVISIONS

Rule 101. [Scope].

(a) Rules applicable. Except as otherwise provided in subdivision (b), ~~T~~these rules ~~govern~~ apply to all actions and proceedings in the [courts of this State] ~~to the extent and with the exceptions stated in Rule ll01~~.

(b) Rules inapplicable. The rules other than those applicable with respect to privileges do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; [preliminary examination] detention hearing in criminal cases; [sentencing]; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt proceedings. Proceedings for contempt in which the court may act summarily.

Drafting Committee Note

This proposed amendment of Uniform Rule 101 incorporates the blackletter of Uniform Rule 1101 into the Rule, but does not make any substantive changes.

The proposed amendment departs from the existing structure of Uniform Rules 101 and 1101 and from the uniformity which currently exists between the structure of the Uniform Rules and Rules 101 and 1101 of the Federal Rules of Evidence. The Advisory Committee on the Federal Rules has not recommended any amendments to Federal Rule 101. In considering the proposed amendment to Uniform Rule 101, it may be appropriate to revisit the question of the extent to which the Uniform Rules should depart from the existing uniformity with the Federal Rules. However, it should be noted that the departure is organizational only and not substantive.

The **Comment** to existing Uniform Rule 1101 states that "[t]he Uniform Rules of Criminal Procedure change the preliminary examination to a detention hearing. This terminology is used in subdivision (b)(3)." This terminology, together with the bracketing of "preliminary examination," is retained in the proposed amendment.

Proposed Rule 101(b) retains in the introductory clause the blackletter of the current Uniform Rule 1101 by providing that "[t]he rules other than those applicable with respect to privileges do not apply in the following situations." This general language concerning the inapplicability of the rules of evidence in the proceedings enumerated in subdivisions (1) through (4) is not intended to eliminate the requirement that the evidence offered in these proceedings must be relevant and not substantially outweighed by the danger of unfair prejudice as provided in Uniform Rules 401 through 403. See, for example, *People v. Turner, 128 Ill.2d 540, 539 N.E.2d 1196, 132 Ill. Dec. 390 (Ill. 1989),* that the test governing admissibility at the sentencing hearing "is whether the evidence is relevant and reliable" and *State v. Williams, 73 Ohio St.3d 153, 652 N.E.2d 721 (Ohio 1995),* holding in sentencing proceedings the rules of evidence "impose upon the trial court the duty to weigh the probative value of the evidence against the potential for unfair prejudice, confusion of the issues, and misleading of the jury."

Unlike existing Uniform Rule 1101(b)(3), it is recommended that the word "sentencing" be bracketed in proposed Uniform Rule 101(b)(3) to give the states flexibility in determining the extent to which the rules of evidence are to apply in sentencing proceedings. It is true that a majority of the states in their blackletter

law provide that the rules of evidence do not apply in sentencing proceedings. These are: **Alabama,** *Ala. R. Evid. 1101(b)(3);* **Alaska,** *Alaska R. Evid. 101(c)(2);* **Arkansas,** *Ark. R. Evid. 1101(b)(3);* **California**, *Pretrial and Trial Rules, Div. 3, c. IV, Rule 420(b) and c. V, Rule 433(c)(1);* **Colorado,** *Colo. R. Evid. 1101(d)(3);* **Connecticut,** *Conn. R. Evid. 1101(d)(3);* **Delaware,** *Del. R. Evid. 1101(b)(3);* **Hawaii,** *Haw. R. Evid. § 626-1, R.1101(d)(3);* **Idaho,** *Idaho R. Evid. 101(e)(3);* **Indiana,** *Ind. R. Evid. 101(c)(2);* **Iowa,** *Iowa R. Evid. 1101(c)(4);* **Kentucky,** *Ky. R. Evid. 1101(d)(5);* **Louisiana,** *La. Code Evid. Ann. art. 1101(c)(4)(West 1997);* **Maine,** *Me. R. Evid. 1101(b)(4);* **Maryland,** *Md. R. Evid. 5-101(b)(9);* **Michigan,** *Mich. R. Evid. 1101(b)(3);* **Minnesota,** *Minn. R. Evid. 1101(b)(3);* **Montana,** *Mont. R. Evid. 101(c)(3);* **Nebraska,** *Neb. Rev. Stat. § 27-1101(d)(3)(Supp. 1996);* **Nevada,** *Nev. Rev. Stat. § 47.020(2)(C)(1995);* **New Hampshire,** *N.H. R. Evid. 1101(d)(3);* **New Jersey,** *N.J. R. Evid. 101;* **New Mexico,** *N.M. R. Evid. 11-1101;* **North Carolina,** *N.C. R. Evid. 1101(b)(3);* **North Dakota,** *N.D. R. Evid. 1101;* **Ohio,** *Ohio R. Evid. 101(c)(3);* **Oklahoma,** *Okla. Stat. Ann. tit. 12, § 2103(b)(3)(West 1997);* **Oregon,** *Or. Rev. Stat. § 40.015(4)(d)(1989), Or. Rev. Stat. § 137.090(1)(1989);* **Pennsylvania,** *42 Pa. C. S. A. § 9711(a)(2);* **Rhode Island,** *R.I. R. Evid. 101(b)(3);* **South Carolina,** *S.C. R. Evid. 1101(d)(3);* **Utah,** *Utah R. Evid. 1101(b)(3);* **Vermont,** *Vt. R. Evid. 1101(b)(3);* **Washington,** *Wash. R. Evid. 1101(c)(3);* **West Virginia,** *W.Va. R. Evid. 1101(b)(3);* **Wisconsin,** *Wis. Stat. Ann. § 911.01(4)(c)(West 1997);* and **Wyoming,** *Wyo. R. Evid. 1101(b)(3).*

In the following seven states it has been held that a strict application of the rules of evidence is not required in the sentencing phase of the trial: **Illinois,** *People v. Turner, 128 Ill. 2d 540, 539 N.E.2d 1196, 132 Ill. Dec. 390 (Ill. 1989);* **Kansas**, *State v. Torrence, 22 Kan. App. 2d 721, 922 P.2d 1109 (Kan. Ct. App. 1996);* **Massachusetts,** *Commonwealth v. Goodwin, 414 Mass. 88, 605 N.E.2d 827 (Mass. 1993);* **Mississippi,** *Williams v. State, 684 So. 2d 1179 (Miss. 1996);* **New York,** *People v. Wright, 104 Misc. 2d 911, 429 N.Y.S.2d 993 (N.Y. Sup. Ct. 1980);* **South Dakota,** *State v. Habbena, 372 N.W.2d 450 (S.D. 1985);* and **Virginia,** *Alger v. Commonwealth, 19 Va. App. 252, 450 S.E.2d 765 (Va. Ct. App. 1994).*

In contrast, there are three jurisdictions which require that the rules of evidence apply, in whole or in part, to sentencing proceedings. These are: **Arizona,** *Ariz. R. Evid. 1101(d);* **Tennessee,** *Tenn. Code Ann. § 40-35-209(b)(1995); and* **Texas,** *Tex. R. Crim. Evid. 1101(d)(1).*

There are also five states which have specific provisions governing the applicability of the rules of evidence in capital cases. These are: **Florida,** *Fla. Stat. Ann. § 921.141(1)(West 1997);* **Maryland,** *Md. Ann. Code of 1957, art. 27,*

§ 413(c); **Ohio,** ***Ohio Rev. Code Ann. § 2929.04(c);*** **Oregon,** *Or. Rev. Stat. § 163.150(1)(amended 1997);* and **Tennessee,** *Tenn. Code Ann. § 39-13-204(c)(amended 1997).*

Finally, in a few jurisdictions, limitations on the inapplicability of the rules of evidence in sentencing proceedings have been imposed by judicial decision even where the blackletter law provides otherwise. See, for example, **Oklahoma**, where it has been held, as a general rule, that the rules of evidence do not apply to sentencing proceedings under Okla. Stat. Ann. tit. 12, § 2103(B)(2)(West 1997). *Hunter v. State, 825 P.2d 1353 (Okla. Crim. App. 1992).* Notwithstanding, the Court of Criminal Appeals has held that the rules of evidence are applicable to sentencing under recidivist statutes [*Wade v. State, 624 P.2d 86 (Okla. Crim. App. 1981)*] and to second-stage jury sentencing proceedings [*Castro v. State, 745 P.2d 394 (Okla. Crim. App. 1987)*].

Accordingly, the Drafting Committee has concluded that the states should be afforded an option in the Uniform Rules to exercise their own discretion in fashioning rules governing the applicability of the rules of evidence in sentencing proceedings.

Rule 102. [Purpose and Construction].

These rules shall be construed to secure fairness ~~in administration~~, ~~elimination of~~ eliminate unjustifiable expense and delay, and ~~promotion of~~ promote the growth and development of the law of evidence, to the end that the truth may be ascertained and ~~proceedings~~ issues justly determined.

Drafting Committee Note

This proposed amendment of Uniform Rule 102 is clarifying only and no change in substance is intended by the Drafting Committee.

In considering this amendment to Uniform Rule 102, it may be appropriate to revisit the question of the extent to which the Uniform Rules of Evidence should depart from the existing uniformity of Uniform Rule 102 with its counterpart in Rule 102 of the Federal Rules of Evidence where changes in substance are not intended.

The Advisory Committee on the Federal Rules of Evidence has not recommended any amendments to Rule 102.

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 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.

(e) Effect of pretrial ruling. A pretrial objection to, or proffer of, evidence must be timely renewed at trial unless, at the request of counsel, or sua sponte, the court states that the ruling on the objection, or proffer, is final.

Drafting Committee Note

This proposed amendment to add a subdivision (e) to Uniform Rule 103 is a revised version of the now withdrawn Proposed Rule 103(e) of the Federal Rules of Evidence. The Federal Rule was withdrawn by the Advisory Committee due to the controversy surrounding the finality which should be accorded to pretrial rulings on objections to, or proffers of, evidence. The withdrawn Proposed Federal Rule 103(e) provided as follows:

> **(e) Effect of pre-trial ruling.** A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

As originally enacted, Federal Rule 103 did not deal with whether a losing party on a pretrial motion concerning the admissibility of evidence was required to renew its objection or offer of proof at trial to preserve the question for consideration on appeal. Differing approaches evolved in the several circuits with corresponding uncertainty among the litigants as to the manner in which the issue should be handled. Proposed Rule 103(e) of the Federal Rules was intended to clarify the different practices among the several circuits regarding the finality of rulings on pretrial motions concerning the admissibility of evidence. See, for a survey of the cases, *United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1993), cert. denied, 510 U.S. 927, 114 S.Ct. 334, 126 L.Ed.2d 279 (1993).*

The Advisory Committee Note to the withdrawn Proposed Federal Rule 103(e) stated that the Rule "does not excuse a litigant from having to satisfy the requirements of *Luce v. United States,* 469 U.S. 38 [105 S.Ct. 460, 83 L.Ed.2d 443] (1984) to the extent applicable. In *Luce,* the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment." In public comment, the Committee has been urged to abandon this approach because "it creates a tactical dilemma for defendants who believe that they have a better chance of obtaining an acquittal if they are silent, because the jury is likely to misuse their criminal history as propensity evidence rather

than as impeachment. *(See Letter of Professor Myrna S. Raeder, Southwestern University School of Law, to Peter G. McCabe, dated March 1, 1996).* The effect of *Luce* on the necessity for renewing objections at trial impacts upon the impeachment of witnesses with prior convictions under Rule 609 of both the Federal Rules and the Uniform Rules.

Public reaction to the withdrawn Proposed Federal Rule 103(e) has been mixed. Some favored the rule as proposed. Others agreed that Federal Rule 103 should be clarified for the reasons given in the Advisory Committee Note, but have argued that the default solution should be the reverse of the rule as proposed and should provide as follows:

> A pretrial objection to or proffer of evidence does not have to be renewed at trial, unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is not final.

Others voiced no opposition to the withdrawn Federal Rule 103. Still others took no position.

Finally, Professor Richard Friedman of the University of Michigan School of Law, testifying at the Public Hearing on Proposed Amendments to the Federal Rules of Evidence, and without questioning the need for a default rule, argued that the default rule should be the opposite, namely, that the in limine objection or proffer should preserve the issue for consideration on appeal. *(See Public Hearing on Proposed Amendments to the Federal Rules of Evidence, January 18, 1996).*

The Advisory Committee on the Federal Rules of Evidence has now revisited the issue of amending Rule 103 to include Subdivision (e) dealing with rulings on motions in limine and submit the Rule for public comment. The Rule as approved by the Advisory Committee provides as follows:

> **(e) Motions in limine.** If a party moves for an advance ruling to admit or exclude evidence, the court may rule before the evidence is offered at trial or may defer a decision until the evidence is offered. A motion for an advance ruling, when definitively resolved on the record, is sufficient to preserve error for appellate review. But in a criminal case, if the court's ruling is conditioned on the testimony of a witness or the pursuit of a defense, error is not preserved unless that testimony is given or that defense is pursued. Nothing in this subdivision precludes the

court from reconsidering an advance ruling.

Federal Rule 103(e), as now approved by the Advisory Committee for submission for public comment, retains in substance the default rule as earlier proposed in the now withdrawn Proposed Federal Rule 103(e). At the same time, the new Federal Rule 103(e) also addresses the requirements of the *Luce* case, but in a broader context by requiring that "if the court's ruling is conditioned on the testimony of a witness or the pursuit of a defense, error is not preserved unless that testimony is given for that defense is pursued." The *Luce* principle is extended in the Rule to include comparable situations to the issue addressed in *Luce* by some lower federal courts. See, for example, *United States v. Weichert, 783 F.2d 23 (2d Cir. 1986)*(applying *Luce* where defendant would be impeached with evidence offered under Rule 608); *United States v. DiPaolo, 804 F.2d 225 (2d Cir. 1986)*(impeachment of defendant's witness); *United States v. Ortiz, 857 F.2d 900 (2d Cir.), cert. denied, 489 U.S. 1070 (1989)*(where uncharged misconduct is ruled admissible if the defendant pursues a certain defense).

Proposed Uniform Rule 103(e) states as a default rule that counsel for the losing party must renew at trial any pretrial objection or offer of proof. It differs from the initially proposed Rule 103(e) of the Federal Rules in that a renewal of the objection or offer of proof is not required if the court, either on the request of counsel, or the court on its own motion, states that "the objection or proffer is final." Counsel bears the risk of waiving an appealable issue if the requisite pretrial ruling of finality is not obtained, or the objection or offer of proof is not renewed at trial.

In contrast to the now approved Federal Rule 103(e) to be submitted for public comment, the Proposed Uniform Rule 103(e) does not deal with the *Luce* problem or its progeny. The Drafting Committee has elected to deal with the *Luce* requirement in the narrower context of Uniform Rule 609 mandating that an accused testify at trial in order to preserve for appeal any objection to a court's pretrial ruling on the admissibility of the accused's prior conviction for impeachment purposes.

As proposed, the requirement in Uniform Rule 103(e) for the renewal of a pretrial objection or offer of proof at trial is in accord with the rule generally followed among the several states where the issue has been raised on appeal. See, in this connection, *State v. Barnett, 67 Ohio App. 3d 760, 588 N.E.2d 887 (Ohio Ct. App.1990)* as follows:

> An order granting or denying a motion in limine is a tentative, preliminary or presumptive ruling about an evidentiary issue that is anticipated, and an appellate court need not review the propriety of such an order unless the claimed error is preserved by

a timely objection when the issue is actually reached during trial.

