

**CONDUCT, CHARACTER, & REMEDIAL MEASURES:
A FOCUS ON ARTICLE IV OF THE TEXAS RULES OF EVIDENCE**

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I. Introduction.

The focus of this paper is Article IV of the Texas Rules of Evidence. It addresses pertinent provisions of Article IV and relevant case authorities in a usable format by a process of selection and compression. Article IV defines, *inter alia*, relevant evidence, requires relevancy as a prerequisite to admissibility, and provides exceptions to this general rule. The authors' intent is to restate the Article IV Rules in an easy to understand, useable format. The cited Rules apply to both civil and criminal cases unless otherwise specified.

While the Texas Rules closely track the Federal Rules, there are some deviations. With that said, the Federal Rules of Evidence may be cited, where applicable, but will briefly be discussed where those rules differ substantively in wording and/or application from the Texas counterpart.

II. Relevance and Admissibility (Texas Rules of Evidence 401, 402 & 403).¹

Texas Rules of Evidence 401 through 403 provide the first step for the admissibility of evidence—it must be relevant. Rule 401 defines the term “relevant evidence”, Rule 402 states the general significance of “relevant evidence”, and Rule 403 sets forth limitations on the admissibility of “relevant evidence”. These rules are set forth below.

A. Texas Rule of Evidence 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.

B. Texas Rule of Evidence 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

C. Texas Rule of Evidence 403: Exclusion of Relevant Evidence on Special Grounds

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

¹ Texas Rules of Evidence 401, 402 & 403 are substantively similar to Federal Rules of Evidence 401, 402 & 403.

the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

D. General Application of Rules 401-403

The essential prerequisite for admissibility, but by no means the only hurdle, is that evidence be relevant. *See* TEX. R. EVID. 401, 402; *see also Pace v. Sadler*, 966 S.W.2d 685, 687 (Tex. App.—San Antonio 1998, no writ). Generally, if evidence is relevant and not barred by an exclusionary rule, it is admissible. *See* TEX. R. EVID. 401, 402. Evidence must also meet requirements of competency and reliability. *See id.*; *see also Morton Int'l v. Gillespie*, 39 S. W.3d 651, 655 (Tex. App.—Texarkana 2001, pet. denied).

E. Selected Cases Interpreting Rules 401-403

1. The Balancing Test under Rule 403

- a. *Natural Gas Pipeline Co. of America v. Pool*, 30 S.W.3d 618, 631-632 (Tex. App.- Amarillo 2000, *rev'd on other grounds*, 124 S.W.3d 188 (Tex. 2003)).

“Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence.” TEX. R. EVID. 401. 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.” TEX. R. EVID. 403.

- b. *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 41 (Tex. 1998).

“Evidence that is not relevant, or is unduly prejudicial, and thus, not admissible to mitigate punitive damages, includes actual damage amounts paid by settlements or by judgments; the number of pending claims filed against a defendant for the same conduct; the number of anticipated claims for the same conduct; insurance coverage; unpaid punitive damages awards for the same course of conduct; and evidence of punitive damages that may be levied in the future.”

2. Factors Considered under Balancing Test

- a. *Robinson v. State*, 236 S.W.3d 260, 266-67 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

A proper analysis of whether the probative value is outweighed by the prejudicial effect includes, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in

some irrational, yet indelible way; (3) the time needed to develop the evidence, such that the attention of the fact-finder is diverted from the indicted offense at hand (4) the proponent's need for the evidence.

- b. *Manning v. State*, 114 S.W.3d 922, *on remand*, 126 S.W.3d 552, 555-56 (Tex. App.—Texarkana 2003).

Presentation of evidence of cocaine metabolite in defendant's bloodstream did not occupy too much time in manslaughter prosecution for purposes of balancing the probative value and prejudice. The court found that evidence of cocaine intoxication was proof of the indicted offense.

3. Probative Value

- a. *National Freight, Inc. v. Snyder*, 191 S.W.3d 416, 424 (Tex. App.—Eastland 2006, no pet).

The probative value of a surveillance video showing personal injury plaintiff in full range of motion with his injured arm simulating an inappropriate act, was outweighed by its prejudicial effect. The court found that the conduct depicted on the video was only a small portion of the much longer video showing plaintiff working in his shop, and one remaining portion of the video showed plaintiff using both of his arms to pick up a large object.

- b. *Goldberg v. State*, 95 S.W.3d 345 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

The probative value of the defendant's notebook found during a school search, which contained a drawing of a demon dripping in blood and an essay entitled, "How to Kill a Woman" was not substantially outweighed by the danger of unfair prejudice, in trial for murder committed three years after the search. The court found that the state's need for evidence to prove motive and identity was extremely great in view of defense counsel's vigorous attack on eyewitness testimony on cross-examination and through expert witness testimony on fallibility of eyewitness testimony.

4. Danger of Unfair Prejudice

- a. *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231 (Tex. 2007).

Testimony is not inadmissible solely because it is "prejudicial." In the adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent.

- b. *Russo v. State*, 228 S.W.3d 779 (Tex. App.—Austin 2007, pet ref'd).

