

ARTICLE IV. RELEVANCY AND ITS LIMITS

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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.

Comment

Pa.R.E. 401 is identical to F.R.E. 401. The rule codifies existing Pennsylvania law, as represented by the Supreme Court’s definition of relevance in *Commonwealth v. Scott*, 480 Pa. 50, 54, 389 A.2d 79, 82 (1978): “Evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable, is relevant.” Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case.

The relevance of a piece of evidence may be conditional, or dependent on facts not yet of record. Under Pa.R.E. 104(b), the evidence may be admitted subject to the introduction of further evidence demonstrating that all conditions necessary to a finding of relevance have been met.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.

Comment

Pa.R.E. 402 is similar to F.R.E. 402. The only variance is in the language of the exceptions clause in the first sentence. The exceptions clause of the federal rule specifically enumerates the various sources of federal rule-making power. Pa.R.E. 402 substitutes the phrase, “by law,” to encompass analogous sources of rule-making power within the Commonwealth.

The rule states a fundamental concept of the law of evidence. Relevant evidence is admissible; evidence that is not relevant is not admissible. This concept is modified by the exceptions clause of the rule, which states another fundamental principle of evidentiary law. Evidence otherwise relevant may be excluded by operation of constitutional law, by statute, by rules of evidence created by decisional law, by these rules, or by other rules promulgated by the Supreme Court.

As noted in the Comment to Pa.R.E. 101, a principal goal of these rules is to construct a comprehensive code of evidence governing court proceedings in the Commonwealth. Pa.R.E. 402 explicitly recognizes, however, that these rules cannot be all inclusive. The law of evidence is also shaped by

constitutional principle, legislative enactment, procedural rule-making and decisional law. These rules of evidence are not intended to supersede other provisions of law, unless they do so expressly or by necessary implication.

Examples of decisionally created rules of exclusion that are not abrogated by the adoption of these rules include: the corpus delicti rule, *Commonwealth v. Ware*, 459 Pa. 334, 329 A.2d 258 (1974); the collateral source rule, *Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963); the parol evidence rule, *Gianni v. R. Russell and Co., Inc.*, 281 Pa. 320, 126 A. 791 (1924); and the rule excluding certain evidence to rebut the presumption of legitimacy, *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380 (1990).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is 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.

Comment

Pa.R.E. 403 differs from F.R.E. 403. The federal rule provides that relevant evidence may be excluded if its probative value is “substantially outweighed.” Pa.R.E. 403 eliminates the word “substantially” to conform the text of the rule more closely to Pennsylvania law. See *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982); *Morrison v. Commonwealth, Dept. of Pub. Welfare*, 538 Pa. 122, 646 A.2d 565 (1994).

“Unfair prejudice” means a tendency to suggest decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.

With regard to evidence of other crimes, wrongs or acts of the defendant in a criminal case, see Pa.R.E. 404(b)(3).

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.

(a) *Character Evidence Generally.* Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same. If evidence of a trait of character of the alleged victim of the crime is offered by an accused and is admitted under subsection (2), evidence of the same trait of character of the accused is admissible if offered by the prosecution.

(2) *Character of Alleged Victim.*

(i) In a criminal case, subject to limitations imposed by statute, evidence of a pertinent trait of character of the alleged victim is admissible when offered by the accused, or by the prosecution to rebut the same.

(ii) In a homicide case, where the accused has offered evidence that the deceased was the first aggressor, evidence of a character trait of the deceased for peacefulness is admissible when offered by the prosecution to rebut the same.

(iii) In a civil action for assault and battery, evidence of a character trait of violence of the plaintiff may be admitted when offered by the defendant to rebut evidence that the defendant was the first aggressor.

(3) *Character of Witness.* Evidence of a pertinent trait of character of a witness is admissible as provided in rules 607 (impeachment of witness), 608 (character and conduct of witness) and 609 (evidence of conviction of crime).

(b) *Other Crimes, Wrongs, or Acts.*

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of general nature of any such evidence it intends to introduce at trial.