See also, *State v. Maurer, 15 Ohio St. 3d 239, 15 O.B.R. 379, 473 N.E.2d 768 (Ohio 1984)* and *Deagan v. Dietz, No. 91-OV-2867, 1996 WL 148612 (Ohio Ct. App. Mar. 29, 1996).*

Other jurisdictions adhering to the general rule requiring the renewal of an objection at trial are: **Alabama,** *Evans v. Fruehauf Corp., 647 So. 2d 718 (Ala. 1994)* and *Grimsley v. State, 678 So. 2d 1197 (Ala. Crim. App. 1996);* **Florida,** *Rindfleisch v. Carnival Cruise Lines, 489 So. 2d 488 (Fla. Dist. Ct. App. 1986)* and *Lindsey v. State, 636 So. 2d 1327 (Fla. 1994);* **Illinois,** *Lundquist v. Nickels, 605 N.E.2d 1373 (Ill. App. Ct. 1992)* and *People v. Rodriguez, 655 N.E.2d 1022 (Ill. App. Ct. 1995);* **Indiana,** *Paullus v. Yarnelle, 633 N.E.2d 304 (Ind. Ct. App. 1994)* and *Carter v. State, 634 N.E.2d 830 (Ind. Ct. App. 1994);* **Kansas,** *Brunett v. Albrecht, 810 P.2d 276 (Kan. 1991)* and *State v. Goseland, 887 P.2d 1109 (Kan. 1994);* **Maine,** *State v. Naoum, 548 A.2d 120 (Me. 1988);* **Maryland,** *United States Gypsum Co. v. Mayor of Baltimore, 336 Md. 145, 647 A.2d 405 (Md. Ct. App. 1994);* **Massachusetts,** *Adoption of Carla, 416 Mass. 510, 623 N.E.2d 1118 (Mass. 1993)* and *Sandler v. Commonwealth, 419 Mass. 334, 644 N.E.2d 641 (Mass. 1995);* **Missouri,** *Vermillion v. Pioneer Gun Club, 918 S.W.2d 827 (Mo. Ct. App. 1996)* and *State v. McNeal, 699 S.W.2d 457 (Mo. Ct. App. 1985);* **Nebraska,** *Molt v. Lindsay Mfg. Co., 248 Neb. 81, 532 N.W.2d 11 (Neb. 1995)* and *State v. Coleman, 239 Neb. 800, 478 N.W.2d 349 (Neb. 1991);* **New York,** *People v. Alleyne, 154 A. 2d 473, (N.Y. App. Div. 1989);* **Oklahoma,** *Braden v. Hendricks, 695 P.2d 1343 (Okla. 1985)* and *Fields v. State, 666 P.2d 1301 (Okla. Crim. App. 1983);* **Oregon,** *State v. Lockner, 663 P.2d 792 (Or. Ct. App. 1983);* **South Carolina,** *State v. Mueller, 460 S.E.2d 409 (S.C. Ct. App. 1995);* **Texas,** *Keene Corp. v. Kirk, 870 S.W.2d 573 (Tex. App. 1993)* and *State v. Chapman, 859 S.W.2d 509 (Tex. Ct. App. 1993);* and **Vermont,** *State v. Hooper, 151 Vt. 42, 557 A.2d 880 (Vt. 1988).*

The following jurisdictions do not require the renewal of an objection at trial. See **Arizona,** *State v. Burton, 144 Ariz. 248, 697 P.2d 331 (Ariz. 1985);* **Arkansas,** *Massengale v. State, 319 Ark. 743, 894 S.W.2d 594 (Ark. 1995);* **Idaho,** *State v. Higgins, 122 Idaho 590, 836 P.2d 536 (Idaho 1992)* and *Davidson v. Beco Corp., 112 Idaho 560, 733 P.2d 781 (Idaho Ct. App. 1986);* **Louisiana,** *State v. Harvey, 649 So. 2d 783 (La. Ct. App. 1995)*(renewal of objection not required on any written motion); **New Hampshire**, *State v. Eldredge, 135 N.H. 562, 607 A.2d 617 (N.H. 1992);* **New Mexico,** *Buffett v. Jaramillo, 914 P.2d 1011 (N.M. Ct. App. 1993)* and *State v. Corneau, 109 N .M. 81, 781 P.2d 1159 (N.M. Ct. App. 1989);* **North Dakota,** *Fischer v. Knapp, 332 N.W. 2d 76 (N.D. 1983);* **Pennsylvania,** *Miller v. Schmitt, 405 Pa. Super. 502, 592 A.2d 1324 (Pa. Super.*

Ct. 1991); **Wisconsin,** *Schultz v. Am. Family Mut. Ins. Co., 178 Wis.2d 877, 506 N.W.2d 427 (Wis. Ct. App. 1993)* and *State v. Bustamante, 549 N.W.2d 746 (Wis. Ct. App. 1996);* and **Wyoming,** *Sims v. Gen. Motors Corp., 751 P.2d 357 (Wyo. 1988).*

There are at least six jurisdictions which apply an exception and 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." These are: **California,** *People v. Morris, 53 Cal. 3d 152, 807 P.2d 949 (Cal. 1991);* **Hawaii,** *Lussier v. Mau-Van Dev., Inc., 4 Haw. App. 359, 667 P.2d 804 (Haw. Ct. App. 1983);* **Maryland,** *Simmons v. State, 542 A.2d 1258 (Md. Ct. App. 1988);* **Tennessee,** *Willis v. Grimsley, No. 01-A-01-9409-CV-00445, 1995 W7 89774 (Tenn. Ct. App. Mar. 3, 1995) a*nd *State v. Brobeck, 751 S.W.2d 828 (Tenn. 1988);* **Utah,** *State v. Dibello, 780 P.2d 1221 (Utah 1989)* and *Salt Lake City v. Holtman, 806 P.2d 235 (Utah Ct. App. 1991);* and **Washington,** *Sturgeon v. Celotex Corp., 52 Wash. App. 609, 762 P.2d 1156 (Wash. Ct. App. 1988)* and *State v. Ramirez, 46 Wash. App. 223, 730 P.2d 98 (Wash. Ct. App. 1986).*

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~~ and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become 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.

Drafting Committee Note

The existing Comment to Uniform Rule 104 states "The phrase, 'or in the court's discretion subject to' [in subd. (b)] preserves the court's control of the order of proof as provided in Rule 611(a)."

Uniform Rule 104 does differ from Rule 104 of the Federal Rules of Evidence in subdivision (b) by substituting the word "Whenever" for the word "When" and by including the phrase "or in the court's discretion subject to" to preserve the court's control of the order of proof as provided in Rule 611(a).

Subdivision (c) differs from its federal rule counterpart by substituting the phrase "in criminal cases" for the phrase "in all cases" in the first sentence, inserting in the second sentence the phrase "in all cases" after the word "matters" and the phrase "in criminal cases" between the words "or" and "when" and by substituting the word "whenever" for the word "when."

Proposed Uniform Rule 104 eliminates the gender-specific language in subdivisions (c) and (d). It is technical and no change in substance is intended.

The Advisory Committee on the Federal Rules of Evidence has not recommended any amendments to Rule 104.

Rule 105. [Limited Admissibility].

Whenever evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Drafting Committee Note

The existing Comment to Rule 105 states that "[t]his rule is not intended to affect the power of a court to order a severance or a separate trial of issues in a multi-party case."

Uniform Rule 105 does differ from Rule 105 of the Federal Rules of Evidence by substituting the word "Whenever" for the word "When."

There are no proposals for amending existing Uniform Rule 105.

The Advisory Committee on the Federal Rules of Evidence has not recommended any amendments to Rule 105.

Rule 106. [Remainder of or Related Records ~~Writings or Recorded~~

Whenever a record ~~writing or recorded statement~~ or part thereof is introduced by a party, an adverse party may require the introduction ~~him~~ at that time ~~to introduce~~ of any other part or any other record ~~writing or recorded statement~~ which in fairness ought to be considered contemporaneously with it.

Drafting Committee Note

The existing Comment to Rule 106 states that "[a] determination of what constitutes 'fairness' includes consideration of completeness and relevancy as well as possible prejudice."

Uniform Rule 106 also differs from its federal rule counterpart by substituting the phrase "in fairness ought" for the phrase "ought in fairness."

Two amendments to Rule 106 are proposed. First, this proposal for amending Rule 106 eliminates the gender-specific language in the rule which is technical and no change in substance is intended.

Second, the Drafting Committee proposes amending Uniform Rule 106 to substitute the word "record" for the language "writing or recorded statement" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. Comparable amendments are also made in Rules 612, 801(a), 803(5) through (15), 803(17), 803(24), 901 through 903 and 1001 through 1007.

"Record" is defined by amending Rule 1001(1) of the Uniform Rules of Evidence to embrace the definition of "record" as follows:

> "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form. All writings, including documents, memoranda and data compilations, audio recordings, videotapes and all photographs are records.

This definition of "record" is derived from § 5-102(a)(14) of the Uniform Commercial Code and would carry forward established policy of the Conference to accommodate the use of electronic evidence in business transactions. The Drafting Committee has inserted for completeness in the foregoing definition of record the words "audio recordings, videotapes" between the words "compilations," and "and all photographs."

In proposing these changes in the Uniform Rules of Evidence, the Task Force believes they "are desirable to ensure that records are placed on the same plane with writings." It further argues as follows:

> To be sure, courts have been generally receptive to the introduction of electronic evidence, at least to the extent courts' actions are revealed in reported appellate opinions. * * * But reported opinions do not tell the entire story. A business person, in deciding whether to rely upon electronic media rather than writings for the storage of business records, may ask his or her lawyer for assurances that business records stored in electronic media will be as reliable as records stored in writings--that is to say, if legal rights must be enforced in court, the business person can have some degree of confidence that information stored electronically will be admissible as information stored in written format. The existing rules and case law do not permit an unambiguous response to this reasonable request.
>
> While the reported appellate cases give some assurance that the courts will lean in the direction of using the structure of the current rules to permit reliance upon electronic evidence, there is still the question of what happens at the trial court level on a day-to-day basis when records electronically stored are sought to be used in evidence. If the trial court refuses to permit admission of electronically stored records into evidence, the parties will likely incur additional expense to prove up the case in other ways, or even settle the case on less favorable terms, rather than appeal the case to get the evidentiary ruling corrected. Consequently, to the extent that the Uniform Rules of Evidence can be amended at least so as to put electronic records on a par with writings, the business community can have greater confidence that it can rely upon electronic records and thereby achieve desired efficiencies and productivity gains.

The Advisory Committee on the Federal Rules of Evidence has not recommended similar amendments to the Federal Rules.

Article II

JUDICIAL NOTICE

Rule 201. [Judicial Notice of Adjudicative Facts].

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

Drafting Committee Note

Uniform Rule 201(g) differs from Rule 201(g) of the Federal Rules of Evidence. Federal Rule 201(g) provides as follows:

> In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

In contrast, Uniform Rule 201(g) does not distinguish between civil and criminal cases in instructing the jury to accept as conclusive any fact judicially noticed.

The Advisory Committee on the Federal Rules of Evidence has not recommended to date any amendments to Article II of the Federal Rules of Evidence dealing with the judicial notice of adjudicative facts.

The Drafting Committee does not recommend any changes in Uniform Rule 201 including Rule 201(g), to make the Uniform rule completely consistent with the Federal rule.

It may be of interest to note that the blackletter of the existing Uniform Rule 201(g) that "[t]he court shall instruct the jury to accept as conclusive any fact judicially noticed" is a reflection of Rule 201(g) of the 1971 Revised Draft of the Proposed Rules of Evidence for the U.S. District Courts and Magistrates. The Advisory Committee's Note to Rule 201(g) in the 1971 Revised Draft explained the rule as follows:

> "Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.
>
> * * *
>
> Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established.
>
> * * *

> "Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases.
>
> * * *

Rule 201(g) in the 1971 Revised Draft of the Proposed Federal Rules of Evidence is to be sharply distinguished from Rule 201(g) of the earlier 1969 Preliminary Draft which provided as follows:

> "Instructing Jury. In civil jury cases, the judge shall instruct the jury to accept as conclusive any facts judicially noticed. In criminal jury cases, the judge shall instruct the jury that it may but is not required to accept as conclusive any fact that is judicially noticed."

The Advisory Committee's Note to this earlier draft explained the distinction between treating civil and criminal cases differently as follows:

> "Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof in civil cases.
>
> * * *
>
> Criminal cases are treated somewhat differently in the rule. While matters falling within the common fund of information supposed to be possessed by jurors need not be proved . . . , these are not, properly speaking, adjudicative facts but an aspect of legal reasoning. The considerations which underlie the general rule that a verdict cannot be directed against the accused in a criminal case seems to foreclose the judge's directing the jury on the basis of judicial notice to accept as conclusive any adjudicative facts in the case. * * * However, this presents no obstacle to the judge's advising the jury as to a matter judicially noticed, if he instructs them that it need not be taken as conclusive."

It is noteworthy that it is this earlier 1969 version of Rule 201(g) which was adopted by Congress contrary to the recommendation of the Supreme Court

which embodied the 1971 Revised Draft of Rule 201(g). The Report of the House explained the Congressional change as follows:

> Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

See *H.R. Rep. No. 93-650, 93rd Cong., 2d Sess. At 6-7 (1973).*

The following state jurisdictions have rejected Uniform Rule 201(g) based upon the 1971 Revised Draft by adopting a rule comparable to Rule 201(g) of the Federal Rules of Evidence as finally enacted by Congress: **Alaska,** *Alaska R. Evid. 203(c);* **Colorado**, *Colo. R. Evid. 201(g);* **Hawaii,** *Haw. R. Evid. 201(g);* **Indiana,** *Ind. R. Evid. 201(g);* **Iowa**, *Iowa R. Evid. 201(g);* **Louisiana,** *La. Code Evid. Ann. art. 201(G)(West 1997);* **Maryland,** *Md. R. Evid. 5-201;* **Michigan**, *Mich. R. Evid. 201(f);* **Mississippi**, *Miss. R. Evid. 201(g);* **Montana,** *Mont. R. Evid. 201(g);* **Nebraska**, *Neb. R. Evid. 201(7):* **New Hampshire**, *N.H. R. Evid. 201(g);* **New Jersey,** *N.J. R. Evid. 201(g);* **New Mexico,** *N.M. R. Evid. 11-201;* **North Carolina**, *N.C. R. Evid. 201(g);* **Ohio,** *Ohio R. Evid. 201(G);* **Oklahoma**, *Okla. Stat. Ann. tit. 12, § 2202(E)(West 1997)*; **Oregon**, *Or. Rev. Stat. § 40.085 (1989);* **Rhode Island**, *R.I. R. Evid. 201(g)*; **Tennessee**, *Tenn. R. Evid. 201(g);* **Texas,** *Tex. R. Civ. Evid. 201(g)* and *Tex. R. Crim. Evid. 201(g);* **Utah**, *Utah R. Evid. 201(g);* **Vermont,** *Vt. R. Evid. 201(g);* **West Virginia**, *W. Va. R. Evid. 201(g);* and **Wyoming**, *Wyo. R. Evid. 201(g).*

The following state jurisdictions follow Uniform Rule 201(g): **Arizona,** *Ariz. R. Evid. 201(g);* **Arkansas,** *Ark. R. Evid. 201(g);* **Delaware,** *Del. R. Evid. 201(g)*(inserts the words "Upon request" at beginning of Rule); **Maine,** *Me. R. Evid. 201(g);* **Minnesota,** *Minn. R. Evid. 201(g);* **North Dakota,** *N.D. R. Evid. 201(g);* **South Carolina,** *S.C. R. Evid. 201(g);* and **Wisconsin,** *Wis. Stat Ann. § 902.01(7)(West 1997).*

Washington omits Uniform Rule 201(g) altogether. See *Wash. R. Evid. 201* and the accompanying Comment.

Florida has a discretionary rule authorizing the court to instruct the jury during trial to accept as a fact a matter judicially noticed. See *Fla. Stat. Ann. § 90.206(West 1997).*

Judicial authority with respect to instructing on the effect of judicial notice in criminal cases is sparse. See, however, *United States v. Mentz, 840 F.2d 315 (6th Cir. 1988),* in which the Court reversed the defendant's conviction for bank robbery, finding that the trial judge invaded the province of the jury and violated the Sixth Amendment by instructing the jury that banks were insured by the Federal Deposit Insurance Corporation. See further, *State v. Vejvoda, 231 Neb. 668, 438 N.W.2d 461 (Neb. 1989), State v. Pierson, 368 N.W.2d 427 (Minn. Ct. App. 1985)* and *State v. Willard, 96 Or. App. 219, 772 P.2d 948 (Or. Ct. App. 1989),* generally differentiating between the conclusive and permissive effect to be accorded matters judicially noticed in civil and criminal cases.

