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The Ohio Rules of Evidence: Part II

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THE OHIO RULES OF EVIDENCE
PART II

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This is the second in a series of articles examining the Rules of Evidence as they apply in criminal cases.

RULE 201: JUDICIAL NOTICE

Rule 201 is the only provision governing judicial notice in the Rules of Evidence. The rule is limited to judicial notice of adjudicative facts. According to the Staff Note, Rule 201 "in its entirety, reflects existing Ohio practice . . . ." This statement is somewhat misleading. Although numerous Ohio decisions fit comfortably within the framework of Rule 201, these cases do not distinguish between adjudicative and legislative facts as does Rule 201, nor is it clear that mandatory judicial notice of facts was recognized prior to the adoption of Rule 201(D). In addition, the procedure for taking judicial notice set forth in Rules 201(E) and (G) was not specified in the prior cases.

Judicial Notice of Law

Rule 201 is limited to judicial notice of adjudicative facts. There is no provision governing judicial notice of law in the Rules of Evidence. Judicial notice of law is governed by Criminal Rule 27, which provides that the "judicial notice and determination of foreign law provisions of Civil Rule 44.1 apply in criminal cases." Civil Rule 44.1(A) governs judicial notice of Ohio law, including municipal ordinances and administrative regulations. *See also* R.C. 2941.12 (judicial notice of statutes in criminal cases).

Adjudicative Facts

Rule 201 is limited to judicial notice of adjudicative facts. The term "adjudicative" fact is used in contradistinction to the term "legislative" fact. Both terms were coined by Professor Davis. *See* Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 402 (1942); Davis, Judicial Notice, 55 Colum. L. Rev. 945 (1955). Professor Davis described adjudicative facts as follows:

> When a court or an agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive or intent — the court or agency is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts . . . .Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. Davis, Judicial Notice, 55 Colum. L. Rev. 945, 952 (1955).

For example, if an accused is charged with grand theft of an automobile, the prosecution is required to prove that the value of the automobile was $150.00 or more. *See* R.C. 2913.02(B). The value of the automobile is an adjudicative fact; it is a "fact of the case" that would normally be decided by a jury.

In contrast to adjudicative facts (the facts of the case), legislative facts are those facts "which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Advisory Committee Note, Fed. R. Evid. 201. According to Professor Davis, when a court "develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts . . . . Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take." Davis, Judicial Notice, 55 Colum. L. Rev. 945, 952 (1955).

While the distinction between legislative and adjudicative facts may be clear in many cases, in

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other cases the distinction is anything but clear. *See* 1 D. Louisell & C. Mueller, Federal Evidence 405-15 (1977); 21 C. Wright & K. Graham, Federal Practice and Procedure 474-81 (1977).

Kinds of Facts Subject to Judicial Notice

Rule 201(B) specifies two kinds of facts that are subject to judicial notice: (1) facts generally known within the territorial jurisdiction of the trial court, and (2) facts capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. These two categories of facts, however, are limited to facts that are "not subject to reasonable dispute." By limiting judicial notice to indisputable facts, Rule 201 has adopted the Morgan view of judicial notice. *See* Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944). Two consequences follow from the adoption of this theory of judicial notice. First, once a fact is judicially noticed by the court, evidence tending to establish or rebut that fact is inadmissible. Second, the jury must accept the judicially noticed fact and is so instructed. There is, however, one deviation from the Morgan theory that is recognized by the rule. Rule 201(G) provides that in criminal cases the jury shall be instructed that they are not bound to accept a judicially noticed fact.

Procedure for Taking Judicial Notice

Rule 201(C) permits a court to take judicial notice *sua sponte,* notwithstanding the absence of a request by either party. Rule 201(D) requires the court to take judicial notice if requested by one of the parties. If the fact is one capable of accurate and ready determination, the requesting party also must supply the court with sources whose accuracy cannot reasonably be questioned. The requirement of mandatory judicial notice upon request appears to represent a change in Ohio law. *See* Zimmerman v. Rockford Stone Co., 93 Ohio L. Abs. 47, 49, 196 NE(2d) 474, 476 (C.P. 1963) ("The taking of judicial notice in situations such as this is discretionary with the court.").

Rule 201(E) entitles a party, upon timely request, to an opportunity to be heard concerning both the propriety of taking judicial notice and the tenor of the matter to be noticed. In situations in which a party has no advanced indication that judicial notice will be taken, the party still is entitled to an opportunity to be heard even if the court has already judicially noticed the fact. The hearing should be held outside the hearing of the jury. *See* Rules 103(C) and 104(C). The provision requiring that a party be granted an opportunity to be heard is consitutionally mandated by due process. In Garnert v. Louisiana, 368 US 157 (1961), the U.S. Supreme Court commented:

> [U]nless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where the evidence is unknown. Such an assumption would be a denial of due process. *Id.* at 173.