Comment—2006

Pa.R.E. 404 is an exception to the general rule set forth in Pa.R.E. 402 that all relevant evidence is admissible. Pa.R.E. 404 is, in principle, consistent with F.R.E. 404. However, the Pennsylvania rule uses more subdivisions to enhance clarity and readability. A few substantive differences accommodate Pennsylvania statutory and prior case law.

Section (a)

This section promulgates a general rule that evidence of a person's character or trait of character is not admissible to prove conduct in conformity therewith on a particular occasion. The rationale is that the relevance of such evidence is usually outweighed by its potential for creating unfair prejudice, particularly with a jury.

This general rule of inadmissibility is consistent with prior Pennsylvania case law. See, e.g., *Greenberg v. Aetna Ins. Co.*, 427 Pa. 494, 235 A.2d 582 (1967) (error to permit the plaintiff to testify that he served in the United States Armed Forces in World War II and distinguished himself with a heroic record).

This section does not preclude the introduction of evidence of a person's character, or trait of character, to prove something other than conduct in conformity therewith. For example, a party must sometimes prove a person's characteristic because it is an element of the party's claim or defense. See, e.g., *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968) (alleged negligent employment of a violence-prone security guard); *Commonwealth ex rel. Grimes v. Grimes*, 281 Pa. Super 484, 422 A.2d 572 (1980) (parental fitness in a custody case); *Christiansen v. Silfies*, 446 Pa. Super. 464, 667 A.2d 396 (1995) (alleged negligent entrustment of a truck to a man with a poor driving record).

A person's trait of character is not the same as a person's habit. The distinction is discussed in the Comment to Rule 406, *infra*. If a person's trait of character leads to habitual behavior, evidence of the latter is admissible to prove conduct in conformity therewith on a particular occasion, pursuant to Rule 406.

Like the federal rule, section (a) has three subsections of exceptions. They should be read together with section (a) of Rule 405, which describes two methods of proving a person's character, or trait of character.

Subsection (1), which deals with the character of a defendant in a criminal case, is essentially the same as subsection (1) of F.R.E. 404(a). It allows the defendant to "put his character in issue," usually by calling character witnesses to testify to his good reputation for a law-abiding disposition, or

other pertinent trait of character. If the defendant does so, the Commonwealth may (1) cross-examine such witnesses, subject to the limitations imposed by Rule 405(a), and (2) offer rebuttal evidence.

If a defendant in a criminal case chooses to offer evidence of a pertinent trait of character of an alleged victim under subsection (2)(i), then subsection (1) allows the Commonwealth to offer evidence that the defendant has the same trait of character. For example, in an assault and battery case, if the defendant introduces evidence that the alleged victim was a violent and belligerent person, the Commonwealth may counter by offering evidence that the defendant was also a violent and belligerent person. Thus, the jury will receive a balanced picture of the two participants to help it decide who was the first aggressor.

Subsection (2), unlike subsection (2) of F.R.E. 404(a), is divided into three subsections.

Subsection (i), like the federal rule, gives an accused the right to introduce evidence of a pertinent trait of character of the alleged victim of the crime with which the accused is charged. However, the Pennsylvania rule differs from the federal rule by recognizing statutory limitations on this right. In particular, 18 Pa.C.S. § 3104 (the Rape Shield Law) often prohibits the accused from introducing evidence of the alleged victim's past sexual conduct, including reputational evidence thereof. See Comment under Rule 412 (not adopted), *infra*.

Subsection (ii), which is essentially the same as the federal rule, applies only in homicide cases in which the defendant offers evidence that the deceased was the first aggressor. It allows the Commonwealth to rebut the defendant's evidence by introducing evidence of the deceased's good reputation for peacefulness.

Subsection (iii), which applies only to a civil action for assault and battery, is not part of the federal rule. It is based on *Bell v. Philadelphia*, 341 Pa. Super. 534, 491 A.2d 1386 (1985).

Section (b)

While Pa.R.E. 404(b) uses the comprehensive word "acts," the vast majority of cases applying it, and its federal counterpart, are criminal cases that deal with bad acts, i.e., acts that are also either crimes or non-criminal wrongs. However, the rule applies in civil cases, too, and it applies to good acts as well. See *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 520 (3d Cir. 2003), interpreting the similar federal rule.