As indicated above, there is respectable authority that it is a violation of the Sixth Amendment right to jury trial by failing to instruct the jury pursuant to Rule 201(g) that "it may, but is not required to, accept as conclusive any fact judicially noticed," in particular, where a fact is judicially noticed which constitutes an essential element of the crime charged. See *United States v. Mentz, supra* at 22.

However, following reasoned discussion by the Drafting Committee it recommends retaining Uniform Rule 201(g) as originally adopted by the Conference.

Article III

PRESUMPTIONS

Rule 301. [Definitions].

(a) Basic Fact. A basic fact means the fact or group of facts giving rise to a presumption.

(b) Presumed Fact. A presumed fact means the fact which must be assumed upon a finding of the basic fact.

(c) Presumption. A presumption means that when a basic fact exists the existence of the presumed fact must be assumed until the presumed fact is rebutted as provided in Rule 302.

Drafting Committee Note

As described by one authority, "'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'" *McCormick on Evidence, v. 2, § 342 (4th ed. 1992).* The definitional provisions of Proposed Rule 301 are intended to have a clarifying effect and avoid the confusion that currently exists in the loose use of the word "presumption" and the corresponding ambiguous meanings employed by the courts and textwriters in the use of the word "presumption."

There are at least seven senses in which the term has been used by legislatures and the courts. First, the word "presumption" has been used to describe what is more particularly known as the "presumption of innocence." In truth, the "presumption of innocence" is merely another form of expression to describe the accepted rule in a criminal case that the accused may remain inactive and secure until the prosecution adduces evidence and produces persuasion beyond a reasonable doubt that the accused is guilty as charged.

Second, the term "presumption" has also been used to create and define the elements of an affirmative defense. In this sense the term describes nothing more than a rule of law established by either statute or judicial decision which allocates

the burden of producing evidence, or of persuasion, to one or the other of the parties to the litigation. In criminal cases, an excellent example of the use of the so-called "presumption" to allocate the burden of producing evidence, or of persuasion, is the "presumption of sanity." In such a case, the accused who seeks to rely upon the defense of insanity must, depending upon the rules in force in the particular jurisdiction, either produce evidence, or persuade the trier of fact, of the accused's insanity at the time of the commission of the offense. In either case, the effect of a "presumption" used in this sense is to create only an affirmative defense.

Third, the terms "prima facie," or "prima facie evidence" are often used interchangeably, or in conjunction with, the term "presumption." For example, the term "prima facie evidence" has been employed in discriminatory practice acts to create a "presumption of authority" or, in other situations, to describe a "presumption of agency." "Presumptions" have also been statutorily described as "prima facie presumptions" or, in the case of the presumption of delivery, by judicial decision, as a "prima facie presumption" of the delivery of a letter upon the introduction of sufficient evidence that the letter has been properly addressed, stamped and deposited in the mail. This imprecision in the use of terminology has produced confusion in interpretation, particularly with respect to the *effect* of rebuttable presumptions. "Prima facie evidence," properly used to avoid confusion, should be confined to those situations in which the party having the burden of first producing evidence has, in fact, introduced *sufficient* evidence from which the trier of fact can conclude that the fact exists.

Fourth, the courts, on occasion, have also used the terms "inference" and "presumption" synonymously. However, strictly speaking, an "inference" is simply a permissible deduction from evidence, while a "presumption" arises from a rule of law rather than from the logical force of evidence to prove the existence of a fact. It is quite true that the basic facts of a presumption created by a rule of law will also often have probative value of the existence of the presumed fact, such as with the presumption that a child born during wedlock is legitimate, the presumption of the delivery of a letter to the addressee which is properly addressed, stamped and deposited in the mail, or the presumption that a vehicle driven by a regular employee of the owner of a vehicle is driven in the course of the owner's business. However, the significance of the distinction between an "inference" and a "presumption" is that the "inference" arises only from the *probative force of the evidence*, while the "presumption" arises from a *rule of law.*

Fifth, "inferences" may also become standardized in the sense that a *rule of law* will establish that a fact, or facts, are sufficient to permit, though not require in the absence of rebuttal evidence, a finding of the desired inference. Most frequently the inference called for by the rule of law is one which a court

would properly have construed to be a permissible deduction from the evidence even in the absence of a rule of law. In this sense, such a rule of law need be viewed no differently from an inference which arises as a matter of logic. *Res ipsa loquitur* illustrates rules of law of this sort. The negligence of the defendant may be inferred from evidence that the plaintiff was injured by an instrumentality in the control of the defendant under circumstances that would not ordinarily occur in the absence of the defendant's negligence.

Sixth, on occasion the terminology "conclusive presumption" has been used by legislatures and courts to describe a basic fact--presumed fact relationship in which the presumption may not be rebutted. In actuality, the terminology is a contradiction in terms and, in Wigmore's view, there can be no such conceptual principle in the law known as a "conclusive presumption." Rather, the law simply formulates a rule of law prohibiting the introduction of contradictory evidence of a particular fact. An example is the statutory presumption that "[e]vidence of statistical probability of paternity established at ninety-eight percent (98%) or more creates a conclusive presumption of paternity." See, for example, *Okla. Stat. Ann. tit. 10 § 504(D)(West 1997).*

Finally, the term "presumption" has been used to describe what has been more specifically denominated as a "rebuttable presumption" which arises from a rule of law creating a basic fact--presumed fact relationship in which a finding of the basic fact *requires* a finding of the existence of the presumed fact unless it has been rebutted as may be required by law. Most scholars, led by Thayer and Wigmore, as well as many judges, believe that the term "presumption" should be employed only in this sense. Proposed Rule 301 adopts this approach to clarify the confusion that often exists in the use of the term and to promote uniformity in its use throughout the several states.

Consistent with this approach, Proposed Rule 301 defines the terminology employed in the use of the word "presumption." Rule 301(a) defines "basic fact" as the fact or group of facts giving rise to the presumption. The basic fact of a presumption may be established in an action just as any other fact may be established, either by the pleadings, by stipulation of the parties, by judicial notice, or by a finding of the basic fact from evidence.

Rule 301(b) defines "presumed fact" as the fact which must be assumed upon a finding of the "basic fact."

Rule 301(c) defines a "presumption" in terms of a "basic fact"—"presumed fact" relationship which requires a finding of the presumed fact until the presumed fact of the presumption is rebutted as provided in Proposed Rule 302. This

definition thereby limits the use of the term “presumption” to what can be described more particularly as a “rebuttable presumption.”

Rule ~~301~~ 302. [Presumptions in General in Civil Actions and Proceedings].

~~(a) Effect.~~ In all civil actions and proceedings not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

~~**(b) Inconsistent Presumptions.** If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.~~

Drafting Committee Note

Three amendments to existing Uniform Rule 301(a), now numbered Rule 302, are proposed. The word "civil" is added to clarify that the rule applies only in civil, as distinct from criminal, cases. Second, the words "judicial decision" are added to accommodate those state jurisdictions in which a different effect from that embodied in the rule is given to presumptions by judicial decision. Third, subdivision (b) of the existing rule is deleted and a new Proposed Rule 303 is recommended to deal with inconsistent presumptions.

As to the effect to be accorded presumptions under Proposed Rule 302, the existing Comment to Uniform Rule 301(a) states that "[t]he reasons for giving this effect to presumptions are well stated in the United States Supreme Court Advisory Committee's Note, 56 F.R.D. 183 (1972)."

Unlike Rule 301 of the Federal Rules of Evidence which follows the Thayer-Wigmore theory of shifting only the burden of producing evidence to the party against whom the presumption operates, Uniform Rule 302 adopts the Morgan-McCormick theory of shifting the ultimate burden of persuasion on the issue of the presumed fact by providing that "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." This effect was proposed in Rule 301 of the *Proposed Rules of Evidence for U.S. District Courts and Magistrates (1971 Revised Draft)* on the ground that the underlying reasons for

creating presumptions did not justify giving a lesser effect to presumptions. See the *Advisory Committee's Note, 56 F.R.D. 183, 208 (1972)*. However, Congress rejected the Morgan-McCormick theory embraced within Uniform Rule 302 in favor of the Thayer-Wigmore theory of shifting only the burden of producing evidence. See *H.R. Conf. Rep. No. 1597, 93rd Cong., 2d Sess. At 5 (1974); 1974 U.S. C. C. A. N. 7098, 7099.*

The Advisory Committee on the Federal Rules of Evidence has not recommended any amendments to Rule 301.

However, the Drafting Committee recommends retaining the effects rule originally adopted by the Conference when the Uniform Rules of Evidence were adopted in 1974. This favors shifting the burden of persuasion, but does not preempt giving the lesser effect of shifting, for example, only the burden of producing evidence, when otherwise provided for "by statute, by judicial decision, or by these rules."

Rule 303. [Inconsistent Presumptions].

(a) Defined. Inconsistent presumptions means that the presumed fact of one presumption is inconsistent with the presumed fact of another presumption.

(b) Effect. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

Drafting Committee Note

Proposed Uniform Rule 303 is new and deals exclusively with inconsistent presumptions. Subdivision (a) defining "inconsistent presumptions" is new and recommended for adoption to clarify the meaning of the terminology in stating the effect of inconsistent presumptions in Subdivision (b).

No change is recommended in proposed Uniform Rule 303(b) which is identical to the existing Uniform Rule 301(b). Rule 301(b) was drawn from, and is consistent with, Rule 15 of the Uniform Rules of Evidence of 1953 which were superseded by the Uniform Rules of Evidence of 1974.

"Inconsistent presumptions," as defined in Subdivision (a), can be illustrated as follows:

> W, asserting that she is the widow of H, claims her share of his property, and proves that on a certain day she and H were married. The adversary then proves that three or four years before W's marriage to H, W married another man. W's proof gives her the benefit of the presumption of the validity of a marriage. The adversary's proof gives rise to the general presumption of the continuance of a status or condition once proved to exist, and a specific presumption of the continuance of a marriage relationship. See, in this connection, *McCormick on Evidence, § 344, p. 465 (4th ed. 1992).*

In this situation, as defined in Proposed Rule 303(a), the presumed fact of the validity of W's marriage to H is inconsistent with the presumed fact of the continuance of the marriage relationship with another man. How is this inconsistency in the presumed facts of the two presumptions to be resolved? Proposed Rule 303(b) provides that "the presumption applies that is founded upon weightier considerations of policy." The presumption of the validity of a marriage is founded on the strongest social policy favoring legitimacy and the stability of family inheritances and expectations. In contrast, the presumption of the continuance of a marriage relationship is founded principally on probability and trial convenience. The conflict should be resolved under Rule 303(b) in favor of the presumption of the validity of the marriage since it "is founded upon weightier considerations of policy." See *Mollie D. Parker, Annotation, Presumption as to Validity of Second Marriage, 14 A. L. R. 2d 7, 37-44 (1950).*

In contrast, where the presumption of control of a student driver by the person in the right front seat is inconsistent with the presumption of control by the owner of the vehicle, the considerations of policy are of equal weight and, under Uniform Rule 303(b), the issue of control would be determined without regard to the presumptions. See, in this connection, *McFetters v. McFetters, 98 N.C.App. 187, 390 S.E.2d 348 (N.C. Ct. App. 1990), review denied 327 N.C. 140, 394 S.E.2d 177(N.C. 1990).*

Rule ~~302~~ 304. [Applicability of Federal Law in Civil Actions and

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

Drafting Committee Note

The existing Comment to Rule 302, now renumbered as Rule 304, states that "[p]arallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302 [Proposed Rule 304] is made in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied."

The Drafting Committee does not recommend any amendments to Rule 302, now renumbered as Rule 304.

Rule ~~303~~ 305. [Presumptions in Criminal Cases].

(a) Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) Submission to jury. The court is not authorized to direct the jury to find a presumed fact against the accused. If a presumed fact establishes guilt or is an element of the offense or negatives a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury provided the basic facts are supported by substantial evidence or are otherwise established, unless the court determines that a reasonable juror on the evidence as a whole could not find the existence of the presumed fact.

(**c) Instructing the jury.** Whenever the existence of a presumed fact against the accused is submitted to the jury, the court shall instruct the jury that it may regard the basic facts as sufficient evidence of the presumed fact but is not required to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.

Drafting Committee Note

Uniform Rule 303, now renumbered as Rule 305, is the same in substance as Proposed Rule 303, Presumptions in Criminal Cases, of the Federal Rules of Evidence. Congress did not adopt the Proposed Federal Rule 303 at the time it was promulgated because the subject of presumptions in criminal cases was addressed in detail in bills pending before the Committee on the Judiciary to revise the federal criminal code. In contrast, the Conference elected to incorporate the substance of the proposed Federal Rule in the Uniform Rules of Evidence of 1974, As Amended.

However, in the interim between the adoption of Uniform Rule 303 and the current study and drafting of revisions to the Uniform Rules, the Supreme Court of the United States has decided a number of cases impacting the constitutionality of presumptions in criminal cases. The issue turns on the existence of a rational connection between the basic fact and presumed fact of the presumption. The rational connection test was largely developed in determining the validity of presumptions under the 5th Amendment. See *2 Whinery, Oklahoma Evidence §§ 9.16-9.17 (1994).* However, it later became clear with the decision in *County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979),* that the rational connection test applies in interpreting the constitutionality of state statutory presumptions under the 14th Amendment. The decision, together with the Court's later decisions in *Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), on remand State v. Sandstrom, 184 Mont. 391, 603 P.2d 244 (Mont. 1979)* and *Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985),* introduced further complexities by distinguishing "permissive" and "mandatory" presumptions, distinguishing those presumptions which allocate to the defendant only the burden of producing evidence as distinguished from those which allocate to the defendant the ultimate burden of persuasion and the degree of persuasion which must be met to rebut the presumption. See further, *2 Whinery, Oklahoma Evidence §§ 9.16-9.17 (1994),* for a more detailed analysis of these issues.

The question then arises whether the constitutional complexities and evolving doctrine associated with the use of presumptions warrants any revisions in Uniform Rule 303, now renumbered as Rule 305. The Drafting Committee considered these issues, concluded that Rule 305 is at least consistent with evolving constitutional doctrine governing the effect of presumptions in criminal cases and decided not to recommend any amendments to the Rule at this time.

Article IV

RELEVANCY AND ITS LIMITS

Rule 401. [Definition of "Relevant Evidence"].

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Drafting Committee Note

There are no proposals for amending Uniform Rule 401.

Rule 402. [Relevant Evidence Generally Admissible; Irrelevant Evidence

All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

Drafting Committee Note

There are no proposals for amending Uniform Rule 402.

Rule 403. [Exclusion of Relevant Evidence on Grounds of Prejudice,

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

Drafting Committee Note

There are no proposals for amending Uniform Rule 403.

Rule 404. [Character Evidence Not Admissible to Prove Conduct,

(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~~ the person acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of ~~his~~ the accused's 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~~ the person 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. Evidence is not admissible under this subdivision unless:

(1) the proponent gives to the adverse party reasonable notice in

advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence the proponent intends to introduce at trial; and

(2) the court:

(A) conducts a hearing to determine the admissibility of the evidence;

(B) finds by clear and convincing proof that the other crime, wrong, or act was committed;

(C) finds that the evidence is relevant to a fact of consequence in the action other than conduct conforming with a character trait;

(D) finds that the probative value of admitting the evidence outweighs the danger of unfair prejudice; and

(E) upon the request of a party, gives an instruction on the limited admissibility of the evidence, as provided in Rule 105.

Drafting Committee Note

The proposal for amending Uniform Rules 404(a) and 404(b) eliminates the gender-specific language in the existing rules. For purposes of clarity, the phraseology in the proposed Uniform Rule 404 differs from the gender-neutral language employed in Federal Rules 404(a) and (b), but the proposal is similarly technical and no change in substance is intended.

There are no proposals at the present time for making any substantive changes in Uniform Rule 404(a).

The proposal for amending Uniform Rule 404(b) in its substance reflects the action of the Drafting Committee at its meetings in Cleveland, Ohio, on October 4-6, 1996 and in Dallas, Texas, on January 24-26, 1997.