Prejudice is not enough. Only evidence that would create the danger of “unfair prejudice” may be excluded if its probative value is substantially outweighed under Rule 403.

- c. *Manning v. State*, 114 S.W.3d 922, on remand, 126 S.W.3d 552 (Tex. App.—Texarkana 2003).

Evidence is “prejudicial” only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence.

5. Application

- a. *Trailways, Inc. v. Clark*, 794 S.W.2d 479 (Tex. App.—Corpus Christi 1990, writ denied).

Postdeath photographs which depicted severe physical injuries to passengers in a bus accident were properly admitted in a wrongful death action, as the photographs were relevant to the amount of pain and suffering experienced by plaintiffs’ decedents from the violence of the crash as well as the seriousness of their injuries immediately before their impending death.

- b. *Reese v. State*, 33 S.W.3d 238 (Tex. Cr. App. 2000).

The court found that the prejudicial effect of photographs of the murder victim and her unborn child lying in a casket outweighed any probative value to show, in the penalty phase of a capital murder case, the result and unforeseeable consequences of the defendant’s actions and his violent and vicious nature.

- c. *Ashorali v. State*, 2008 WL 726202 (Tex. App.—Dallas 2008, pet. ref’d).

Photographs of the victim’s charred remains were properly admitted where the medical examiner used the photographs to explain the victim’s injuries to the jury, and the photographs provided a visual component to, and contributed to, the understanding of such testimony.

6. Evidence of Other Similar Incidents / Rule 403

In *Nissan Motor Co., Ltd. v. Armstrong*, 145 S.W.3d 131, 138-139 (Tex. 2004), the Texas Supreme Court addressed the admissibility of “similar incidents” in the context of a products liability case. In doing so, the court provided the relevant inquiry for the admissibility of “similar incidents”.

The court held that other similar incidents are admissible if the other incidents occurred under reasonably similar conditions. *See id.* at 138. The court clarified that the conditions need not be identical and that the degree of similarity is largely dependent on the issue the evidence is offered to prove. *See id.* Secondly, the court held that the evidence must not violate Rule 403. *See id.* The court stated that proof

of what happened in a previous accident does not, without more, prove what happened in a current one. *Id.* Thus, prolonged proof of what happened in other accidents cannot be used to distract a jury's attention from what happened in the case at hand. *Id.* Lastly, the court stated that the relevance of other accidents depends upon the purpose for offering them. For example, other accidents may be admissible for some purposes and not for others. *Id.* In exercising discretion regarding admissibility, the trial courts must carefully consider the bounds of similarity, prejudice, confusion, and sequence before admitting evidence of other accidents involving a product. *Id.* at 139.

Other incidents have been offered to show:

a. Notice

Sears Roebuck & Co. v. Kunze, 996 S.W.2d 416 (Tex. App—Beaumont 1999, write denied)(court upheld the admission of nearly 90 other claims against Sears Roebuck stating that such evidence was admissible on the issue of notice and conscious indifference in view of such notice).

b. Product Defect

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 340-41 (Tex. 1998)(product was unreasonably dangerous).

c. Need for Warning / Inadequate Warning

Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 356 (Tex. 1993).

d. Safer Alternative Design Available

Hernandez v. Tokai Corp., 2 S.W.3d 251, 258 (Tex. 1999); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980).

e. Conscious Indifference

Gen. Chem. Corp. v. De la Lastra, 852 S.W.2d 916, 921-22 (Tex. 1993)(other accidents offered to support claim for exemplary damages as evidence of conscious indifference).

f. State of the Art / Absence of Defect

Boatland of Houston, 609 S.W.2d 743, 748 (absence of other accidents as offered to rebut claims that product was defective).

III. Character Evidence (Texas Rules of Evidence 404, 405, 406 & 412).²

Evidence of a person's character is generally inadmissible to prove action in conformity therewith on a particular occasion. *See* TEX. R. EVID. 404(a). However, evidence of custom or habit is generally admissible to show that a person or organization acted pursuant to habit or routine on the occasion in question. *See* TEX. R. EVID. 406.

There are exceptions to the general proposition that character evidence is inadmissible. *See* TEX. R. EVID. 404(a)(1)-(3); 405(a)-(b); 412(a)-(b). The general exceptions can be summarized as follows:

- i) Evidence of character is admissible when it is an element of the cause of action or offense;
- ii) Evidence of character is admissible when one party or the other "opens the door" and places character in issue;
- iii) Evidence of character is admissible when prior bad acts, wrongs, or crimes are used to show motive, opportunity, preparation, plan, knowledge, intent, or identity;
- iv) Evidence of character is admissible in crimes against children, in cases where the victim is incapacitated, and for policy reasons.