Evidence of other crimes, wrongs or bad acts, is powerful evidence. This is particularly so when it is offered against a defendant in a criminal case. By far the issue most often litigated under Rule 404(b) is whether such evidence can be introduced against an accused for some reason other than to prove that the accused acted in conformity with his (or her) prior bad conduct.

Section (b) is similar to section (b) of F.R.E. 404. Unlike the federal rule, it is divided into four subsections to enhance clarity:

Subsection (1), which uses the same language as the federal rule, treats evidence of other crimes, wrongs, or acts, the same as section (a) treats evidence of a person's character, or trait of character, i.e., it makes such evidence inadmissible to prove conduct in conformity therewith.

Subsection (1) is consistent with prior Pennsylvania case law. See *Commonwealth v. Fortune*, 464 Pa. 367, 346 A.2d 783 (1975) (in murder case, reversible error to admit evidence that the defendant participated in six robberies other than the one that culminated in the murder with which he was charged); *Commonwealth v. Seiders*, 531 Pa. 592, 614 A.2d 689 (1992) (in statutory rape case, reversible error to admit evidence that the defendant had previously been convicted of indecent assault and endangering the welfare of children).

Subsection (1) rejects an alternate holding in *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971), a murder case in which the defendant pled self-defense, that it was error to preclude the defendant from introducing the alleged victim's criminal record to prove that the victim was a man of "quarrelsome and violent character," and thus the aggressor.

Subsection (2), like the federal rule, contains a non-exhaustive list of purposes, other than proving character in order to show action in conformity therewith, for which evidence of other crimes, wrongs, or acts committed by a person may be admitted. When the evidence is admitted for such a purpose,

the party against whom it is offered is entitled, upon request, to a limiting instruction to the jury. See *Commonwealth v. Hutchinson*, 571 Pa. 45, 811 A.2d 556 (2002). See also Pa.R.E. 105.

Subsection (3) is an adjunct to subsection (2). However, subsection (3) applies only in criminal cases. Unlike the federal rule, it creates a special balancing test that makes it harder for a party, usually but not always the Commonwealth, to introduce relevant evidence of other crimes, wrongs, or acts committed by a person. Under Rules 402 and 403, most other evidence, as far as relevance is concerned, is admissible unless its probative value is outweighed by one or more of the six negative factors set forth in Rule 403. Under subsection (3), relevant evidence of other crimes, wrongs, or acts committed by a person is admissible only if its probative value outweighs its potential for prejudice. This is a codification of an evidential rule enunciated in *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981).

When weighing the potential for prejudice of evidence of other crimes, wrongs, or acts, the trial court may consider whether, and how much, such potential for prejudice can be reduced by cautionary instructions. See *Commonwealth v. Nolen*, 535 Pa. 77, 634 A.2d 192 (1993); *Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221 (1995); *Commonwealth v. Miles*, 545 Pa. 500, 681 A.2d 1295 (1996).

Subsection (4), which applies only in criminal cases, and only to the Commonwealth, requires that reasonable notice be given before evidence of other crimes, wrongs, or acts is introduced at trial. It is the same as the federal rule. Its purpose is to prevent unfair surprise, and to give the defendant reasonable time to prepare an objection to, or ready a rebuttal for, such evidence.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised November 2, 2001; effective January 1, 2002.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001, revision of Subsection (a) of the Comment published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).

Source

The provisions of this Rule 404 amended November 2, 2001, effective January 1, 2002, 31 Pa.B. 6381; amended February 28, 2006, effective immediately, 36 Pa.B. 1213 (March 18, 2006). Immediately preceding text appears at serial pages (285598) to (285600).

Rule 405. Methods of Proving Character.

(a) *Reputation Evidence.* 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. On cross-examination of the reputation witness, inquiry is allowable into specific instances of conduct probative of the character trait in question, except that in criminal cases inquiry into allegations of other criminal misconduct of the accused not resulting in conviction is not permissible.