First, the Drafting Committee considered at length the amendment of Rule 404(b) to add either a lustful disposition, or modus operandi, exception recognized in some jurisdictions as one of the permissible purposes for which other crimes, wrongs, or acts evidence may be admitted. A number of state jurisdictions do recognize a so-called "lustful disposition" exception to the general rule barring evidence of other crimes, wrongs, or acts to show action in conformity therewith on a particular occasion. These are: **Georgia,** *Gable v. State, 222 Ga. App. 768, 476 S.E.2d 66 (Ga. Ct. App. 1996), Johnson v. State, 222 Ga. App. 722, 475 S.E.2d 918 (Ga. Ct. App. 1996)* and *Loyd v. State, 222 Ga. App. 193, 474 S.E.2d 96 (Ga. Ct. App. 1996);* **Idaho,** *State v. Moore, 120 Idaho 743, 819 P.2d 1143 (Idaho 1991)* and *State v. Maylett, 108 Idaho 671, 701 P.2d 291 (Idaho Ct. App. 1985);* **Indiana,** if it relates to the sexual abuse of a child. See *Ind. Code Ann. § 35-37-4-15(West 1997);* **Iowa,** *State v. Maestas, 224 N.W.2d 248 (Iowa 1974);* **Kentucky,** *McDonald v. Commonwealth, 569 S.W.2d 134 (Ky. 1978);* **Louisiana,** *State v. Coleman, 673 So.2d 1283 (La. Ct. App. 1996)* and *State v. Crawford, 672 So.2d 197 (La. Ct. App. 1996);* **Mississippi,** *Lovejoy v. State, 555 So.2d 57 (Miss. 1989), Mitchell v. State, 539 So.2d 1366 (Miss. 1989)* and *Hicks v. State, 441 So.2d 1359 (Miss. 1983)*; **Missouri,** if it constitutes "propensity of the defendant to commit the crime or crimes with which he is charged" when it relates to a sex crime against a victim under fourteen years of age. *State v. Barnard, 820 S.W.2d 674 (Mo. Ct. App. 1991)* and *Mo. Ann. Stat. § 566.025(Veron 199);* **New Mexico,** *State v. Gray, 79 N.M. 424, 444 P.2d 609 (N.M. Ct. App. 1968);* **Oklahoma,** *Landon v. State, 77 Okl. Cr. 190, 140 P.2d 242 (Okla. Crim. App. 1943),* a pre-Code case cited in dictum in *Hawkins v. State, 782 P.2d 139 (Okla. Crim. App. 1989);* **Rhode Island,** *State v. Jalette, 382 A.2d 526 (R.I. 1978), State v. Pignolet, 465 A.2d 176 (R.I. 1983), State v. Tobin, 602 A.2d 528 (R.I. 1992)* and *State v. Quattrocchi, 681 A.2d 879 (R.I. 1996);* **Washington,** *State v. Ray, 116 Wash.2d 531, 806 P.2d 1220 (Wash. 1991), State v. Pingitore, Nos. 35027-1-I, 37246-7-I, 1996 WL 456020 (Wash. Ct. App. Aug. 12, 1996)* and *State v. Dawkins, 71 Wash. App. 902, 863 P.2d 124 (Wash. Ct. App. 1993);* and **West Virginia,** *State v. Edward Charles L., Sr., 183 W.Va. 641, 398 S.E.2d 123 (W. Va. 1990),* overruling *State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (W. Va. 1986).*

Other state jurisdictions recognize an exception similar to the lustful disposition, but describe it differently. One state describes it as "depraved sexual instinct:" **Arkansas,** *Mosley v. State, 325 Ark. 469, 929 S.W.2d 693 (Ark. 1996)* and *Clark v. State, 323 Ark. 211, 913 S.W.2d 297 (Ark. 1996).* Two others label

the exception "lewd disposition:" **Alaska,** *Pletnikoff v. State, 719 P.2d 1039 (Alaska Ct. App. 1986)*; and **South Carolina,** *State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (S.C. Ct. App. 1994).* One state employs the label "unnatural sexual passion:" **Alabama,** *Ex parte Register, 680 So.2d 225 (Ala. 1994)* and *Corbitt v. State, 596 So.2d 426 (Ala. Crim. App. 1991).* The terminology "emotional propensity" and "emotional propensity for sexual aberration" have been employed in another state: **Arizona,** *State v. Treadaway, 116 Ariz. 163, 167, 568 P.2d 1061, 1065 (Ariz. 1977)* and *State v. McFarlin, 110 Ariz. 225, 227, 517 P.2d 87, 89 (Ariz. 1973).* **Massachusetts** admits prior acts of sexual activity "to prove an inclination to commit the facts charged in the indictment." *Commonwealth v. King, 387 Mass. 464, 441 N.E.2d 248 (Mass. 1982).*

Other states characterize the exception as "modus operandi." See, for example, *State v. Craig, 219 Neb. 70, 361 N.W.2d 206 (Neb. 1985)*, as follows:

> "Modus operandi" is "a characteristic method employed by a defendant in the performance of repeated criminal acts." "Modus operandi" means, literally, "method of working," and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.

In contrast, there are also several states which do not recognize a "lustful disposition" exception. These are: **California,** *People v. Balcolm, 7 Cal. 4th 414, 422, 867 P.2d 777, 782, 27 Cal. Rptr. 2d 666, 670 (Cal. 1994)*, with one dissenting judge arguing for recognition of a lewd disposition exception. But see, *People v. Stewart, 181 Cal. App.3d 300, 226 Cal. Rptr. 252 (Cal. Dist. Ct. App. 198)(*applying the "plan" exception to establish lewd disposition toward victim) and *People v. Barney, 192 Cal. Rptr. 172, 143 Cal. App.3d 490 (Cal. Dist. Ct. App. 1983)(*applying "modus operandi" to establish lewd disposition toward victim); **Delaware,** *Getz v. State, 538 A.2d 726 (Del. 1988);* **Florida,** *Hodges v. State, 403 So.2d 1375 (Fla. Dist. Ct. App. 1981);* **Indiana**, *Pirnat v. State, 612 N.E.2d 153 (Ind. Ct. App. 1993)* and *Lannan v. State, 600 N.E.2d 1334 (Ind. 1992);* **Kansas,** *State v. Clements, 241 Kan. 77, 734 P.2d 1096 (Kan. 1987)***,** *State v. Dotson, 256 Kan. 406, 886 P.2d 356 (Kan. 1994);* **Oregon,** *State v. Davis, 54 Or. App. 133, 634 P.2d 279 (Or. Ct. App. 1981); Oregon v. Zybach, 93 Or. App. 218, 761 P.2d 1334 (Or. Ct. App. 1988)*, but see, the dissenting opinion criticizing the majority of the court for refusing to recognize the lustful disposition exception to the admission of other crimes, wrongs or acts evidence; **Tennessee,** *State v. Rickman, 876 S.W.2d 824 (Tenn. 1994);* **Vermont,** *State v. Winter, 162 Vt. 388, 648 A.2d 624 (Vt. 1994).*

Arguments have been advanced for both the retention and rejection of the exception. Recently, in abandoning the "lustful disposition" or "depraved sexual instinct" rule, the Supreme Court of Indiana focused upon the following competing rationales for recognition of the rule:

> First, the exception has been based on a recidivist rationale: "Acts showing a perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character." * * * Second, the exception has been based on the need to bolster the testimony of victims: to lend credence to a victim's accusations or testimony which describe acts which would otherwise "seem improbable standing alone."

In responding to these arguments for the retention of the rule, the court observed:

> [w]e do not allow the State to introduce previous drug convictions in its case-in-chief in a prosecution for selling 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.
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> . . . there 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.

See *Lannan v. State, 600 N.E.2d 1334, 1335-38 (Ind. 1992).*

Initially, at least some members of the Drafting Committee believed that such an exception in Uniform Rule 404(b) would not only be intrinsically useful in physical and sexual abuse cases, but would also be a rational alternative to Rules 413-415 of the Federal Rules of Evidence. See the Introduction discussing

Federal Rules 413-415 which have not been adopted to date in any state. However, after further consideration, the Committee decided not to recommend amending Uniform Rule 404(b) in this respect for at least three reasons. First, a "lustful disposition" exception is closely related to propensity evidence which is inadmissible under the general rule of Uniform Rule 404(b) barring specific instances of physical and sexual conduct to prove the character of a person to show action in conformity therewith on a particular occasion.

Second, it was reasoned by some members of the Committee that it would rarely be necessary to invoke a special exception, such as "lustful disposition" or "modus operandi," because it would be admissible under one of the normal noncharacter 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. It would only be necessary to invoke such a special exception where the evidence is irrelevant to the proof of one of the commonly recognized exceptions to the general rule barring evidence of other crimes, wrongs, or acts evidence. See, in this connection, *Edward J. Imwinkelreid, Uncharged Misconduct Evidence, §§ 4:12, 4:13 (1990).*

Third, some members of the Committee also find the reasoning of the **Indiana** Supreme Court in *Lannan v. State, supra,* persuasive. If a high rate of recidivism among drug offenders does not justify a departure from the propensity rule for these offenders, then there is no justification for departure from the propensity rule in sex offense cases. Some members of the Committee also believe 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.

The Drafting Committee is recommending that Uniform Rule 404(b) be amended to incorporate procedural guidelines to govern the admissibility of other crimes, wrongs, or acts evidence when it is offered for one of the permissible purposes authorized by the Rule. The proposed amendments to Uniform Rule 404(b) incorporate a provision for notice and contain five other conditions which the Drafting Committee adopted at its meeting in Cleveland, Ohio on October 4-6, 1996 and in Dallas, Texas on January 24-26, 1997.

The notice provision now incorporated in proposed Uniform Rule 404(b)(1) would apply to any party seeking to offer evidence under the Rule, apply in any case, civil or criminal, and eliminate the necessity of a request by the accused, or any other party, for information regarding the general nature of the

evidence a party intends to offer at trial. This provision is also consistent with the concern and objections raised by members of the Drafting Committee at its meeting in Dallas, Texas, on January 26-28, 1997 as to the notice provision of Rule 404(b) of the Federal Rules of Evidence and, at least indirectly, to comparable state statutory provisions.

Accordingly, the notice requirement of Uniform Rule 404(b)(1) recommended by the Drafting Committee differs from that contained in Rule 404(b) of the Federal Rules of Evidence which provides as follows:

> 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.

The notice requirement in Federal Rule 404(b) applies in criminal cases only and, in this respect, is in accord with eleven state jurisdictions and the Virgin Islands requiring statutory notice of the intent to introduce evidence of other crimes, wrongs, or acts in criminal cases. Notice is required by statute in **Alabama,** *Ala. R. Evid. 404(b)*(upon request by accused, prosecution shall give reasonable notice in advance of trial or during trial if trial court excuses pretrial notice on good cause shown)*;* **Florida,** *Fla. Stat. Ann. § 90.404(2)(b)(West 1997)*(state shall give to accused a minimum of 10 days notice prior to trial except when used for impeachment or on rebuttal)*;* **Hawaii,** *Haw. R. Evid. 404*(proponent of evidence shall give reasonable notice in advance of trial, or during trial if trial court excuses pretrial notice on good cause shown); **Indiana,** *Ind. R. Evid. 404(b)*(upon request by accused, prosecution shall give reasonable notice in advance of trial or during trial if the trial court excuses pretrial notice on good cause shown)*;* **Kentucky,** *Ky. R. Evid. 404(c)*(prosecution shall give reasonable pretrial notice to defendant and if it fails to do so the proffered evidence may be excluded unless notice is excused by trial court which may then grant a continuance or such other remedy as necessary to prevent unfair prejudice to accused)*;* **Louisiana,** *La. Code Evid. Ann. art. 404(B)(West 1997)*(upon request by accused, prosecution shall provide reasonable notice in advance of trial); **Michigan,** *Mich. R. Evid. 404(b)(2)*(prosecution shall provide reasonable notice in advance of trial, or during trial if trial court excuses notice on good cause shown); **North Dakota,** *N.D. R. Evid. 404(b)*(prosecution shall provide reasonable notice in advance of trial, or during trial if trial court excuses notice on good cause shown); **Texas,** *Tex. R. Crim. Evid. 404(b)*(upon timely request by accused, state shall give reasonable notice in advance of trial); **Vermont,** *Vt. R. Evid. 404(b)* and *Vt. R. Crim. P. 26(c)*(state shall furnish notice to defendant at

least seven days before trial except court may allow notice to be given at later date, including during trial, if evidence is newly discovered or issue to which evidence relates has newly arisen in case, but no notice is required for evidence used for impeachment or in rebuttal); **West Virginia,** *W.Va. R. Evid. 404(b)*(upon request by accused, prosecution shall give reasonable notice in advance of trial, or during trial if trial court excuses notice on good cause shown); and **Virgin Islands,** *V.I. Fed. R. Evid. 404(b)*(upon request by accused, prosecution shall give reasonable notice in advance of trial, or during trial if trial court excuses pretrial notice on good cause shown).

The notice requirement of Federal Rule 404(b) also conditions the giving of notice upon the request of the accused. The statutory giving of notice is also conditioned upon a request by the accused in **Indiana, Louisiana, Texas, West Virginia** and the **Virgin Islands. Florida, Hawaii, Kentucky, Michigan,** and **North Dakota** require the prosecution, or the proponent, to give notice without a request.

Reasonable notice in advance of trial, or during trial if pretrial notice is excused for good cause shown is also required under Federal Rule 404(b). All of the foregoing jurisdictions with the exception of **Florida, Louisiana** and **Texas** have similar requirements. **Florida** requires at least ten days notice in advance of trial, while **Louisiana** and **Texas** require only reasonable notice in advance of trial.

Finally, Federal Rule 404(b) also requires that the general nature of the evidence which the proponent intends to offer be disclosed. All of the foregoing jurisdictions have comparable statutory requirements.

Decisional law in a number of state jurisdictions also requires notice of the intent to offer other crimes, wrongs, or acts evidence. These are **Alaska,** *Moor v. State, 709 P.2d 498 (Alaska Ct. App. 1985)*("prosecution should be required to give advance notice to the defendant and the court"); **Minnesota,** *State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (Minn. 1965), State v. Slowinski, 450 N.W.2d 107 (Minn. 1990)* ("[e]vidence of other crimes may not be received unless there has been [advance] notice as required by State v. Spreigl"); **Montana,** *State v. Just, 184 Mont. 262, 602 P.2d 957 (Mont. 1979), State v. Croteau, 248 Mont. 403, 812 P.2d 1251 (Mont. 1991)*("notice requirement must be given sufficiently in advance of trial to afford a defendant a reasonable opportunity to prepare to meet the evidence against him"); **Ohio**, *State v. Jurek, 52 Ohio App. 3d 30, 556 N.E.2d 1191 (Ohio Ct. App.1989)*("in light of potential for unfair prejudice, such [notice] procedure should, upon timely request, be followed prior to the admission of evidence of other crimes"), but see, *No. 467, 1993 WL 63443 (Ohio Ct. App. Ar.*

2, 1993), intimating that absent an amendment of Rule 404(b) of the Ohio Rules of Evidence requiring notice, that notice of the intent to introduce "other acts" evidence will not be required; and **Oklahoma,** *Burks v. State, 594 P.2d 771 (Okla. Crim. App. 1979)*("[T]he State shall, within ten days before trial, or at a pretrial hearing, whichever occurs first, furnish the defendant with a written statement of the other offenses it intends to show, described with the same particularity of an indictment or information . . . [but] no such notice is required if the other offenses are prior convictions, or are actually a part of the res gestae of the crime charged and thus are not chargeable as separate offenses").

The requirement of notice is also qualified in some state jurisdictions. See, for example, Oklahoma where the requirement of notice under *Burks, supra, at 44,* is unnecessary where the other crime evidence is a part of the *res gestae* of the crime charged *[Brogie v. State, 695 P.2d 538 (Okla. Crim. App. 1985)],* where the other crime evidence is offered during the presentation of rebuttal evidence *[Freeman v. State, 681 P.2d 84 (Okla. Crim. App. 1984)],* where the state introduces the other crime evidence during cross or re-cross examination *[Smith v. State, 695 P.2d 864 (Okla. Crim. App. 1985)],* or, perhaps, even where "the State was unaware of the [other crime] evidence in time to have afforded pre-trial notice" *[Brogie v. State, supra]*.