A. **Texas Rule of Evidence 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

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

(1) Character of accused. Evidence of a pertinent character trait offered:

- (A) by an accused in a criminal case, or by the prosecution to rebut the same,
or
- (B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) Character of victim. In a criminal case and subject to Rule 412, evidence of pertinent character trait of the victim of the crime offered by an accused, or by

² Texas Rules of Evidence 404, 405, and 406 mirror Federal Rules of Evidence 404, 405 and 406. Texas Rule of Evidence 412 differs slightly in substance and application from Federal Rule of Evidence 412. These distinctions will be identified, *infra*. Further, the Federal Rules contain additional evidentiary rules pertaining to specific criminal sexual assault and child molestation issues. *See* FED. R. EVID. 413, 414, 415. These distinctions are not explored in this paper.

the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

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

(b) *Other Crimes, Wrongs or Acts*. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for the other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

B. Texas Rule of Evidence 405: Methods of Proving Character

(a) *Reputation or Opinion*. In all cases in which evidence of a person's character or character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify at the guilt stage of trial concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

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

C. Texas Rule of Evidence 406: Habit; Routine Practice

Evidence of the habit of a person or 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.

D. Texas Rule of Evidence 412: Evidence of Previous Sexual Conduct in Criminal Cases³

³ For information concerning the procedures for offering this type of evidence, sealing records, or pertaining to cases involving the sexual conduct of a child as a defense, please review TEX. R. EVID. 412 (c)-(e).

- (a) *Reputation or Opinion Evidence.* In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.
- (b) *Evidence of Specific Instances.* In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:
- (1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;
 - (2) it is evidence:
 - (A) that is necessary to rebut or explain scientific or medical evidence offered by the State;
 - (B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;
 - (C) that relates to the motive or bias of the alleged victim;
 - (D) is admissible under Rule 609; or
 - (E) that is constitutionally required to be admitted; and
 - (3) its probative value outweighs the danger of unfair prejudice.

E. General Application of Rules 404, 405, 406 & 412

1. Character and Habit

Generally, evidence of character is not admissible to show action in conformity therewith. *See* TEX. R. EVID. 404(a). While character cannot be proved to show conformity with conduct, habit can. *See* TEX. R. EVID. 404(a), 406. Unfortunately, "character evidence" is not specifically defined in the Rules of Evidence. *See* Charles Alan Wright, et al., Federal Practice and Procedure § 5233 (1978). Character is a generalized *quality* usually attributed to a person, such as truthfulness, violence, drunkenness, and the like. A habit is a specific, regular, and consistently repeated *behavior*, such as a practice of always locking one's doors.

Texas Rule of Evidence 404 contains the general prohibition against using other crimes, wrong, or acts to prove the character of one of the parties. The Rule is an exclusionary rule. It prohibits evidence of a person's "character", that is, his or her moral traits, such as dishonesty, cruelty, infidelity, aggressiveness, and prior bad acts or crimes to show that a person's conduct on the occasion in question conformed to their character and, thus, the person should be held liable or found guilty. The rule is subject to a number of exceptions and where character is relevant for some other material reason, it frequently is admissible. *Infra.*

2. Exceptions to the General Rule

An exception to the rule discussed above applies when character is directly at issue or is put in issue in a particular case. TEX. R. EVID. 405. For example, a witness's character for veracity is put in issue when he takes the stand. Additionally, a plaintiff's character and reputation could be at issue in an action for slander or libel where the defendant attempts to show that the plaintiff's reputation was already so bad that he could not have suffered any harm from the alleged defamatory statement. An exception to the rule that character evidence may not be used for action in conformity therewith is when character is used to impeach a witness.

An additional exception relates specifically to criminal cases. For example, a defendant may call character witnesses to testify that a defendant's character was inconsistent with the alleged acts for which he is accused. *See* TEX. R. EVID. 404(a)(1); *see also State Bar v. Evans*, 774 S.W.2d 656, 658 (Tex. 1989)(attorney allowed to offer evidence of a pertinent character trait where he was accused of conduct involving moral turpitude). By doing so, the defendant puts his character in issue for the traits about which the character witness testifies. *See Evans, supra*. Then, the prosecution may offer his own witness(es) to the defendant's bad character for the same traits to show that he acted in conformity with that character. *See* TEX. R. EVID. 404(a)(1); *see also id.* at 658 (State Bar allowed to offer rebuttal testimony to pertinent character trait testimony). A criminal defendant may also offer character evidence of an alleged victim to show action in conformity therewith. *See* TEX. R. EVID. 404(a)(2); *see also Hernandez v. State*, 774 S.W.2d 319, 327 (Tex. App.—Dallas 1989, pet. ref'd)(discussion of the codification of TEX. R. CRIM. EVID. 404(a)(2)).⁴

3. Reputation and Opinion Evidence of Victim

Texas Rule of Evidence 412 represents a codification of the Texas "rape shield" law. *See generally* Andrew J. Cloutier, *The Texas Rape-Shield Law: Texas Rule of Evidence 412*, 14 AM. J. CRIM. L. 281, 281-96 (1987)(discussing the codification from TEX. PEN. CODE §22.065 to Rule 412). As such, Rule 412 operates to exclude reputation and opinion evidence of an alleged victim in a sexual assault case and provide exceptions to same. *See* TEX. R. EVID. 412.⁵

F. Selected Cases interpreting Rules 404, 405, 406, & 412

⁴ Rule 404(a)(2) of the Texas Rules of Evidence is unlike its Federal counterpart in that it provides for the admissibility of "evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same."