(b) *Specific Instances of Conduct.* Specific instances of conduct are not admissible to prove character or a trait of character, except as follows:

(1) In civil cases where character or a trait of character is admissible as an element of a claim or defense, character may be proved by specific instances of conduct.

(2) In criminal cases where character or a trait of character is admissible under Pa.R.E. 404(a)(2), the accused may prove the complainant's character or trait of character by specific instances of conduct.

Comment

Pa.R.E. 405 differs from F.R.E. 405. One of the principal points of divergence is that Pennsylvania law does not permit proof of character by opinion evidence. See *Commonwealth v. Lopinson*, 234 A.2d 552 (Pa. 1967).

Reputation evidence is an exception to the hearsay rule under Pa.R.E. 803(21).

Subsection (a). Pa.R.E. 405(a) differs from F.R.E. 405 because Pa.R.E. 405(a) prohibits cross-examination of reputation witnesses offered on behalf of a defendant in a criminal case regarding arrests of the defendant not resulting in conviction. This is consistent with Pennsylvania law. See *Commonwealth v. Scott*, 436 A.2d 607 (Pa. 1981). Subsection (a) was amended in 2000 in view of *Commonwealth v. Morgan*, 739 A.2d 1033 (Pa. 1999). Where a reputation witness is cross-examined regarding specific instances of conduct, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Commonwealth v. Adams*, 626 A.2d 1231 (Pa. Super. 1993).

Subsection (b). Unlike F.R.E. 405(b), Pa.R.E. 405(b) distinguishes between civil and criminal cases in permitting the use of specific instances of conduct to prove character.

Cf. Pa.R.E. 608(b)(use of specific instances of conduct to attack or support credibility of witness, either on cross-examination or as extrinsic evidence).

Subsection (b)(1). With regard to civil cases, Pa.R.E. 405(b)(1) is identical to the federal rule in permitting proof of character by specific instances of conduct where character is an essential element of the claim or defense. This is consistent with Pennsylvania law. See *Matusak v. Kulczewski*, 145 A. 94 (Pa. 1928); *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968); *Commonwealth ex rel. Grimes v. Grimes*, 422 A.2d 572 (Pa. Super. 1980).

Subsection (b)(2). In criminal cases under Pa.R.E. 404(a)(2), the accused may offer evidence of a pertinent trait of character of the complainant. In such a case the trait may be proven by specific instances of conduct. This is consistent with Pennsylvania law. See *Commonwealth v. Dillon*, 598 A.2d 963 (Pa. 1991); *Commonwealth v. Amos*, 284 A.2d 748 (Pa. 1971).

Official Note: Adopted May 8, 1998, effective October 1, 1998; amended July 20, 2000, effective October 1, 2000.

Committee Explanatory Reports:

Final Report explaining the July 20, 2000 amendment of paragraph (a) concerning allegations of other criminal misconduct published with the Court's Order at 30 Pa.B. 3920 (August 5, 2000).

Source

The provisions of this Rule 405 amended July 20, 2000, effective October 1, 2000, 30 Pa.B. 3919. Immediately preceding text appears at serial pages (245748) and (264693).

Rule 406. Habit; Routine Practice.

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.

Comment

This rule is identical to F.R.E. 406 and is consistent with Pennsylvania law. See *Baldrige v. Matthews*, 378 Pa. 566, 106 A.2d 809 (1954) (uniform practice of hotel permitted to establish conduct in conformity with practice). The concepts of "habit" and "routine practice" denote conduct that occurs with fixed regularity in repeated specific situations. Like the federal rule, Pa.R.E. 406 does not set forth the ways in which habit or routine practice may be proven, but leaves this for case-by-case determination. See, e.g., *Commonwealth v. Rivers*, 537 Pa. 394, 644 A.2d 710 (1994) (allowing testimony based on familiarity with another's conduct); *Baldrige*, 378 Pa. at 570; 106 A.2d at 811 (testimony of uniform practice apparently permitted without examples of specific instances).