There are also a number of jurisdictions that do not appear to require any notice at all. These are: **Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Georgia; Idaho; Illinois; Iowa; Kansas; Maine; Maryland; Massachusetts; Mississippi; Missouri; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Utah; Virginia; Washington; Wisconsin;** and **Wyoming;** and the **District of Columbia.** In Delaware, the Delaware Study Committee, citing the Florida rules of evidence, has recommended that the Superior Court Criminal Rules be amended to provide for the giving of notice under Rule 404(b) of Delaware's Rules of Evidence. The rules have not been so amended to date.

The proposed amendments to Uniform Rule 404(b) also embrace five other conditions in Subparagraph (2) which would have to be satisfied before evidence could be admitted for one of the exceptional purposes authorized by the Rule. The intent is to propose a uniform rule which will restrict and eliminate the abuses believed to currently exist in the admissibility of other crimes, wrongs or acts evidence throughout the several jurisdictions of the United States.

Subparagraph (2)(A) of Uniform Rule 404(b) requires the trial court to conduct a hearing to determine the admissibility of the evidence. A few states

currently require that the hearing be conducted *in camera.* It is required by statute in **Tennessee.** See *Tenn. R. Evid. 404(b)(1).* It is required by judicial decision in **West Virginia.** See *State v. McGhee, 193 W.Va. 164, 455 S.E.2d 533 (W. Va. 1995)* and *State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (W. Va. 1994).* 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. See *Burks, supra at 44.* The amendment as proposed by the Drafting Committee would leave within the discretion of the trial court the type of hearing to conduct in determining the admissibility of other crimes, wrongs, or acts under one or the other of the permissible purposes for which the evidence is admissible.

Subparagraph (2)(B) of Uniform Rule 404(b) proposed by the Drafting Committee provides that the commission of the other crime, wrong or act be determined by clear and convincing proof. This procedural rule is supported by decisional law in **Delaware,** *Getz v. State, 538 A.2d 726 (Del. 1988)*("plain, clear and conclusive evidence"); **Maryland,** *Harris v. State, 324 Md. 490, 597 A.2d 956 (Md. Ct. App. 1991)*("clear, convincing and uncomplicated proof"); **Minnesota,** *State v. Slowinski, 450 N.W.2d 107 (Minn. 1990)*("clear and convincing evidence"); **Nevada,** *Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (Nev. 1995)*("clear and convincing evidence"); **New Hampshire,** *State v. Dushame, 136 N.H. 309, 616 A.2d 469 (N.H. 1992)*("clear proof"); **Oklahoma,** *Burks, supra at 44*("clear and convincing proof"); **South Carolina,** *State v. Raffaldt, 456 S.E.2d 390 (S.C. 1995)*("clear and convincing proof"); and **South Dakota,** *State v. Sieler, 397 N.W.2d 89 (S.D. 1986)*("clear and convincing evidence").

Subparagraph (2)(B) also provides that the "court finds . . . that the other crime, wrong or act was committed" to make clear that this is a preliminary question of fact for the court. This departs from the holding in *Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988),* that the admissibility of other crimes, wrongs, or acts evidence is a question of conditional relevancy under Rule 104(b) of the Federal Rules of Evidence. The Drafting Committee believes that the preferable view is to insulate the jury from hearing this evidence until there has been a final decision by the trial court under the clear and convincing evidence standard that the other crime, wrong, or act has, in fact been committed.

Subparagraph (2)(C) proposed by the Drafting Committee also provides that the trial court find that the evidence is relevant to a fact of consequence in the action other than conduct conforming with a character trait. The substance of this subparagraph is followed in a number of states. These are: **Arkansas,** *Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (Ark. 1992);* **California,** *People v. Balcom, 7*

Cal. 4th 414, 867 P.2d 777 (Cal. 1994); **Colorado,** *State v. McKibben, 862 P.2d 991 (Colo. Ct. App. 1993);* **Connecticut**, *State v. Santiago, 224 Conn. 325, 618 A.2d 32 (Conn. 1992)*; **District of Columbia,** *Campbell v. United States, 450 A.2d 428 (D.C. 1982);* **Illinois,** *People v. Davis, 248 Ill. App. 3d 886, 617 N.E.2d 1381 (Ill. App. Ct. 1993);* **Kansas,** *State v. Searles, 246 Kan. 567, 793 P.2d 724 (Kan. 1990);* **Maryland,** *Harris v. State, 324 Md. 490, 597 A.2d 956 (Md. 1991);* **Nebraska,** *State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (Neb. 1994);* **Nevada,** *Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (Nev. 1995);* **New Jersey,** *State v. Stevens, 115 N.J. 289, 558 A.2d 833 (N.J. 1989);* **New Mexico,** *State v. Aguayo, 114 N.M. 124, 835 P.2d 840 (N.M. Ct. App. 1992);* **New York,** *People v. Alvino, 71 N.Y.2d 233, 519 N.E.2d 808 (N.Y. 1987);* **Pennsylvania,** *Commonwealth v. Seiders, 531 Pa. 592, 614 A.2d 689 (Pa. 1992);* **Rhode Island,** *State v. Brown, 626 A.2d 228 (R.I. 1993);* **West Virginia,** *State v. McGhee, 193 W. Va. 164, 455 S.E.2d 533 (W.Va. 1995);* and **Washington,** *State v. Peerson, 62 Wash. App. 755, 816 P.2d 43 (Wash. Ct. App. 1991).*

Subparagraph (2)(D) proposed by the Drafting Committee sets forth a balancing test for determining the admissibility of other crimes, wrongs or acts evidence. It makes the evidence presumptively inadmissible by requiring that the court find that the probative value of admitting the evidence outweighs the danger of unfair prejudice. A number of states follow this approach in balancing the relevancy of the other crimes, wrongs or acts evidence against the danger of unfair prejudice. The states adhering to this balancing test are: **California,** *People v. Balcom, 7 Cal. 4th 414, 867 P.2d 777 (Cal. 1994);* **Colorado,** *People v. McKibben, 862 P.2d 991 (Colo. Ct. App. 1993);* **Connecticut,** *State v. Santiago, 224 Conn. 325, 618 A.2d 32 (Conn. 1992);* **Kansas,** *State v. Searles, 246 Kan. 567, 793 P.2d 724 (Kan. 1995);* **Maryland,** *Harris v. State, 324 Md. 490, 597 A.2d 956 (Md. 1991);* **Nebraska,** *State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (Neb. 1994);* **Nevada,** *Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (Nev. 1995);* **New Mexico,** *State v. Aguayo, 114 N.M. 124, 835 P.2d 840 (N.M. Ct. App. 1992);* **New York,** *People v. Alvino, 71 N.Y.2d 233, 519 N.E.2d 808 (N.Y. 1987);* **Pennsylvania,** *Commonwealth v. Seiders, 531 Pa. 592, 614 A.2d 689 (Pa. 1992);* **Rhode Island,** *State v. Brown, 626 A.2d 228 (R.I. 1993);* **South Carolina,** *State v. Raffaldt, 456 S.E.2d 390 (S.C. 1995);* and **Washington,** *State v. Peerson, 62 Wash. App. 755, 816 P.2d 43 (Wash. Ct. App. 1991).*

Other states follow a balancing test requiring only that the probative value of admitting the evidence be substantially outweighed by the danger of unfair prejudice. Accordingly, in the jurisdictions adhering to this test the other crimes, wrongs or acts evidence is presumptively admissible. The states adhering to this balancing test are: **Arizona,** *State v. Barr, 904 P.2d 1258 (Ariz. Ct. App. 1995);* **Arkansas,** *Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (Ark. 1992)* and *Price v.*

State, 268 Ark. 535, 597 S.W.2d 598 (Ark. 1980); **Delaware,** *Getz v. State, 538 A.2d 726 (Del. 1988)* and *Trowbridge v. State, 647 A.2d 1076 (Del. 1994);* **Idaho,** *State v. Moore, 120 Idaho 743, 819 P.2d 1143 (Idaho 1991)* and *State v. Medina, 909 P.2d 637 (Idaho Ct. App. 1996);* **Illinois,** *State v. Davis, 248 Ill. App. 3d 886, 617 N.E.2d 1381 (Ill. App. Ct. 1993);* **Maine,** *State v. Webber, 613 A.2d 375 (Me. 1992);* **Massachusetts,** *Commonwealth v. Brousseau, 659 N.E.2d 724 (Mass. 1996);* **Missouri,** *State v. Kitson, 817 S.W.2d 594 (Mo. Ct. App. 1991);* **Montana,** *State v. Paulson, 250 Mont. 32, 817 P.2d 1137 (Mont. 1991);* **New Hampshire,** *State v. Dushame, 136 N.H. 309, 616 A.2d 469 (N.H. 1992);* **New Jersey,** *State v. Stevens, 115 N.J. 289, 558 A.2d 833 (N.J. 1989);* **Ohio,** *State v. Jurek, 556 N.E.2d 1191 (Ohio Ct. App. 1989);* **South Dakota,** *State v. Floody, 481 N.W.2d 242 (S.D. 1992);* **Tennessee,** *Tenn. R. Evid. 404(b)(3)* and *State v. Nichols, 877 S.W.2d 722 (Tenn. 1994);* **West Virginia,** *State v. McGhee, 193 W. Va. 164, 455 S.E.2d 533 (W.Va. 1995);* **Wisconsin**, *State v. Landrum, 191 Wis.2d 107, 528 N.W.2d 36 (Wis. Ct. App. 1995);* and **Wyoming,** *Mitchell v. State, 865 P.2d 591 (Wyo. 1993)* and *Gezzi v. State, 780 P.2d 972 (Wyo. 1989).* See also, **District of Columbia,** *Campbell v. United States, 450 A.2d 428 (D.C. 1982).*

The state jurisdictions are almost evenly divided on the balancing test to apply in determining the admissibility of other crimes, wrongs or acts evidence, although a slight majority favor the less stringent standard by requring only that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The Drafting Committee recommends the more stringent standard embodied in Subparagraph (2)(C) because of the inherent danger that other crimes, wrongs or acts evidence will be used for propensity purposes rather than the more limited purpose for which the evidence may be admitted under Uniform Rule 404(b).

Subparagraph (2)(E) proposed by the Drafting Committee provides that upon the request of a party, the court shall give an instruction on the limited admissibility of the evidence, as provided in Rule 105. The requirement for giving a limiting instruction, either with or without the request of a party, is followed in the following jurisdictions as indicated: **Arizona,** *State v. Barr, 904 P.2d 1258 (Ariz. Ct. App. 1995)*(if requested); **Delaware,** *Getz v. State, 538 A.2d 726 (Del. 1988)*(if requested); **Minnesota,** *State v. Fallin, 540 N.W.2d 518 (Minn. 1995)*(required); **Nebraska,** *State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (Neb. 1994)*(if requested); **New Jersey,** *State v. Loftin, 670 A.2d 557 (N.J. 1996)*(if not requested, must demonstrate failure to give instruction was capable of producing unjust result); **Ohio,** *State v. Jurek, 52 Ohio App.3d 30, 556 N.E.2d 1191 (Ohio Ct. App. 1989)*(if requested); **Oklahoma,** *Burks v. State, 594 P.2d 771 (Okla. Crim. App. 1979);* **Pennsylvania,** *Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (Pa. 1989)*(required); **Rhode Island,** *State v. Brown, 626 A.2d 228 (R.I.*

1993)(required); **Utah,** *State v. Smith, 700 P.2d 1106 (Utah 1985)*(if requested); **West Virginia,** *State v. McGhee, 193 W.Va. 164, 455 S.E.2d 533 (W.Va. 1995)*(required); and **Wyoming,** *Goodman v. State, 601 P.2d 178 (Wyo. 1979)*(if requested).

The Drafting Committee believes that the giving of a limiting instruction on the request of a party is preferable for two reasons. First, the party against whom the evidence is being admitted ought to have the discretion of whether a limiting instruction ought to be given as against the risk of unnecessarily emphasizing the limited purpose for which the evidence is admitted. Second, the blackletter of this procedural requirement is consistent with both the blackletter and the policy supporting the blackletter of Uniform Rule 105 conditioning the giving of limiting instructions generally upon the request of a party.

The Advisory Committee on the Federal Rules of Evidence has not recommended any amendments to Federal Rule 404(b).

Rule 405. [Methods of Proving Character].

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of ~~his~~ the person's conduct.

Drafting Committee Note

This proposal for amending Rule 405 eliminates the gender-specific language in Subdivision (b). The change is technical and no change in substance is intended.

There are no other recommendations for amending Uniform Rule 405.

Rule 406. [Habit: Routine Practice].

(a) Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(b) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Drafting Committee Note

There are no recommendations for amending Uniform Rule 406.

Rule 407. [Subsequent Remedial Measures].

Whenever, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event. This rule does not require the exclusion of~~. Evidence of subsequent measures may be admissible when offered for another purpose, such as impeachment or, if controverted, ~~proving~~ proof of ownership, control, or feasibility of precautionary measures~~, if controverted, or impeachment~~.

Drafting Committee Note

The amendments to Uniform Rule 407 recommended by the Drafting Committee reflect the action of the Committee at its meeting in Cleveland, Ohio on October 4-6, 1996. First, the Rule retains the existing language of Uniform Rule 407 as set forth in Lines 3, 4, 5 and 6 to reflect the judgment of the Drafting Committee that the Rule ought to apply to pre-accident, post-manufacturing measures as well as post-accident measures to provide an incentive to take remedial measures before the injury giving rise to the action has occurred. Second, the rule as now drafted, retains in Lines 5-7, with two minor punctuation changes, the language of Proposed Rule 407 of the Federal Rules of Evidence. It is consistent with the general feeling of the members of the Drafting Committee that the general rule of exclusion ought to apply to products liability cases as well as to negligence actions.

In contrast to the blackletter of Uniform Rule 407 as now recommended, Proposed Federal Rule 407 provides:

> When, after an injury or harm allegedly caused by an event measures are taken ~~which~~ that, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct defect in a product, a defect in a product's design, or a need for a

warning or instruction ~~in connection with the event. This rule does not require the exclusion of~~. Evidence of subsequent measures may be ~~when~~ offered for another purpose, such as impeachment or - if controverted - ~~proving~~ proof of ownership, control, or feasibility of precautionary measures~~ controverted, or impeachment~~.

The rationale for the proposed amendment of Federal Rule 407 is explained in the Committee Note as follows:

> The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly cause by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).
>
> Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product, a defect in a product's design, or a need for a warning or instruction." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343, 345 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1972); Werner v. Upjohn Co., Inc., 628 F.2d 848, 856 (4th Cir, 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 887 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).
>
> Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407.

> Evidence of subsequent remedial measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

Public reaction to Proposed Federal Rule 407 has been mixed. Some favor the Rule as proposed. *(See Letter of William B. Poff, Chair of Ad Hoc Committee, National Association of Railroad Trial Counsel, to Study Proposed Changes to the Federal Rules, to Peter G. McCabe, dated March 1, 1996; Comment of Mark Laponsky from Kent S. Hofmeister, Section Coordinator, Federal Bar Association, to Peter G. McCabe, dated February 29, 1996; Letter of Virginia M. Morgan, President, Federal Magistrate Judges Association, to Peter G. McCabe, dated January 23, 1996; Letter of James A. Strain, President, The Seventh Circuit Bar Association, to Peter G. McCabe, dated February 29, 1996;* and *Letter of Virginia M. Morgan, President, Federal Magistrate Judges Association, to Peter G. McCabe, dated January 23, 1996).*

Others have qualified their support of the proposed Rule. *(See Letter of David P. Leonard, Professor of Law, Loyola Law School, to Peter G. McCabe, dated March 1, 1996, arguing that the meaning of "after an event" be clarified "to apply the exclusionary principle to all cases in which admission might materially affect the decision whether to repair, regardless of whether the measure was taken before or after the accident in question");*

(See Comments, Gerald G. Paul, Chair, Commercial and Federal Litigation Section from Robert F. Wise, Jr., Chair, Federal Procedure Committee, New York State Bar Association, dated February 28, 1996, recommending that the words "an injury or harm allegedly caused by" following the words "after an" be added "at the beginning of the rule to make it clear that subsequent remedial measures are inadmissible only when taken after the event that caused the damage");

(See Letter of Hugh F. Young, Jr., Executive Director, Product Liability Advisory Council, to Peter G. McCabe, dated February 29, 1996, recommending that the Committee "revise the Rule to make clear that, in product liability cases, it applies not only to changes made in a product line after an accident occurs but also to any product line changes made after the sale of the product involved in the case"); and

(See Comment of Thais L. Richardson, The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does Not Fix the Problem, 45 Am. U. L. Rev. 1453 (1996), arguing "that while the rule's expansion to cover products liability actions is appropriate, limiting the scope of

the exclusionary rule to measures taken after personal injury or property damage in products liability actions is inconsistent with both the public policy behind the rule and substantive products liability law").