⁵ The Texas rule applies only to criminal cases. *See* TEX. R. EVID. 412. It should be noted that the Federal and Texas Rule 412 differ. Federal Rule 412 incorporates Federal Rules of Evidence 413, 414, and 415, which address the admissibility of evidence of similar crimes and acts in sexual assault and child molestation cases. *See* FED. R. EVID. 413, 414, and 415. For a discussion of the federal provision, *see* 23 WRIGHT & GRAHAM §5382, at 492 (1980).

1. Rule 404

a. Character Evidence Admissible

Matter of G.M.P., 909 S.W.2d 198 (Tex. App.—Houston [14th Dist.] 1995, no writ)(holding that juvenile charged with sexual assault was entitled to present evidence of pertinent character trial to show that it was improbable that he committed crime, and thus trial court erred in excluding juvenile reputation witness).

Smith v. State, 763 S.W.2d 836 (Tex. App.—Dallas 1988, writ ref'd)(holding that a defendant may introduce testimony concerning his peaceable and law-abiding character as proof that it is unlikely that he committed offense for which he was on trial).

b. Character Evidence Inadmissible

Kirby v. State, 208 S.W.3d 568 (Tex. App.—Austin 2006, no pet.)(holding hearsay testimony that the defendant mother accused of sexually abusing her son was the victim of sexual abuse was improper character evidence where the State sought to elicit testimony from the defendant that she was a victim of sexual abuse and was therefore more likely to have committed the crime).

Walker v. State, 195 S.W.3d 250 (Tex. App.—San Antonio 2006, no pet.)(holding officer's testimony that he once had to stop defendant from shooting fireworks because he was disturbing the peace of a dying woman and heard automatic weapon fire coming from defendant's property was inadmissible character evidence in resisting arrest prosecution).

Mack v. State, 928 S.W.2d 219 (Tex. App.—Austin 1996, writ ref'd)(holding witness was improperly allowed, in capital murder case, to testify as to the peaceful character of the victim, where defendant had not presented evidence that victim was the first aggressor).

Service Lloyds Ins. Co. v. Martin, 855 S.W.2d 816 (Tex. App.—Dallas 1993, no writ)(holding claimant's job application in which he falsely answered "no" to question whether he had ever been injured on the job was not admissible in his workers' compensation action since job application raised collateral matter to prove claimant's character in effort to show that he acted in conformity therewith).

c. Other Crimes, Wrongs, or Acts

Pollard v. State, 225 S.W.3d 184 (Tex. App.—San Antonio 2008, pet granted)(holding evidence of prior criminal conduct is inherently prejudicial, tends to confuse the issues, and forces the accused to defend himself against charges not part of the present case against him).

Dickson v. State, 246 S.W.3d 184 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd)(holding that to be admissible to show identity in a criminal prosecution, an extraneous offense must be so similar to the offense at issue that the offenses are marked as the accused's handiwork; sufficient similarity may be shown by proximity in time and place or by a common mode of committing the offenses).

c. Motive

Maranda v. State, 253 S.W.3d 762 (Tex. App.—Amarillo 2007, pet. dismiss'd)(holding that evidence of aggravated robbery defendant's use of an inhaled intoxicant, two hours after robbery in which he stole carburetor cleaner which could be used as an inhaled intoxicant, was relevant to motive and thus admissible as bad acts evidence).

Beaumont v. Basham, 205 S.W.3d 608 (Tex. App.—Waco 2006, pet. denied)(holding evidence of employer's prior bad acts relating to the operation of the ranch was admissible, in ranch employee's action against employer for defamation and unlawful employment practices, to show malice, for purposes of the defamation claim, and as evidence probative of unlawful employment practices).

Johnson v. State, 963 S.W.2d 140 (Tex. App.—Texarkana 1998, writ ref'd)(holding that when an accused claims self-defense or accident, the state may introduce evidence of other violent acts when accused was aggressor for purposes of showing accused's intent).

McLellan v. Benson, 877 S.W.2d 454 (Tex. App.—Houston [1st Dist.] 1994, no writ)(holding evidence that defendant had assaulted another woman under similar circumstances 26 months earlier was relevant to the issue of defendant's intent where defendant admitted sexual intercourse but claimed it was consensual).

d. Scheme or Plan

Gregory v. State, 159 S.W.3d 254 (Tex. App.—Beaumont 2005, pet. ref'd)(holding evidence that defendant possessed altered driver's license was relevant in drug trial to demonstrate defendant's involvement in clandestine meth lab, where detective testified that it was common for people involved in the manufacture of meth to use false identification for renting hotel rooms or buying products to make it).

Allstate Texas Lloyds v. Potter, 30 S.W.3d 658 (Tex. App.—Texarkana 2000, no pet.)(holding evidence of prior fires of insured required a showing of sufficient nexus existing between the alleged arson in question and prior fires).