Evidence of habit must be distinguished from evidence of character. Character applies to a generalized propensity to act in a certain way without reference to specific conduct, and frequently contains a normative, or value-laden, component (e.g., a character for truthfulness). Habit connotes one's conduct in a precise factual context, and frequently involves mundane matters (e.g., recording the purpose for checks drawn). The Advisory Committee's Note to F.R.E. 406 sets forth a description of this distinction: "Character is a generalized description of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. . . . A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving." F.R.E. 406 advisory committee's note (quoting 1 McCormick, *Evidence* § 162).

Rule 407. Subsequent Remedial Measures.

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct, or produced, sold, designed, or manufactured a product with a defect or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment, or to prove other matters, if controverted, such as ownership, control, or feasibility of precautionary measures.

Comment

Pa.R.E. 407 is substantially the same as F.R.E. 407. The wording has been modified in order to clarify two ambiguities in the federal formulation.

The first sentence of Pa.R.E. 407 makes clear that the rule of exclusion favors only the party who took the subsequent remedial measures. Though F.R.E. 407 is silent on the point, the courts have generally held that the federal rule does not apply when one other than the alleged tortfeasor takes the

action because the reason for the rule (to encourage remedial measures) is not then implicated. See, e.g., *TLT-Babcock, Inc. v. Emerson Electric Co.*, 33 F.3d 397, 400 (4th Cir. 1994) (collecting cases).

The last sentence of Pa.R.E. 407 makes clear that the rule's exception for evidence that is offered to prove matters such as ownership, control, or feasibility of precautionary measures, applies only when those issues are controverted. Though the federal rule, as worded, can be construed to mean that only feasibility need be controverted, the cases have generally interpreted it to mean that any issue for which evidence is admitted under the rule's exception must be controverted. See, e.g., *Hall v. American Steamship Co.*, 688 F.2d 1062, 1066-67 (6th Cir. 1982); *Hull v. Chevron U.S.A., Inc.*, 812 F.2d 584, 586-87 (10th Cir. 1987).

Duchess v. Langston Corp., 564 Pa. 529, 769 A.2d 1131 (2001), is a case dealing with the admissibility of evidence of subsequent remedial measures in a strict product liability case, and, in particular, the applicability of exceptions to the rule of exclusion when the evidence is offered to prove feasibility of precautionary measures, or to impeach the credibility of a witness.

The original wording of Pa.R.E. 407 applied to negligence cases, but, like the original wording of F.R.E. 407, left open whether it applied to strict product liability cases. In *Duchess v. Langston Corp.*, 564 Pa. 529, 769 A.2d 1131 (2001), the Supreme Court held that it did. The rule was amended to make this clear.

Source

The provisions of this Rule 407 adopted September 11, 1998, effective October 1, 1998; amended June 12, 2003, effective July 1, 2003, 33 Pa.B. 2973. Immediately preceding text appears at serial pages (276573) to (276574).

Rule 408. Compromise and Offers to Compromise.

(a) *Prohibited uses.*—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

- (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or statements made in compromise negotiations.

(b) *Permitted uses.*—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

Comment

This rule differs from F.R.E. 408 as follows:

The federal rule in paragraph (a)(2) permits the use in criminal cases of statements made to government investigators, regulators, or enforcement authority in negotiations in civil cases.

The federal rule does not contain the last sentence of Pa.R.E. 408(b).

This rule does not follow the common law rule that distinct admissions of fact made during settlement discussions are admissible. See *Rochester Machine Corp. v. Mulach Steel Corp.*, 449 A.2d 1366 (Pa. 1982), a plurality decision. Instead, like the federal rule, Pa.R.E. 408 permits evidence relating to compromises and offers to compromise to be admitted for purposes other than proving liability,

such as showing bias or prejudice of a witness, but specifically prohibits use of such evidence to impeach a witness through a prior inconsistent statement or contradiction.

Admissibility of conduct and statements in mediations pursuant to the Mediation Act of 1996, 42 Pa.C.S. § 5949, are governed by that statute.

The rule is consistent with the Mediation Act of 1996. See 42 Pa.C.S. § 5949 (Confidential mediation communications and documents).