Others oppose the proposed Rule. *(See Letter of Pamela Anagnos Liapakis, President, Association of Trial Lawyers of America, to Peter G. McCabe, dated March 1, 1996).*

Still others have taken no position with regard to the amendment of Rule 407. *(See Letter of Nanci L. Clarence, Chair, Federal Practice Subcommittee, Litigation Section of the State Bar of California, to Peter G. McCabe, dated February 28, 1996; Letter of Harriet L. Turney, General Counsel, State Bar of Arizona, to Peter G. McCabe, dated February 27, 1996; Memorandum of Paul Berghoff, Subcommittee Chairman, from Donald R. Dunner, Chair, Section of Intellectual Property Law, American Bar Association, to Peter G. McCabe, dated March 1, 1996; Letter of Carolyn B. Witherspoon, President, Arkansas Bar Association, to Peter G. McCabe, dated January 31, 1996;* and *Letter of Don W. Martens, President, American Intellectual Property Law Association, to Peter G. McCabe, dated February 29, 1996).*

Finally, Ms. Thais L. Richardson, Law Student, American University School of Law, testifying at the Public Hearing on Proposed Amendments to the Federal Rules of Evidence, and while concurring that the expansion of the Rule to cover products liability actions is appropriate, the limiting of the scope of the exclusionary rule to measures taken after personal injury or property damage in products liability actions is inconsistent with both the public policy behind the rule and substantive products liability law. *(See Public Hearing on Proposed Amendments to the Federal Rules of Evidence, January 18, 1996).*

Uniform Rule 407 as recommended is not significantly different in substance from the proposed Federal Rule 407. Uniform Rule 407 does depart in two respects from the rule now applicable in a number of state jurisdictions.

First, as to the meaning of "event," as that term is now used in Uniform Rule 407 in contrast to Federal Rule 407, the state courts have taken varying approaches. Some have held that the word "event" refers to the time of the injury rather than to the date of manufacturer or distribution of the product. In such a case the exclusionary rule would not be a bar to the admissibility of remedial measures, such as warning labels issued after the date of manufacture, but prior to the date of injury. See, for example, **Florida,** *Keller Indust. v. Volk, 657 So.2d 1200 (Fla. Dist. Ct. App. 1995);* and **New Jersey,** *Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 637 A.2d 915 (N.J. Super. Ct. App. Div. 1994).* However, other state jurisdictions have construed the word "event" as the date of

manufacture. See, for example, **Kansas,** *Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (Kan. 1993);* and **Montana,** *Mont. R. Evid. 407, Rix v. Gen. Motors Corp., 222 M. 318, 723 P.2d 195 (Mont. 1986), followed in, Krueger v. Gen. Motors Corp. 240 M. 266, 783 P.2d 1340 (Mont. 1989).*

Second, the most significant revision in proposed Uniform Rule 407 is in making the exclusion of remedial measures expressly applicable to products liability actions and thereby conform the Rule to the majority rule among the federal circuits of the United States. Only the Eighth and Tenth Circuits currently admit evidence of subsequent remedial measures in strict liability cases. See *Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993)* and *Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983).* In contrast, the states are almost evenly divided on the issue of admitting remedial measures in product liability actions.

Subsequent remedial measures have been held to be *inadmissible* in strict liability cases in the following state jurisdictions: **Arizona,** *Hallmark v. Allied Prod. Co., 132 Ariz. 434, 646 P.2d 319 (Ariz. Ct. App. 1982)* and *Hohlenkamp v. Rheem Mfg. Co., 134 Ariz. 208, 655 P.2d 32 (Ariz. Ct. App. 1982),* discussed in *Readnor v. Marion Power Shovel, 149 Ariz. 442, 719 P.2d 1058 (Ariz. 1986);* **Florida,** *Fla. Stat. Ann. § 90.407(West 1997), Voynar v. Butler Mfg. Co., 463 So.2d 409 (Fla. Dist. Ct. App. 1985);* **Idaho,** *Idaho R. Evid. 407, Idaho Code § 6-1406 (1994); Watson v. Navistar Int'l. Transp. Corp., 121 Idaho 643, 827 P.2d 656 (Idaho 1992);* **Kansas,** *Kan. Stat. Ann. § 60-3307 (1992 Supp.)* and *Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (Kan. 1993);* **Maryland,** *Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 488 A.2d 516, cert. denied, 303 Md. 471, 494 A.2d 939 (Md. Ct. Spec. App. 1985);* **Minnesota,** *Minn. R. Evid. 407, Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987);* **Montana,** *Mont. R. Evid. 407, Rix v. Gen. Motors Corp., 222 Mont. 318, 723 P.2d 195 (Mont. 1986), followed in, Krueger v. Gen. Motors Corp. 240 Mont. 266, 783 P.2d 1340 (Mont. 1989);* **Nebraska,** *Neb. Rev. Stat. § 27-407 (1995), Rahmig v. Mosley Mach. Co., 226 Neb. 423, 412 N.W.2d 56 (Neb. 1987);* **New Hampshire,** *N.H. R. Evid. 407, Cyr v. J.I. Case Co., 139 N.H. 193, 652 A.2d 685 (N.H. 1994);* **New Jersey,** *Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 637 A.2d 915 (N.J. Super. Ct. App. Div. 1994), Price v. Buckingham Mfg. Co., 110 N.J. Super. 462, 266 A.2d 140 (N.J. Super. Ct. App. Div. 1970);* **North Carolina,** *N.C. R. Evid. 407,* and see, *Commentary to Rule 407,* stating that "It is the intent of the Committee that the rule should apply to all types of actions." See further, *Jenkins v. Helgren, 26 N.C. App. 653 (N.C. Ct. App. 1975);* **Oregon,** *Or. R. Evid. 407, Krause v. Am. Aerolights, 307 Or. 52, 762 P.2d 1011 (Or. 1988);* and **Tennessee,** *Tenn. R. Evid. 407,* expressly providing that the exclusionary rule is applicable to strict liability actions.

See further, **Colorado,** *Colo. R. Evid. 407, Uptain v. Huntington Lab, Inc., 723 P.2d 1322 (Colo. 1986),* **Indiana,** *Ind.R. Evid. 407, Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 388 N.E.2d 541 (Ind. Ct. App. 1979),* **Michigan,** *Mich.R. Evid. 407, Smith v. E.R. Squibb & Sons, Inc., 405 Mich. 79, 273 N.W.2d 476 (Mich. 1979),* applying the exclusionary rule in "failure to warn" cases.

Subsequent remedial measures have been held to be *admissible* in strict liability cases in the following state jurisdictions: **Alaska,** *Alaska R. Evid., 407, Commentary to Rule 407, Agostino v. Fairbanks Clinic Partnership, 821 P.2d 714 (Alaska 1991);* **California,** *Cal. Evid. Code § 1151, Ault v. Int'l. Harvester Co., 13 Cal.3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (Cal. 1974);* **Connecticut,** *Hall v. Burns, 213 Conn. 446, 569 A.2d 10 (Conn. 1990);* **Delaware,** *Del. R. Evid. 407, Wilson v. Teagle, 1987 WL 6458 (Del. Super. Ct. Jan. 9, 1987),* following *Ault v. Int'l. Harvester Co., supra;* **Georgia,** *General Motors Corp. v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (Ga. Ct. App. 1994);* **Hawaii,** *Haw. R. Evid. 407,* expressly providing that the exclusionary rule does not apply when offered for a purpose other than to prove negligence or culpable conduct, "such as proving dangerous defect in products liability cases. . ."; **Iowa,** *Iowa R. Evid. 407,* expressly providing that the exclusionary rule does not apply "when offered in connection with a claim based on strict liability in tort or breach of warranty. . .", *McIntosh v. Best W. Steeplegate Inn, 546 N.W.2d 595 (Iowa 1996);* **Kentucky,** *Ky. R. Evid. 407,* expressly providing that "[t]his rule does not require the exclusion of evidence of subsequent measures in products liability cases . . .", *Ford Motor Co. v. Fulkerson, 812 S.W.2d 119 (Ky. 1991);* **Louisiana,** *La. Code Evid. Ann. art. 407(West 1997), Toups v. Sears, Roebuck & Co., 507 So.2d 809 (La. 1987);* **Missouri,** *Pollard v. Ashby, 793 S.W.2d 394 (Mo. Ct. App. 1990), Tune v. Synergy Gas Corp., No. 18273, 1993 WL 309055 (Mo. Ct. App. Aug. 17, 1993);* **Nevada,** *Nev. Rev. Stat. § 48.095, Jeep Corp. v. Murray, 101 Nev. 640, 708 P.2d 297 (Nev. 1985), Robinson v. G.G.C., Inc., 107 Nev. 135, 808 P.2d 522 (Nev. 1991);* **New York,** *Caprara v. Chrysler Corp., 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (N.Y. 1981);* **Ohio,** *Ohio. R. Evid. 407, McFarland v. Bruno Mach. Corp., 68 Ohio St. 3d 305, 626 N.E.2d 659 (Ohio 1994);* **Pennsylvania,** *Matsko v. Harley Davidson Motor Co., 325 Pa. Super. 452, 473 A.2d 155 (Pa. Super. Ct. 1984);* **Rhode Island,** *R.I R. Evid. 407,* expressly providing "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is admissible"; **South Dakota,** *Klug v. Keller Indust., Inc., 328 N.W.2d 847 (S.D. 1982), Shaffer v. Honeywell, 249 N.W.2d 251 (S.D. 1976);* **Texas,** *Tex. R. Crim. Evid. 407,* expressly providing "[n]othing in this rule shall preclude admissibility in products liability cases based on strict liability"; **Wisconsin,** *Wis. Stat. Ann. § 904.07(West 1997), D.L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d*

890 (Wis. 1983), Chart v. Gen. Motors Corp., 80 Wis. 2d 91, 258 N.W.2d 680 (Wis. 1977); and **Wyoming,** *Wyo. R. Evid. 407, Caldwell v. Yamaha Motor Co., 648 P.2d 519 (Wyo. 1982).*

The applicability of the exclusionary rule in strict liability cases appears to be unresolved in the following state jurisdictions: **Alabama; Arkansas; Illinois; Maine**, where the rule permitting the admissibility of subsequent remedial measures of subsequent remedial measures was repealed by legislative enactment in 1996 by 1996 Me. Laws Ch. 576; **Massachusetts; Mississippi; New Mexico; North Dakota; Oklahoma; South Carolina; Utah; Vermont; Virginia; Washington; West Virginia; District of Columbia; Puerto Rico;** and **Virgin Islands.**

Rule 408. [Compromise and Offers to Compromise].

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

Drafting Committee Note

Uniform Rule 408 as adopted by the Conference in 1974 provided as follows:

> Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing

a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

As amended in 1988, Rule 408 provided as follows:

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

The 1988 amendments to the text of Uniform Rule 408 are shown by underlines. They were approved by the Executive Committee at its Mid-Year Meeting on February 6, 1988 as technical amendments to Rule 408. See the *Minutes of the Scope and Program Committee dated August 4, 1987* and the *Minutes of the Executive Committee dated August 4-5, 1987 and February 6, 1988*. The Comment to Rule 408 states that "[t]he amendment is intended to make it clear that the rule as originally adopted already extends to all forms of voluntary dispute resolution. Thus, no substantive change to the rule is intended."

Rule 408 now recommended by the Drafting Committee incorporates the 1988 amendments to the text of the rule as originally adopted with the exception of the last sentence "Compromise negotiations encompass mediation." As submitted, the rule is silent with respect to the forms of voluntary dispute resolution in which compromise negotiations falling within the rule can be conducted. The rule thus avoids any attempt at uniformity with respect to what constitutes inadmissible compromise negotiations in voluntary dispute resolution mechanisms, an area with respect to which there is undoubtedly considerable disagreement from state to state. This is left to state law determination on a case-by-case basis.

Rule 409. [Payment of Medical and Similar Expenses].

Evidence of furnishing, offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Drafting Committee Note

There are no recommendations for amending Rule 409.

Rule 410. [Withdrawn Pleas and Offers].

~~Evidence of a plea later withdrawn, of guilty, or admission of the charge, or nolo contendere, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.~~

(a) Except as otherwise provided in this rule, evidence of

(1) a plea of guilty which was later withdrawn,

(2) a plea of nolo contendere,

(3) any statement made in the course of any proceedings regarding either of the foregoing pleas, or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn,

is not admissible in any civil or criminal proceeding against the defendant who made the plea or was a participant in the plea discussions.

(b) Such a plea or statement set forth in subdivision (a) is admissible

(1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with the other statement,

(2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel, or

(3) in any proceeding wherein the defendant has knowingly and voluntarily entered into an agreement to permit the use of such pleas or statements for impeachment purposes.

Drafting Committee Note

The Drafting Committee recommends, with minor changes in format and one substantive change, substituting the substance of revised Rule 410 of the Federal Rules of Evidence which became effective on December 1, 1980 for the existing Uniform Rule 410 excluding evidence of withdrawn pleas, offers to plead and statements made in connection with any such pleas or offers to plead.

The existing Uniform Rule 410, with insubstantial modifications, was drawn from the rule originally promulgated by the Supreme Court when the Uniform Rules were adopted in 1974. Rule 410 of the Federal Rules, as originally proposed by the Supreme Court, when first enacted by Congress, included the provision that "[t]his rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement." This amendment was made to reduce the scope of Federal Rule 410 in order to prevent "injustice", particularly in cases where "a defendant would be able to contradict his previous statement and thereby lie with impunity." *Report of the Senate Committee on the Judiciary, 93rd Cong., 2d Sess., Oct. 18, 1974, p. 11.*

In 1975 Congress amended Rule 11(e)(6) of the Federal Rules of Criminal Procedure. See *Federal Rules of Criminal Procedure of 1975, Pub. L. 94-64, 89 Stat. 371.* It then amended Rule 410 of the Federal Rules of Evidence to conform to Rule 11(e) (6) as follows:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or

> any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel. *Federal Rules of Evidence of 1975, Pub. L. 94-149, 89 Stat. 805.*

Subsequently, the Supreme Court promulgated an amendment to Rule 410, which became effective on December 1, 1980 due to the failure of Congress to take any action on the amendment as proposed by the Supreme Court. *Federal Rules of Evidence of 1979, Pub. L. 96-42, 93 Stat. 326.* Aside from clarifying language, the principle thrust of the amendments was to assure that the rule did not cover discussions between suspects and law enforcement agents.