2. Rule 405

a. In General

Evans v. State, 876 S.W.2d 459 (Tex. App.—Texarkana 1994, writ granted)(holding opinion testimony and testimony as to a person’s reputation are generally the only forms of evidence admissible to prove character, except where character of person is essential element of the charge, claim, or defense).

b. Reputation

Turner v. State, 805 S.W.2d 423 (Tex. Cr. App. 1991)(holding reputation witness’ testimony may be based on discussion with others concerning defendant, or on hearing others discuss defendant’s reputation, and not just personal knowledge; discussions with police officers are sufficient to qualify witness on reputation).

Gonzales v. State, 838 S.W.2d 848 (Tex. App.—Houston [1st Dist.] 1992, pet dismiss’d, 864 S.W.2d 522 (Tex. Cr. App. 1993)(holding evidence that victim had previously assaulted police officer, had a bad reputation for being peaceful and law abiding, and had shot at her husband on two occasions, was admissible in murder prosecution of off-duty police officer to show that victim was the first aggressor in a highway chase incident ending in roadside shootings).

Perter v. Nemir, 900 S.W.2d 376 (Tex. App.—Austin 1995, no writ)(holding that given the evidence concerning counselor’s conviction for sexual assault of his stepson was not admissible, reputation testimony about conviction also was not admissible in action arising from counselor’s sexual encounter with patients wife).

c. Specific instances of conduct

Whitehead v. State, 220 S.W.3d 171 (Tex. App.—Eastland 2007, *rev’d on other grounds*, 2008 WL 2512836 (Tex. Cr. App. 2008)(holding a witness who testifies to another’s good character may be cross-examined to test the witness’ awareness of relevant specific instances of conduct).

Lancaster v. State, 754 S.W.2d 493 (Tex. App.—Dallas 1988, writ ref’d)(holding in a prosecution for aggravated robbery, the trial court properly permitted state to cross-examine defendant’s character witness about criminal conduct with which defendant was charged but of which he had not yet been convicted).

3. Rule 406

a. In General

Dietz v. State, 123 S.W.3d 528 (Tex. App.—San Antonio 2003, pet. ref'd)(holding that in order for evidence of a person's conduct to be admissible as habit evidence to prove the conduct of that person on a particular occasion, the movant must demonstrate a regular practice of meeting a particular kind of situation with a specific kind of conduct).

Johnson v. City of Houston, 928 S.W.2d 251 (Tex. App.—Houston [14th Dist.] 1996, no writ)(holding that for testimony of routine practice of an organization to be admissible, it must show regular response to a repeated, specific situation).

Miller v. State, 882 S.W.2d 936 (Tex. App.—Beaumont 1994, no writ)(holding habit evidence is admissible whether corroborated or not and regardless of the presence of eyewitnesses).

b. Alcohol / Intoxication

Haynes v. State, 85 S.W.3d 855 (Tex. App.—Waco 2002, pet. ref'd)(holding neighbor's testimony in defendant's murder trial that defendant was frequently intoxicated was admissible as habit evidence.

c. Driving

Felix v. Gonzalez, 87 S.W.3d 574 (Tex. App.—San Antonio 2002, pet. denied)(holding admission of evidence of allegedly rear-ending driver's prior accident as "habit" evidence in injured driver's lawsuit as evidence of state of mind, given no allegations of gross negligence or claims of punitive damages, was improper).

d. Industry Practice

Mediacomp, Inc. v. Capital Cities Comm., Inc., 698 S.W.2d 207 (Tex. App.—Houston [1st Dist.] 1985, no writ)(holding copy of ad agency association's standard contract was relevant as evidence of custom and industry practices, and was circumstantial evidence regarding intent of parties, when issue was whether ad agency had impliedly assumed liability of principal on contract with television station).

4. Rule 412

a. In General

In re J.G., 195 S.W.3d (Tex. App.—San Antonio 2006, no writ)(holding the trial court's determination that testimony from witness who would have testified that she observed the juvenile victim playing with naked dolls and "more or less" simulating sex by placing the dolls on top of the other, was inadmissible evidence of the victim's past sexual behavior in aggravated sexual assault case).

Ex parte Rose, 704 S.W.2d 751 (Tex. Cr. App. 1984)(holding “[s]exual conduct” within the meaning of the rape shield statute limiting admission of evidence of victim’s sexual conduct encompasses sexual activity or conduct whether willingly engage in or not, including a prior rape).

b. Materiality

Cooper v. State, 959 S.W.2d 682 (Tex. App.—Austin 1997, writ ref’d)(holding rape shield law does not contemplate admission of evidence of sexual assault victim’s past sexual conduct when potential injury outweighs potential usefulness of evidence.

c. Reputation

Rankin v. State, 821 S.W.2d 230 (Tex. App.—Houston [14th Dist.] 1991, no writ)(holding that vague reference to sexual assault complainant’s alleged sexual activity were not admissible; the evidence was either based on reputation or on what complainant had told witnesses rather than what witness had observed).

d. Sexual history hearing

LaPoint v. State, 225 S.W.3d 513 (Tex. Cr. App. 2007)(holding the proper remedy upon determination by Court of Appeals that the defendant was deprived of his right to participate in the hearing to determine admissibility of evidence of the victim’s prior sexual history was to abate the defendant’s appeal and remand the case to the trial court to afford the defendant an adversarial hearing in which he would have the opportunity to make a showing that the victim’s prior sexual history was admissible).

e. Post-offense conduct

Cuyler v. State, 841 S.W.2d 933 (Tex. App.—Austin 1992, no pet.), *overruled on other grounds*, *Halstead v. State*, 891 S.W.2d 11 (Tex. App.—Austin 1994, no pet)(holding that “rape shield statute” governs the admission of all evidence of the victim’s extraneous sexual behavior, including sexual behavior after the alleged offense).