Pa.R.E. 408 is consistent with 42 Pa.C.S. § 6141 which provides, in pertinent part, as follows:

§ 6141. *Effect of certain settlements*

(a) *Personal Injuries.* Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(b) *Damages to Property.* Settlement with or any payment made to a person or on his behalf to others for damages to or destruction of property shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(c) *Admissibility in Evidence.* Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

See *Hatfield v. Continental Imports, Inc.*, 610 A.2d 446 (Pa. 1992) (evidence of “Mary Carter” agreement admissible to show bias or prejudice, and not excluded by § 6141(c)).

Under Pa.R.E. 408, as under F.R.E. 408, evidence of offers to compromise or completed compromises is admissible when used to prove an effort to obstruct a criminal investigation or prosecution. This is consistent with prior Pennsylvania case law. See *Commonwealth v. Pettinato*, 520 A.2d 437 (Pa. Super. 1987). Pa.R.E. 408 does not permit, however, the use of evidence relating to good faith compromises or offers to compromise when made for the purpose of reaching an agreement such as those sanctioned by Pa.R.Crim.P. 586 (relating to dismissal of criminal charges not committed by force or violence upon payment of restitution) or Pa.R.Crim.P. 546 (relating to dismissal upon satisfaction or agreement). The court may need to conduct, out of the hearing of the jury, a preliminary inquiry into the circumstances surrounding compromises in criminal matters to determine whether to permit such evidence.

Official Note: Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000; effective July 1, 2000; Comment revised March 29, 2001, effective April 1, 2001.

Committee Explanatory Reports:

Final Report explaining the March 10, 2000 amendments concerning the inadmissibility of evidence of conduct or statements made in compromise negotiations published at 30 Pa.B. 1643 (March 25, 2000).

Final Report explaining the March 29, 2001 revision of the Comment published with the Court’s Order at 31 Pa.B. 1995 (April 14, 2001).

Source

The provisions of this Rule 408 amended March 10, 2000, effective immediately, 30 Pa.B. 1639; amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993; amended September 18, 2008, effective October 30, 2008, 38 Pa.B. 5423. Immediately preceding text appears at serial pages (297552) and (316997).

Rule 409. Payment of Medical and Similar Expenses.

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

Comment—2005

This rule is identical to F.R.E. 409 and is consistent with prior Pennsylvania law. See 42 Pa.C.S. § 6141(c) (payment to injured person and others generally not admissible) (text quoted in Comment to Pa.R.E. 408); *Burns v. Joseph Flaherty Co.*, 278 Pa. 579, 123 A. 496 (1924) (guarantee of medical expenses cannot be used as basis for liability). As with F.R.E. 409, ancillary statements made in the course of paying, offering to pay, or promising to pay, medical, hospital, or similar expenses are not excluded by this rule. However, they may be excluded by Pa.R.E. 408.

Source

The provisions of this Rule 409 amended December 30, 2005, effective February 1, 2006, 36 Pa.B. 384. Immediately preceding text appears at serial pages (276575) to (276576).

Rule 410. Inadmissibility of Pleas, Plea Discussions and Related Statements.

(a) *General rule.* Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (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 under Rules 409, 414, 424, 311, 313, or 590 of the Pennsylvania Rules of Criminal Procedure, Fed. R. Crim. P. 11, or any comparable rule or provision of law of Pennsylvania or any other jurisdiction regarding the pleas identified in subsections (1) and (2) of this rule; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

(b) *Exception.* A statement made in the course of a plea, proceedings or discussions identified in subsection (a) of this rule is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced by the defendant and the statement ought in fairness to be considered contemporaneously with it, or (2) in a criminal proceeding for perjury, false swearing or unsworn falsification to authorities if the statement was made by the defendant, under oath, and in the presence of counsel.

Comment

This rule is similar to F.R.E. 410. References to Rules 409, 414, 424, 311, 313, and 590 of the Pennsylvania Rules of Criminal Procedure and the comparable rules or other provisions of Pennsylvania or other jurisdictions have been added. Unlike the federal rule, subsection (b) of the Pennsylvania rule is set forth separately to indicate that it creates an exception applicable to all of subsection (a).