It is this version of the rule which the Drafting Committee is recommending for adoption by the Conference. Most of the litigation throughout the several states has centered on what constitutes a plea negotiation [*People v. Oliver, 111 Mich. App. 734, 314. N.W.2d 740 (Mich. Ct. App. 1981)*] and what statements made during the plea negotiation process [*State v. Lewis, 539 So.2d 1199 (La. 1989)*] and the persons to whom the statements must be made [*Fritz v. State, 811 P.2d 1353 (Okla. Crim. App. 1991)*] are such as to fall within the statutory ban on the admission of evidence of such negotiations. In the latter case, comparable state law rules to Uniform Rule 410 have created interpretive difficulties for the courts insofar as statements made to persons other than attorneys for the prosecuting authorities. See, for example, *People v. Rollins, 759 P.2d 816 (Colo. Ct. App. 1988)* and *Fritz v. State*, *supra.* This problem is avoided in Rule 410(3) of the Federal Rules of Evidence, and would be avoided in proposed Uniform Rule 410(a)(4) by providing for the exclusion of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

Rule 410 of the Federal Rules of Evidence is also virtually identical to Rule 11(e)(6) of the Federal Rules of Criminal Procedure, both of which generally prohibit the admission of plea negotiated statements. Both Rules, as is the proposed Uniform Rule 410, are designed to promote plea agreements by encouraging unrestrained candor in the plea bargaining process. This duality in

purpose and similarity in language of Rules 410 and 11(e)(6) led the Advisory Committee currently considering amendments to the Federal Rules of Evidence to defer to the Advisory Committee on the Criminal Rules for its views on whether any amendments to Rules 410 or 11(e)(6) would be appropriate.

The Advisory Committee on the Criminal Rules discussed the subject of amending Rule 410 at its meeting in October, 1993, but, noting that the 9th Circuit decision in *United States v. Mezzanatto, 998 F.2d 1452 (9th Cir. 1993)* had triggered debate concerning the waiver of the rule excluding pleas and plea statements under Rule 410 for impeachment purposes, tabled the matter pending further development of the caselaw. The issue was finally resolved in *United States v. Mezzanatto, 513 U.S. 196, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995),* with the Supreme Court broadly holding that an agreement to waive the plea-statement exclusionary provisions is valid and enforceable in the absence of some affirmative indication that the defendant entered into the agreement unknowingly or involuntarily. The issue raised and decided in *Mezzanatto* presents a fundamental question. Would the waiver of the protections of Rules 410 and 11(e)(6) "have a chilling effect on the entire plea bargaining process" and undercut the policy implicit in the rules to promote effective plea bargaining through frank discussion in negotiations? A resolution of the issue through amendments to Rules 410 and 11(e)(6) has not yet been reached by either the Advisory Committee on the Federal Rules of Evidence or the Advisory Committee on the Criminal Rules.

The substantive change proposed for adoption in Uniform Rule 410 is in the addition of an exception in Subdivision (b)(3) admitting a plea or statement "in any proceeding wherein the defendant has knowingly and voluntarily entered into an agreement to permit the use of such pleas or statements for impeachment purposes." The addition of this exception is narrower than the holding of the Supreme Court in the *Mezzanatto* case by applying a waiver rule to the admission of such pleas or statements only for impeachment purposes to reflect the opinion of the Concurring Justices Ginsberg, O'Connor and Breyer as follows:

> The Court holds that a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress's intent to promote plea bargaining. It may be, however, that a waiver to use such statements in the case-in-chief would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining. As the Government has not sought such a waiver, we do not here explore this question.

Uniform Rule 410 as proposed, except for the substantive change embraced in Subdivision (b)(3), would also be consistent with Rule 410 of the Federal Rules of Evidence which has been widely adopted in state jurisdictions. These are: **Delaware,** *Del. Court of Common Pleas R. Crim. Proc. 11(e)(4)* and *Del. Super. Ct. R. Crim. Proc. 11(e)(6);* **Hawaii,** *Haw. R. Evid. Rule 410* and *Haw. R. Penal Proc. 11(e)(4);* **Indiana,** *Ind. R. Evid. 410;* **Iowa,** *Iowa R. Evid. 410;* **Louisiana,** *La. Code of Evid. Ann. art. 410(West 1997);* **Maryland,** *Md. R. Evid. 5-410;* **Michigan,** *Mich. R. Evid. 410;* **Mississippi,** *Miss. R. Evid. 410;* **North Carolina,** *N.C. R. Evid. 410;* **North Dakota,** *N.D. R. Evid. 410,* but compare, *N.D. R. Crim. Proc. 11(d)(6);* **New Hampshire,** *N.H. R. Evid. 410;* **Ohio,** *Ohio R. Evid. 410;* **Oklahoma,** *Okla. Stat. Tit. 12, § 2410 (1981);* **Rhode Island,** *R.I. R. Evid. 410;* **South Carolina,** *S.C. R. Evid. 410;* **Tennessee,** *Tenn. R. Evid. 410;* **Texas,** *Tex. R. Civ. Evid. 410* and *Tex. R. Crim. Evid. 410;* **Utah,** *Utah R. Evid. 410;* **Virginia,** *Va. R. Crim. Proc. & Prac. 3A:8(c)(5);* **Vermont,** *Vt. R. Evid. 410* and *Vt. R. Crim. Proc. 11(e)(5);* **West Virginia,** *W. Va. R. Evid. 410* and *W. Va. R. Crim. Proc. 11(e)(6);* and **Wyoming,** *Wyo. R. Crim. Proc. 11(e)(6).*

New Jersey, *N.J. R. Evid. 410* and **Washington,** *Wash. R. Evid. 410* have rules which are similar, though they differ in some respects, from Rule 410 of the Federal Rules.

Florida, *Fla. R. Crim. Proc. 3.172(h),* has a rule quite similar to Uniform Rule 410.

There are three states which provide for the exclusion of plea bargains, but they are quite different in their approach. These are: **Arizona,** *Ariz. R. Evid. 410;* **New Mexico,** *District Ct. R. Crim. Proc. 5-304(F);* and **Oregon,** *Or. Evid. Code 410.*

Rule 411. [Liability Insurance].

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

Drafting Committee Note

This proposal for amending Uniform Rule 411 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals for amending Uniform Rule 411.

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:~~

~~**(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.~~

(a) **Definition. Sexual Behavior.** Sexual behavior means any behavior relating to the sexual activities of a person, including, but not limited to, the person's experience or observation of sexual intercourse or sexual contact, use of contraceptives, previous marital or divorce history, expressions of sexual ideas or emotions, activities of the mind, such as fantasies or dreams, and sexual

predisposition.

(b) **Evidence of sexual behavior generally inadmissible.** In any criminal proceeding involving the alleged sexual misconduct of an accused evidence offered to prove that any alleged victim engaged in other alleged sexual behavior as defined in subdivision (a) is inadmissible except as provided in subdivisions (c) and (d):

(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) a source other than the accused for the victim's knowledge of sexual behavior;

(3) consent where the alleged victim's sexual behavior was not remote in time or dissimilar from that alleged in the proceeding and either involved the accused or is so distinctive and so closely resembled the accused's version of the alleged sexual behavior of the victim at the time of the alleged sexual misconduct that it corroborates the accused's reasonable belief that the victim had consented to the act or acts of alleged misconduct; or

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

(d) Procedure to determine admissibility. Evidence is not admissible

under subdivision (c) unless:

(1) (A) the proponent gives to the adverse party reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence the proponent intends to introduce at trial; and

(B) serves the notice on all parties and the alleged victim or, when appropriate, the alleged victim's guardian or representative; and

(2) the court

(A) conducts a hearing in camera and affords the alleged victim and parties a right to attend the hearing and be heard;

(B) finds that the evidence is relevant to a fact of consequence for which such evidence is admissible under subdivision (c);

(C) finds that the probative value of admitting the evidence is not substantially outweighed by the danger of unfair prejudice; and

(D) upon request, gives an instruction on the limited admissibility of the evidence, as provided in Rule 105.

Drafting Committee Note

Rule 412, Subdivisions (a) and (b), were added to the Uniform Rules of Evidence in 1986.

The Comment to the 1986 Amendment reads as follows:

> Congress added a "rape-shield" provision to the Federal Rules of Evidence when it adopted Rule 412 in 1978. A great majority of states have also added similar provisions to their rules

of evidence or criminal codes. Unfortunately, the rules and statutes vary greatly in detail and in basic structure. The committee reviewed a number of the state provisions as well as the federal version and opted for a concise rule of evidence rather than a rule of criminal procedure. No provision is made for notice or *in camera* hearings as do many of the state, as well as the federal, versions. This omission is not intended to preclude such procedures. It was felt that existing rules of criminal procedure and the inherent power of the court to conduct criminal proceedings in an orderly and fair manner already provide adequate protection to the parties. The prosecutor may move for an *in camera* proceeding to determine the admissibility under Rule 403 of highly prejudicial evidence concerning the sexual behavior of a prosecuting witness. The court should seriously consider granting any such motion.

The rule applies only to criminal cases and then only to cases where a person is accused of a sexual offense against another person. Evidence of reputation or opinion concerning sexual behavior of an alleged victim of the sexual offense is not admissible under any circumstances. The low probative value when weighed against the risk of great prejudice is thought to justify a *per se* rule. The rule does not preclude the introduction of expert testimony regarding, for example, mental or emotional illness of the victim, subject to the provisions of Rule 403 and Article VII.

With regard to the issue of consent to the sexual offense alleged, evidence of specific instances of sexual behavior of the alleged victim with persons other than the accused is not admissible. This obviously raises serious constitutional questions with regard to a defendant's right to adduce evidence and to cross-examine witnesses. Although certainly not free from doubt, it would seem that notice and/or an *in camera* hearing would not cure any constitutional defect in this regard. The U.S. Supreme Court has yet to rule on the matter.

It matters not that the sexual behavior took place after the alleged offense but before trial rather than before the alleged offense.

The rule provides that the evidence is admissible on other

issues and details those situations in subdivision (b).

Earlier law left the subject of this rule to other more general rules such as those relating to the credibility and character of victims generally. Thus, some clarification is in order concerning the relationship between Rule 412 and other rules which may also seem to cover the evidence. Examples of these other rules might be Rules 403, 404-406, 608-609, and Article VII. Such other rules may on occasion be either more restrictive or less restrictive than Rule 412. It is intended that the restrictions in Rule 412 apply notwithstanding more permissive provisions of other rules. However, provisions of Rule 412 which appear to permit evidence are meant to be read as exceptions only to Rule 412's ban. They are therefore subject to any more restrictive provisions in other rules that may apply. This is consistent with the scheme of most of the Uniform Rules of Evidence and the relationship among them.

> In the administration of Rule 412, the court should have due regard for the mandate of Rule 611(a)(3), which applies to evidence sought to be admitted pursuant to a provision of Rule 412.

This proposal of the Drafting Committee for amending Uniform Rule 412 combines, with some substantive modifications, the substance of Federal Rule 412 and a proposed, though not enacted Wisconsin rape shield law. See *Proposed Revision, Wis. St. § 972.11(2)(a), (b) and (c).* There are at least six features of the recommended Rule which deserve comment.

First, the applicability of the rule is limited to criminal cases and is consistent in this respect with the overwhelming majority rule among the several states. All of the states, with the exception of **Montana,** exclude in criminal cases evidence relating to the past sexual behavior of complaining witnesses in sexual assault cases. These are: **Alabama,** *Ala. Code § 12-21-203 (1975);* **Alaska,** *Alaska Stat. § 12.45.045 (1985);* **Arkansas,** *Ark. Code Ann. § 16-42-101 (Michie 1993);* **California,** *Cal. Evid. Code § 782 (Deering 1989)* and *Cal. Evid. Code § 1103(c)(1) (West 1991);* **Colorado,** *Colo. Rev. Stat. Ann. § 18-3-407 (West 1997);* **Connecticut,** *Conn. Gen. Stat. Ann. § 54-86f (West 1997);* **Delaware,** *Del. Code Ann. tit. 11, § 3508 (1995); (Del. R. Evid. 412 omitted because adequately covered by this section);* **Florida,** *Fla. Stat. Ann. § 794.022 (West 1997);* **Georgia,** *Ga. Code Ann. § 24-2-3 (1989);* **Hawaii,** *Haw. Rev. Stat. Ann. § 626-1, R. 412 (1992);* **Idaho,** *Idaho R. Evid. 412;* **Illinois,** *Ill. Ann. Stat. ch. 72, para. 5/115-7 (Smith-Hurd 1994);* **Indiana,** *Ind. R. Evid. 412;* **Iowa,** *Iowa R. Evid. 412;* **Kansas,** *Kan. Stat. Ann. § 21-3525 (1993);* **Kentucky,** *Ky. R. Evid. 412;* **Louisiana,** *La. Code Evid. Ann. art. 412 (West 1997);* **Maine,** *Me. R. Evid. 412;* **Maryland,** *Md. Code Ann., Crim. Law § 461A (1977);* **Massachusetts,** *Mass. Gen. Laws Ann. ch. 233, § 21B (West 1997);* **Michigan,** *Mich. Comp. Laws*

Ann. § 750.520j (West 1997); **Minnesota,** *Minn. R. Evid. 412;* **Mississippi,** *Miss. Code Ann. § 97-3-68 (1993)* and *Miss. R. Evid. 412;* **Missouri,** *Mo. Rev. Stat. § 491.015 (1986);* **Nebraska,** *Neb. Rev. Stat. § 27-404(1)(b)(1993);(Neb. R. Evid. 404);* **Nevada,** *Nev. Rev. Stat. § 48.069 (1991);* **New Hampshire,** *N.H. R. Evid. 412* and *N.H. Rev. Stat. Ann. § 632-A:6I (1993);* **New Jersey,** *N.J. Stat. Ann. § 2C:14-7 (West 1997);* **New Mexico,** *N.M. R. Evid. 11-413;* **New York,** *N.Y. Crim. Proc. Law § 60.42 (McKinney 1975)* and *N.Y. Crim. Proc. Law § 60.43 (McKinney 1990);* **North Carolina,** *N.C. R. Evid. 412;* **North Dakota,** *N.D. Cent. Code § 12.1-20-14 (1975);* **Ohio,** *Ohio. Rev. Code Ann. § 2907.02(D) (Baldwin 1995);* **Oklahoma,** *Okla. Stat. Ann. tit. 12, § 2412 (West 1997);* **Oregon,** *Or. Rev. Stat. § 40.210 (1993);* **Pennsylvania,** *18 Pa. Cons. Stat. Ann. § 3104 (1976);* **Rhode Island,** *R.I. R. Evid. 412;* **South Carolina,** *S.C. R. Evid. 412* and *S.C. Code Ann. § 16-3-659.1 (Law. Co-op. 1977);* **South Dakota,** *S.D. Codified Laws Ann. § 23A-22-15 (1995);* **Tennessee,** *Tenn. R. Evid. 412;* **Texas,** *Texas R. Crim. Evid. 412;* **Utah,** *Utah R. Evid. 412);* **Vermont,** *Vt. Stat. Ann. tit. 13, § 3255 (1993);* **Virginia,** *Va. Code Ann. § 18.2-67.7 (Michie 1981);* **Washington,** *Wash. Rev. Code Ann. § 9A.44.020 (West 1997);* **West Virginia,** *W. Va. R. Evid. 404(3)* and *W. Va. Code § 61-8B-11 (1986);* **Wisconsin,** *Wis. Stat. Ann. § 972.11 (West 1997);* and **Wyoming,** *Wyo. Stat. § 6-2-312 (1982).* In **Arizona**, the exclusionary rule has been established by judicial decision. See *State ex rel. Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (Ariz. 1976)* and *State v. Castro, 163 Ariz. 465, 788 P.2d 1216 (Ariz. Ct. App. 1989).*

Applying the Rule in all criminal cases seems obvious in view of the strong social policy of protecting the privacy of victims of sexual misconduct, as well as encouraging victims to come forward and report criminal acts.

Rule 412 of the Federal Rules of Evidence extends the exclusion of a victim's prior sexual behavior to civil cases "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." See *Notes of Advisory Committee to 1994 Amendment.*

However, unlike criminal cases, the exclusion of such evidence in civil cases varies greatly in the state jurisdictions depending upon the nature of the action, the blackletter of the applicable rule, the interpretive scope given to the rule and the person whose past sexual behavior is in issue. **California** statutorily excludes such evidence in civil cases. The *Cal. Evid. Code § 1106(West 1997),* 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 absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium." At the same time, it has been held that the rule has no application in an action brought against a psychologist to recover damages for medical malpractice and infliction of emotional distress through sexual contact with the defendant where the proximate cause of the plaintiff's injuries were alleged to be due to her pre-treatment psycho-sexual history through parental sexual abuse, prostitution and topless dancing. See *Patricia C. v. Mark D., 12 Cal. App. 4th 1211, 16 Cal.Rptr.2d 71 (Cal. Dist. Ct. App. 1993).* At the same time, and without reference to Section 1106, in *Kelly-Zurian v. Wohl Shoe Co., 22 Cal. App. 4th 397, 27 Cal. Reptr.2d 457 (Cal. Dist. Ct. App. 1994),* an action by the plaintiff for sexual harassment by a supervisory employee, the court sustained under *Cal. Evid. Code §* 352(West 1997) the exclusion of plaintiff's viewing of x-rated video tapes, her abortions and her 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."