IV. Liability Evidence Limitations (Texas Rules of Evidence 407, 408, 409, 410, & 411).⁶

Exclusionary Rules 407-411 recognize the circumstantial nature of certain evidence which, although relevant, does not establish liability on the occasion in question.

Rule 407 prohibits evidence of remedial measures subsequent to the event causing the injury or harm to prove fault on a particular occasion. *See* TEX. R. EVID. 407(a). In 2003, the

⁶ Texas Rules of Evidence 407 and 409 are substantively similar to Federal Rules of Evidence 407, 408, 409, 410, and 411. Texas Rules of Evidence 408, 410, and 411 differ slightly from Federal Rules of Evidence 408 and 410, as explained herein.

Texas Legislature, as part of sweeping tort reform, explicitly ordered the Texas Supreme Court to amend Rule 407(a) to conform to the 1997 changes made to the Federal Rule concerning product liability cases.⁷ In short, both the Texas Rule and Federal Rule prohibit the introduction of evidence of subsequent remedial measures on the issue of liability in products cases. Notwithstanding this fact, however, Rule 407 does not prohibit evidence of subsequent remedial measures offered for another purpose, such as ownership, control, feasibility of precautionary measures, if controverted, or impeachment purposes. *See* TEX. R. EVID. 407(a); *see also* FED. R. EVID. 407(a).

Under Rule 408, settlement discussions offered to prove liability or that a claim is invalid are generally excluded from evidence. *See* TEX. R. EVID. 408. Likewise, evidence of the offer to pay or payment of medical expenses and the existence of insurance coverage are inadmissible when offered to prove liability. *See* TEX. R. EVID. 409, 411. Finally, evidence of a guilty plea that is later withdrawn, or any statements made in connection with it, is not admissible to show liability. *See* TEX. R. EVID. 410.

A. Texas Rule of Evidence 407: Subsequent Remedial Measures; Notification of Defect

- (a) *Subsequent Remedial Measures.* When, after an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment.
- (b) *Notification of Defect.* A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.⁸

B. Texas Rule of Evidence 408: Compromise & Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

⁷ *See* Act of June 2, 2003, 78th Leg., R.S., ch.204, §5.03, 2003 Tex. Gen. Laws 847, 862 ("As soon as practicable after the effective date of this Act, the supreme court shall amend Rule 407(a), Texas Rules of Evidence, to conform that rule to Rule 407, Federal Rule of Evidence).

⁸ TEX. R. EVID. 407(b) is unique to the Texas rules and has no federal counterpart.

This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

C. Texas Rule of Evidence 409: Payment of Medical & 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.

D. Texas Rule of Evidence 410: Inadmissibility of Pleas, Plea Discussions & Related Statements

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty that was later withdrawn;
- (2) in civil cases, a plea of nolo contendere, and in criminal cases, a plea of nolo contendere that was later withdrawn;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding, in a civil case, either a plea of guilty that was later withdrawn or a plea of nolo contendere, or in a criminal case, either a plea of guilty that was later withdrawn or a plea of nolo contendere that was later withdrawn; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority, in a civil case, that do not result in a plea of guilty or that result in a plea of guilty later withdrawn, or in a criminal case, that do not result in a plea of guilty or a plea of nolo contendere or that results in a plea, later withdrawn, of guilty or nolo contendere.

E. Texas Rule of Evidence 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 issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

F. Selected Authorities and Analysis of Rules 407, 408, 409, 410, & 411

1. TEX. R. EVID. 407: Subsequent Remedial Measures

- a. In General

Evidence of subsequent remedial measures is not admissible to show previous negligence or culpable conduct. *See* TEX. R. EVID. 407. The purpose behind this Rule is to prohibit evidence that a tortfeasor has taken steps after an accident to prevent the accident's recurrence as proof that prior conduct was negligent. Rule 407 does not define "remedial measures". *See* TEX. R. EVID. 407. However, "the courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them." *See* FED. R. EVID. 407, Advisory Committee Notes. The prohibition regarding evidence of subsequent remedial measures has exceptions. *See* TEX. R. EVID. 407. The Rule contains a non-exhaustive list of those exceptions. *See id.* If evidence of the subsequent remedial measure is offered for another purpose, other than prohibited by Rule 407, it may be admissible. *Infra.*

b. The 2003 Amendments to 407(a)

As stated previously, in 2003 the Texas Legislature amended Rule 407 to mirror its federal counterpart. Rule 407(a) was clarified to define the "event" that caused injury or harm to the plaintiff as the point after which evidence of remedial measure will be excluded. *Cf.* FED. R. EVID. 407, Advisory Committee's note to 1997 amendments (the words "an injury or harm allegedly caused by" were added to Rule 407 to clarify when the rule applies); *In Re Aircrash in Bali, Indon.*, 871 F. 2d 812, 816 (9th Cir. 1989)(exclusionary rule did not apply to safety report prepared before the accident). Accordingly, if a manufacture makes a remedial change to its product or its notification procedures after the product has been placed into the stream of commerce but before the accident giving rise to the lawsuit, evidence of those measures is not barred by the rule. *Cf.* FED. R. EVID. 407, Advisory Committee's note to 1997 amendments ("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.")