Pa.R.E. 410 reflects present Pennsylvania law. See *Commonwealth v. Jones*, 544 A.2d 54 (1988); *Commonwealth ex rel. Warner v. Warner*, 40 A.2d 886 (Pa. Super. 1945); Pa.R.Crim.P. 311(B), 313(B).

Pa.R.E. 410 does not prohibit the use of a conviction that results from a plea of nolo contendere, as distinct from the plea itself, to impeach in a later proceeding (subject to Pa.R.E. 609) or to establish an element of a charge in a later administrative proceeding. See *Commonwealth v. Snyder*, 182 A.2d 495 (1962) (conviction based on nolo contendere plea could be used to impeach witness in later

criminal proceeding); *Eisenberg v. Commonwealth, Dep't. of Public Welfare*, 516 A.2d 333 (Pa. 1986) (conviction based on nolo contendere plea permitted to establish element of charge in administrative proceeding).

In addition, Pa.R.E. 410 does not govern the admissibility of pleas in summary proceedings involving motor vehicle matters, which is addressed in 42 Pa.C.S. § 6142. § 6142 provides:

§ 6142. *Pleas in vehicle matters*

(a) *General Rule.*—A plea of guilty or nolo contendere, or a payment of the fine and costs prescribed after any such plea, in any summary proceeding made by any person charged with a violation of Title 75 (relating to vehicles) shall not be admissible as evidence in any civil matter arising out of the same violation or under the same facts or circumstances.

(b) *Exception.*—The provisions of subsection (a) shall not be applicable to administrative or judicial proceedings involving the suspension of a motor vehicle or tractor operating privilege, learner's permit, or right to apply for a motor vehicle or tractor operating privilege, or the suspension of a certificate of appointment as an official inspection station, or the suspension of a motor vehicle, tractor, or trailer designation.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; amended March 10, 2000, effective immediately; amended March 29, 2001, effective April 1, 2001.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions of the Comment published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 technical amendments updating the rule published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

Final Report explaining the March 29, 2001 amendments published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Source

The provisions of this Rule 410 amended March 23, 1999, effective immediately, 29 Pa.B. 1712; amended March 10, 2000, effective immediately, 30 Pa.B. 1639; amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993. Immediately preceding text appears at serial pages (265696) to (265697).

Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether 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.

Comment

This rule is identical to F.R.E. 411 and is consistent with Pennsylvania law that evidence of insurance may be admitted, notwithstanding some prejudicial effect, if the evidence is relevant to prove an issue other than negligence or wrongful conduct. E.g., *Beechwoods Flying Serv. v. Al Hamilton Contracting Corp.*, 504 Pa. 618, 476 A.2d 350 (1984); *Price v. Yellow Cab Co.*, 443 Pa. 56, 278 A.2d 161 (1971) (plurality) (collecting cases); *Fleischman v. Reading*, 388 Pa. 183, 130 A.2d 429 (1957);

Copzi v. Hearst Publishing Co., 371 Pa. 503, 92 A.2d 177 (1952); *McGowan v. Devonshire Hall Apartments*, 278 Pa. Super. 229, 420 A.2d 514 (1980); *Jury v. New York Central R.R. Co.*, 167 Pa. Super. 244, 74 A.2d 531 (1950). As with all evidence, evidence not excluded by this rule may be excluded under Pa.R.E. 403.

Rule 412. Sex Offense Cases: Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition (Rape Shield Law) Not Adopted.

Comment

Pennsylvania has not adopted a Rule of Evidence comparable to F.R.E. 412. In Pennsylvania this subject is governed by 18 Pa.C.S. § 3104 (the “Rape Shield Law”).

18 Pa.C.S.A. § 3104 provides as follows:

§ 3104. Evidence of victim’s sexual conduct

(a) *General rule.*—Evidence of specific instances of the alleged victim’s past sexual conduct, opinion evidence of the alleged victim’s past sexual conduct, and reputation evidence of the alleged victim’s past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim’s past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) *Evidentiary proceedings.*—A defendant who proposes to offer evidence of the alleged victim’s past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

F.R.E. 412 is applicable in civil cases. There is no comparable provision in Pennsylvania law.

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