In **Massachusetts,** in a proceeding to revoke a psychiatrist's license to practice medicine, the Supreme Judicial Court interpreted the public policy expressed in both the state's rape shield statute *[Mass. Gen. L. ch. 233, § 21B (1986))]* and prior decisional law *[Commonwealth v. Joyce, 382 Mass. 222, 415 N.E.2d 181 (Mass. 1981)],* both applicable in criminal cases, to hold that evidence of the patient-victim's sexual history in a civil proceeding should be rejected "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." See *Morris v. Bd. of Registration in Medicine, 405 Mass. 103, 539 N.E.2d 50 (1989).* The same reasoning has been applied in **North Carolina** in excluding evidence of the prior sexual conduct of a college student in an action brought against a fraternity and fraternity members to recover damages for sexual assault and battery and intentional infliction of emotional distress. The Court of Appeals observed that *N.C. R. Evid. 412* to date had only been applied in criminal cases, but that the reasoning applied in the prior criminal case of *State v. Younger, 306 N.C. 692, 295 S.E.2d 453 (N.C. 1982)* was equally applicable in civil cases, namely, that "[t]oday, 'common sense and sociological surveys make clear that prior sexual experiences by a woman with one man does not render her more likely to consent to intercourse with an often armed and frequently strange attacker.'" See *Wilson v. Bellamy, 105 N.C. App. 446, 414 S.E.2d 347 (N. C. Ct. App. 1992).*

In contrast, in **Indiana**, the Supreme Court has held that the Indiana Rape Shield Statute was not enacted to apply in civil cases. In an action for compensatory and punitive damages brought by a daughter against her father, the

Court held that the trial court erred in excluding evidence of the daughter's prior sexual experiences which could have caused or contributed to her injury. It reasoned that "[u]nlike 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." See *Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992).*

It has also been held in some jurisdictions that the admissibility of evidence of a victim's prior sexual behavior is a matter of relevancy versus unfair prejudice. As earlier observed, in **California**, even though evidence of past sexual conduct is statutorily excluded in civil cases, it has been held that the rule has no application in an action brought against a psychologist to recover damages for medical malpractice and infliction of emotional distress through sexual contact with the defendant where the proximate cause of the plaintiff's injuries were alleged to be due to her pre-treatment psycho-sexual history through parental sexual abuse, prostitution and topless dancing. See *Cal. Evid. Code §1106(West 1997)* and *Patricia C. v. Mark D., 12 Cal. App.4th 1211, 16 Cal. Rptr.2d 71 (Cal. Dist. Ct. App. 1994), supra*, at 73. Similarly, in **Tennessee**, in an action for assault, malicious harassment and civil conspiracy, evidence of plaintiff's failed relationships, prior sexual encounters and elective abortions was held to be relevant under Tennessee's Rule 401 as to the issue of causation of plaintiff's psychological and emotional damage in that the evidence provided the jury with other plausible explanations for plaintiff's condition. See *Vafaie v. Owens, No. 92C-1642, 1996 WL 502133 (Tenn. Ct. App. Sept. 6, 1996).* In **Utah**, in a patient's action against her therapist to recover damages for sexual misconduct, it has been held that it is permissible to cross-examine the patient relating to prior sexual behavior to demonstrate that the patient's condition was not worsened by the sexual misconduct of the therapist. See *Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).*

However, in some jurisdictions the evidence is excluded on either grounds of relevancy or unfair prejudice. In **Louisiana,** depositional evidence of previous sexual experiences of a plaintiff in an action for damages for rape has been excluded on the ground that the evidence "as offered, is inaccurately and poorly phrased, incomplete and vague and would tend to mislead and confuse the jury . . . . [which] outweigh its probative value." See *Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So.2d 70 (La. Ct. App. 1989).* Similarly, in **Missouri**, in an action to dismiss a highway patrolman for, among other grounds, engaging in immoral conduct, the Supreme Court held that the trial court did not

err in excluding evidence of the complainant's prior sexual victimization on the ground that it related only collaterally to the competency of the complainant and not on a probative issue in the case, as well as carrying the danger of unfair prejudice and surprise. See *Gamble v. Hoffman, 732 S.W.2d 890 (Mo. 1987).*

It is also of interest to note that **Utah** patterned its Rule 412 on Federal Rule 412, as amended in 1994, when it was in draft form issued by the Committee on Rules and Practice and Procedure of the Judicial Conference of the United States in July of 1993. However, as explained in the Advisory Committee Note, unlike the draft of the federal rule, the Committee elected at that time to limit Rule 412's application to criminal cases because of the lack of judicial experience or precedent imposing these evidentiary restrictions in a civil context." See *Advisory Committee's Note, Utah R. Evid. 412).*

It is also the position of the Drafting Committee that the proposed Uniform Rule 412 not be broadened to apply in civil cases at the present time. The relatively few jurisdictions and types of actions in which the issue has arisen, the varying approaches utilized in determining the admission or exclusion of evidence of victims' past sexual behavior and the need for further precedential support all suggest that it would be premature to extend the proposed Uniform Rule 412 to civil cases at the present time. Uniform Rules 401, 402 and 403 admitting relevant evidence and excluding evidence that is unfairly prejudicial provide adequate safeguards to the admission of a victim's past sexual behavior in the civil context pending further judicial experience with the issue.

In this respect, mention should also be made of cases that have arisen in several jurisdictions involving the admissibility in civil actions of alleged sexual conduct of persons other than the victims. These have all been resolved either on grounds of relevancy versus unfair prejudice, the exclusion or admission of prior bad acts testimony, or under special statutory rules. These include: **California**, *Bihum v. AT & T Info. Sys., Inc., 13 Cal. App. 4th 976, 16 Cal. Rptr.2d 787 (Cal. Dist. Ct. App. 1993)*(evidence of supervisor's sexual conduct toward other female employees admissible in plaintiff's action for sexual harassment); **Colorado**, *Connes v. Molalla Transp. Sys., Inc., 831 P.2d 1316 (Colo. 1992)*(evidence of truck driver's past lewd conduct admissible as evidence of negligence in plaintiff's action against employer for damages for sexual assault), *Q & T Food Stores, Inc. v. Zamarripa, 910 P.2d 44 (Colo. Ct. App. 1995)*(evidence principal officer of convenience store was not person of good character admissible in action to revoke convenience store's license as lottery sales agent) and *JRM, Inc. v. Bd. of County Comm. of Adams County, 200 Colo. 384, 615 P.2d 31 (Colo. 1980)*(evidence of sex acts and nudity in operation of massage parlors admissible in licensing massage parlor under statutory licensing procedures); **Illinois**, *Doe v.*

Lutz, 281 Ill. App.3d 630, 668 N.E.2d 564, 218 Ill. Dec. 80 (Ill. App. Ct. 1996)(evidence of prior acts of sexual harassment by defendants inadmissible in action for damages for sexual harassment of plaintiff's child); **Iowa**, *Lynch v. Des Moines, 454 N.W.2d 827 (Iowa 1990)*(evidence of sexual harassment admissible to prove hostile work environment in plaintiff's action against city for sexual discrimination); **Minnesota**, *M. L. V. Magnuson, 531 N.W.2d 849 (Minn. Ct. App. 1995)*(evidence of other acts of sexual abuse by defendant was inadmissible to prove intent, absence of mistake or accident since these matters were not in dispute, while in related case evidence of other incidents of sexual abuse was admissible to prove modus operandi under *Minn. R. Evid. 404(b));* **New York**, *Salerno v. N.Y. State Bd. for Professional Medical Conduct, 210 A.D.2d 599, 619 N.Y.S.2d 869 (N.Y. App. Div. 1994)*(evidence of doctor's acknowledgment of improper sexual contact with patients admissible in proceeding to revoke license to practice medicine); **South Dakota**, *Strain v. Rapid City Sch. Bd. for Rapid City Area Sch. Dist.*, 447 N.W.2d 332 (S.D. 1989)(evidence of teacher's prior acts of sexual contact with students admissible to prove intent, motive, plan and lack of mistake under S.D. Codified Laws Ann. § 19-12-5); **Texas**, *McLellan v. Benson, 877 S.W.2d 454 (Tex. Ct. App. 1994)*(by analogy to *Tex. R. Civ. Evid. 404(b)*(evidence of an assault by defendant on another woman under similar circumstances 26 months earlier is relevant to intent on issue of consent and not subject to exclusion on grounds of unfair prejudice under *Tex. R. Civ. Evid. 403)* and *Porter v. Nemir, 900 S.W.2d 376 (Tex. Ct. App. 1995)*(by analogy to *Tex. R. Civ. Evid. 404(b)*(evidence of defendant's assault of another woman is relevant to intent on issue of consent, but excluded on grounds of unfair prejudice under *Tex. R. Civ. Evid. 403)*; and **Washington**, *Himango v. Prime Time Broadcasting, Inc., 37 Wash. App. 259, 680 P.2d 432 (Wash. Ct. Cpp. 1984)*(probative value of evidence of plaintiff's extramarital sexual activity substantially outweighed by danger of unfair prejudice in action for defamation growing out of report that plaintiff was seen in compromising position with married woman).

Finally, it is of interest to note that recently in **New Hampshire**, the state Senate requested an opinion of the Justices of the Supreme Court concerning the constitutionality of a pending act to admit evidence of prior acts of sexual assault in civil and criminal cases. The Court concluded that the separation of powers doctrine would be violated because the pending bill directly conflicted with Rule 404(b) which was a rule concerning a uniquely judicial function. See *Opinion of Justices, 688 A.2d 1006 (N.H. 1997).*

Second, proposed Uniform Rule 412 adopts the term "sexual behavior" in lieu of "sexual conduct." With only five exceptions the states limit the inadmissible evidence to evidence of sexual conduct or sexual behavior connoting

all activities involving actual physical conduct. The Drafting Committee recommends a broad definition of "sexual behavior." In Subdivision (a), unlike Federal Rule 412 adopting the term "sexual behavior" without definition, the term is defined broadly which is consistent with a broader definition of the term to be found in five state jurisdictions. In **Alabama, Georgia, Utah, Washington** and **Wisconsin** the excluded evidence extends to both evidence of sexual conduct and sexual behavior other than physical conduct. In **Alabama "**sexual behavior" is defined 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 community standards." See *Ala. Code § 12-21-203(a)(3) (1975).* **Georgia's** definition of "sexual behavior" is the same. See *Ga. Code Ann. § 24-2-3(a) (1989).* **Utah** excludes "evidence offered to prove any alleged victim's sexual predisposition." See *Utah R. Evid. 412(a)(2).* **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. . . ." See *Wash. Rev. Code Ann. § 9A.44.020(2) and (3) (West 1997).* **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." *Wis. Stat. Ann. §972.11 (West 1994).*

Third, as in the case of Rule 412 of the Federal Rules of Evidence, the proposed Uniform Rule 412 applies only to the "alleged victims" of sexual misconduct. The terminology "alleged victim" is used in the rule because there will frequently be a dispute as to whether the alleged sexual misconduct occurred. However, the rule does not apply unless the person against whom the evidence is offered can reasonably be characterized as the victim of "the alleged sexual misconduct of an accused." However, unlike Federal Rule 412 the proposed Uniform Rule 412 applies only where the accused is a party to the proceeding on the complaint of the victim of the alleged crime. This comports with the statutory rules currently in force in most of the states. *See the enumeration of the statutory rules in the several states, supra.*

Fourth, the proposed Uniform Rule 412 seeks to achieve its objectives by affording the broadest possible protection to victims of sexual misconduct, whether offered as substantive evidence or for impeachment. However, unlike Federal Rule 412 and Uniform Rule 412 excluding evidence relating to the alleged victim's sexual conduct or behavior whether offered as substantive evidence or for impeachment unless permitted under one of the designated exceptions, a few states, in addition to other enumerated exceptions, permit the admission of such evidence to impeach the credibility of the complaining witness

within varying limitations. These include: **California,** *Cal. Evid. Code § 1103(c)(1)* and *Cal. Evid. Code § 782 (Deering 1989);* **Connecticut,** *Conn. Gen. Stat. Ann. § 54-86f (West 1997);* **Indiana,** *Ind. R. Evid. 412;* **Kansas,** *Kan. Stat. Ann. § 21-3525(c) (1993);* **Maryland,** *Md. Code Ann., Crim. Law § 461A(a)(4) (1977);* **Oregon,** *Or. Rev. Stat. § 40.210 (1993);* **South Carolina,** *S.C. Code Ann. § 16-3-659.1(1) (Law. Co-op. 1977);* **Tennessee,** *Tenn. R. Evid. 412(c)(2);* **Texas,** *Texas R. Cr. Evid. 412(b)(2)(C);* **Vermont,** *Vt. Stat. Ann. tit. 13, § 3255(a)(3) (1993);* **Virginia,** *Va. Code Ann. § 18.2-67.7 (Michie 1981);* and **West Virginia,** *W. Va. R. Evid. 404(3)* and *W. Va. Code § 61-8B-11 (1986).*

Fifth, generally speaking the exceptions to the general rule excluding evidence of the sexual behavior of an alleged victim are narrower than in the existing Uniform Rule 412, but generally comport with both the Federal Rule 412 and those recommended in the proposed Wisconsin statute which has also been used as a model in the drafting of the proposed Uniform Rule 412. The exception in Subdivision (c)(3) is intended to facilitate the proof of consent based upon the weight of American authority that a reasonable belief of the accused that the alleged victim had consented to the sexual encounter is a defense to the crime of rape. However, the exception is narrowly drawn to provide that the prior behavior not be remote in time and distinctively similar to the accused's version of the alleged sexual behavior of the victim.

In contrast to the exceptions proposed in Subdivision (c), the exceptions recognized in the several state jurisdictions vary greatly. They range from the relatively specific exceptions as set forth in the existing Uniform Rule 412(b), as in the case of **Idaho** *[Idaho R. Evid. 412(b)(2)]*, to the exceptions as set forth in Federal Rule 412, As Amended in 1994, as in the case of **Utah** *[Utah R. Evid. 412(b)]*, to a discretionary approach, as in the case of **Alaska** *[Alaska Stat. § 12.45(a) (1985)]*, which permits the introduction of evidence of sexual conduct "[i]f the court 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 . . . ." The Drafting Committee prefers the narrower, more specific, approach to the permissible exceptions as recommended in the proposed Uniform Rule 412.

Sixth, in those cases where evidence of the prior sexual behavior of the alleged victim is admissible under one of the exceptions set forth in Subdivision (c) of the proposed Uniform Rule 412, the carefully drawn procedures set forth in Subdivision (d) must be followed to protect the sensibilities of the parties involved in the disclosure of the evidence to determine its admissibility. The

procedural rules require the giving of notice to all concerned persons, holding an *in camera* hearing to determine the admissibility of the evidence, a finding that the evidence is relevant to a fact of consequence for which such evidence is admissible, a finding that the evidence is not substantially outweighed by the danger of unfair prejudice and the giving of an instruction on the limited admissibility of the evidence as provided in Uniform Rule 105. All of the states except **Arizona, Maine, Montana, Nebraska, North Dakota, South Carolina** and **West Virginia** have varying provisions governing the procedure to be followed in determining the admissibility of sexual conduct or behavior under the recognized exceptions to the rule. The procedural rules recommended by the Drafting Committee in proposed Uniform Rule 412(d) are also in accord with the procedural rules recommended by the Drafting Committee to govern the admissibility of sensitive other crimes, wrongs, or acts evidence under proposed Uniform Rule 404(b).