The second change made in 2003 made the exclusionary rule apply to products-liability cases as well as negligence cases. Previously, strict liability cases were excluded from the ambit of Rule 407. Evidence of subsequent remedial measures remains admissible for "other purposes" such as showing ownership or control. *Infra.*

c. 407(b)

Rule 407(b) applies only to "written notification[s]" made by manufacturers. Additionally, the rule only applies to notifications to purchasers, not to dealers or others (unless they are also purchasers). The notifications are admissible only against the manufacturer, not against others, such as a retail seller, who might be a codefendant. The notifications are admissible only with regard to

the existence of a defect and are not admissible on other issues, such as causation.

d. Additional selected cases concerning Rule 407

Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 237-42 (Tex. App.—Tyler 2003, no pet.)(evidence of subsequent remedial measures admitted to show control).

Exxon Corp. v. Roberts, 724 S.W.2d 863, 869 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.)(evidence that defendant had changed its method of moving tools was admitted to prove control in case where a tool-lifting procedure allegedly caused accident).

Houston Lighting & Power Co. v. Taber, 221 S.W.2d 339, 344 (Tex. Civ. App.—Galveston 1949, writ ref'd n.r.e.)(admitting evidence of defendant's replacement of old wires to show control and ownership).

Huckaby v. A.G. Perry & Son, Inc., 20 S.W.3d 194 (Tex. App.—Texarkana 2000, writ denied)(evidence of subsequent efforts by the state to improve an intersection following a truck accident was not offered to prove negligence or culpable conduct of the state and was not inadmissible as evidence of a party's subsequent remedial measures where state was not a party).

Russell v. Dunn Equipment, Inc., 712 S.W.2d 542 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(testimony from the defendant about subsequent repairs to a tractor trailer's brakes which struck and fatally injured the decedent was not admissible for purposes of showing that the brakes were in a dangerous condition and, hence, was properly excluded).

Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669 (Tex. App.—Amarillo 1991, writ denied)(evidence of subsequent remedial measures taken by the U.S. Army following a helicopter crash was admissible in a wrongful death case against the company which performed maintenance on the helicopter where the army was not a party to the suit and the evidence suggested that it was the actions of the Army and not those of the maintenance company which were responsible for the crash).

2. TEX. R. EVID. 408: Settlement Discussions

a. In General

Evidence of settlement discussions is not admissible to prove liability for the claims that were being discussed. See TEX. R. EVID. 408; see also *Avary v. Bank of Am.*, 72 S.W.3d 779, 798 (Tex. App.—Dallas 2002, pet. denied)(Rule

408 excludes offers of compromise or settlement “to allow a party to buy his peace and encourage settlement of claims outside of the court-house”). The Federal Rule goes further in its prohibition, specifically stating that impeachment is not an exception to Rule 408. *See* FED. R. EVID. 408. Additionally, the Federal Rule allows evidence of “conduct or statements made in compromise negotiations regarding the claim and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative or enforcement authority.” *See* FED. R. EVID. 408. The Texas Rule would seem to allow such evidence only when “proving an effort to obstruct a criminal investigation or prosecution.” *See* TEX. R. EVID. 408.

Another issue that often arises in this context is what constitutes settlement discussions. In Texas, courts have typically required two elements: (1) a preexisting dispute; and (2) a proposal of concession for the sake of peace. *See Hundere v. Tracy & Cook*, 494 S.W.2d 257, 260-61 (Tex. Civ. App.—San Antonio 1973, writ ref’d n.r.e.); *see also Mercedes Benz of N. Am., Inc. v. Dickinson*, 720 S.W.2d 844, 857 (Tex. App.—Fort Worth 1986, no writ)(letter demanding indemnification was an ultimatum and not a compromise offer). Evidence of a settlement discussion may be offered for another reason, unrelated to liability or an invalid claim. *See, e.g., Battles v. Adams*, 415 S.W.2d 479, 483 (Tex. Civ. App.—Austin 1967, writ ref’d n.r.e.)(testimony concerning settlement agreement was admissible to show effect of a boundary agreement in real-property case); *see also Portland S&L Ass’n v. Bernstein*, 716 S.W.2d 532, 537 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.)(admitting compromise negotiations into evidence related to a claim of misrepresentation arising out of negotiations).

b. Additional selected cases

Stergiou v. Gen. Metal Fabricating Corp., 123 S.W.3d 1 (Tex. App. [1st Dist.] 2003, pet. denied)(exclusion of documents proffered by defendant was error even though there was evidence that defendant subjectively believed it was an offer of compromise or settlement where the documents themselves failed to mention any concessions or to impose any conditions related to request that plaintiff drop any claims or relinquish rights).

MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 61 (Tex. App.—San Antonio 2005, pet. denied)(holding that Rule 408 does not bar the admission of evidence of settlement negotiations or statements made during those negotiations when offered “to establish the existence of a promise or agreement made by a non-party to the settled lawsuit.”).

3. TEX. R. EVID. 409: Medical Expenses

Evidence of the payment of medical expenses is not admissible to show liability. TEX. R. EVID. 409. Medical expenses are admissible as proof of the damages sought by a plaintiff, so long as they are reasonable and necessary. *See, e.g.,*

Robertson Tank Lines, Inc. v. Watson, 491 S.W.2d 706, 708-09 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.)(evidence of a medical-expense settlement is not admissible to show liability, but the relevant statute was not controlling; evidence was admissible to show bias and prejudice of witnesses).

4. TEX. R. EVID. 410: Pleas

Guilty pleas that were later withdrawn and pleas of *nolo contendere* are excluded under Rule 410 on policy grounds because the admission of such evidence tends to encourage the jury to draw the inference that guilt or liability on another occasion is more likely to indicate guilt or liability on the occasion in question. *See* TEX. R. EVID. 410. The Texas and the Federal Rules differ slightly in that the Federal Rule does not specifically exclude from evidence in a civil or criminal trial a plea of *nolo contendere* that was later withdrawn. *See* FED. R. EVID. 410. The Texas Rule states that evidence of a plea of *nolo contendere* is not admissible in a civil suit against the defendant but omits to exclude *nolo contendere* pleas that are withdrawn. *See* TEX. R. EVID. 410(2). There is one additional distinction between the state and federal rule 410. Federal Rule of Evidence 410 contains an additional exception to the rule, which the Texas Rule does not, allowing in evidence “in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.” *See* FED. R. EVID. 410(4); *and compare with* TEX. R. EVID. 410(4).

Texas Rule 410 has been strictly followed in many contexts. For example, “plea offers or other statements to anyone other than an attorney for the prosecution are not covered by Rule 410 and are admissible even if offered ‘against’ the defendant.” *See Cantu v. State*, 993 S.W.2d 712, 722 (Tex. App.—San Antonio 1999, pet. ref’d); *see also Montoya v. State*, 65 S.W.3d 111, 115-16 (Tex. App.—Amarillo 2000, no pet.) (holding “the trial court did not abuse its discretion in excluding evidence of plea discussions between appellant’s uncle and the State.”). However, the courts have also interpreted portions of that rule and determined that statements made during plea negotiations cannot be admitted for impeachment. *See, e.g., Taylor v. State*, 19 S.W.3d 858, 864 (Tex. App.—Eastland 2000, pet. ref’d) (offering proof of statements taking place during the course of plea negotiations for impeachment purposes violates Rule 410).

5. TEX. R. EVID. 411: Liability Insurance

Similarly, evidence that a person did or did not have liability insurance is not admissible to show liability. *See* TEX. R. EVID. 411. There are exceptions to this rule, which is where the Texas and Federal Rules differ slightly. If evidence regarding the existence of liability insurance is offered for another reason, such as “proof of agency, ownership, or control...or bias or prejudice of a witness” it is admissible. *See* FED. R. EVID. 411. However, the Texas Rule requires that “proof of agency, ownership, or control” be in dispute before liability insurance evidence becomes admissible. *See* TEX. R. EVID. 411. “The purpose of Texas Rule of

Evidence 411 is to avoid informing the jury that someone other than the defendant may be liable to pay the damages.” *See Brownsville Pediatric Ass’n v. Reyes*, 68 S.W.3d 184, 193 (Tex. App.—Corpus Christi 2002, no pet.). Thus, in a situation where liability insurance is mentioned because of an issue pertaining to it—such as an insurance company issuing an annuity, at least one court of appeals has held that “the harm the rule was designed to prevent does not come into play.” *See id.*

The Rule’s specified exceptions generally tend to support this contention since the Rule’s purpose is largely to avoid prejudice to the jury by admitting evidence of liability insurance for no other reason than to allow the jury to know that a defendant may not be fully responsible for paying damages. *See generally, e.g. Jacobini v. Hall*, 719 S.W.2d 396, 401 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.) (finding “since the main point of contention in this lawsuit was the matter of ownership of the vehicle, evidence of insurance was admissible under rule 411.”); *see also Davis v. Stallones*, 750 S.W.2d 235, 238 (Tex. App.—Houston [1st Dist.] 1987, no writ) (holding that “because of appellant’s repeated references to the ‘missing’ and ‘unavailable’ wreckage, the issue of control was disputed, and the testimony about control was properly admitted.”).

V. Conclusion.

The determination of whether evidence is relevant and admissible turns on the facts of each case. Correspondingly, the operation of the Article IV Rules turns on the particular evidence at issue. As a result, a close reading of the Rules and an understanding of recent case law applying the Rules is necessary.