Rule 201(F) provides that judicial notice may be taken at any time of the proceedings. Thus, judicial notice may be taken on appeal. The principal limitation on this use of judicial notice involves criminal cases in which no evidence on an ultimate fact has been introduced at trial and the trial court has not judicially noticed that fact. The appellate court should not be permitted to supply the missing fact on appeal through the use of judicial notice. *See* Garner v. Louisiana, 368 US 157, 173 (1961) ("To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial.'"). In United States v. Jones, 580 F(2d) 219 (6th Cir. 1978), the court commented: "Rule 201(g) plainly contemplates that the jury in a criminal case shall pass upon facts which are judicially noticed. This it could not do if this notice were taken for the first time after it had been discharged and the case was on appeal." *Id.* at 224.

Jury Instructions

Rule 201(G) governs jury instructions of judicially noticed facts. In criminal cases the court must instruct the jury that it "may, but is not required to, accept as conclusive any fact judicially noticed." In effect, judicial notice operates as a permissive inference in this context. This provision was added by Congress. According to the House Judiciary Committee Report, a "mandatory instruction to a jury in criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to jury trial." H.R.Rep.No. 93-650, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7080. *See also* State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951).

Although Rule 201(G) specifies that the jury is not bound to accept a judicially noticed fact, it leaves unanswered the question of whether evidence contravening the fact noticed may be introduced by a criminal defendant. *See* 21 C. Wright & K. Graham, Federal Practice & Procedure 534-35 (1977).

RULE 301: PRESUMPTIONS

Rule 301 is the only provision governing presumptions in the Rules of Evidence. The rule covers only rebuttable presumptions in civil cases. There is no rule dealing with criminal presumptions. The U.S. Supreme Court proposed a rule on criminal presumptions (proposed Federal Rule 303), but it was not enacted by Congress. *See* 56 F.R.D. 212-14 (1973). Presumptions in criminal cases, however, are subject to review on constitutional grounds. *See* County Court of Ulster v. Allen

442 US 140 (1979); Barnes v. United States, 412 US 837 (1973); C. McCormick, Evidence §§ 344, 346 (2d ed. 1972).

RULE 401: RELEVANT EVIDENCE

Rule 401 defines relevant evidence as "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." This definition embraces the concepts of relevancy and materiality. The phrase "fact that is of consequence to the determination of the action," however, is used in lieu of the phrase "material fact." Consequently, to be admissible evidence must be both relevant and material.

Relevancy concerns the relationship between an item of evidence and the proposition for which it is offered to prove. In contrast, materiality concerns the relationship between the proposition for which the item of evidence is offered and the issues in the case. *See* C. McCormick, Evidence § 185 (2d ed. 1972). For example, evidence of the results of a breathalyzer test tends to prove whether the person tested was intoxicated. The test results are relevant to the proposition (intoxication). Evidence of intoxication, however, may not be material under the substantive law. If the results of a breathalyzer test were offered by a criminal defendant as a defense in an aggravated vehicular homicide case (R.C. 2903.06), the evidence should be excluded as immaterial, even though the results of the test tend to prove intoxication. On the other hand, if the defendant were charged with aggravated murder (R.C. 2903.01), the same evidence would be material because it tends to negate the element of prior calculation and design. *See* Long v. State, 109 OS 77, 141 NE 691 (1923).

As noted above, Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of [a material or consequential fact] more probable or less probable than it would be without the evidence." This definition is consistent with Barnett v. State, 104 OS 298, 135 NE 647 (1922), in which the Ohio Supreme Court commented: "Any fact that makes more probable or less probable, where the probabilities are in question, renders such fact, relevant as evidence . . ." *Id.* at 306 *Accord,* State v. Phipps, 3 App(2d) 226, 210 NE(2d) 138 (1964), *cert. denied,* 382 US 957 (1965).

This standard does *not* require that the evidence make a material fact more probable than not, but only that the material fact be more probable with the evidence than without the evidence. For example, in a homicide case the prosecution may proffer evidence showing a motive on the part of the defendant. Such evidence does not establish that it is more probable than not that the defendant committed the crime. The evidence, however, would satisfy the standard of Rule 401; it is more probable that the defendant committed the crime with the evidence than without it. This illustrates the difference between sufficiency and admissibility. The evidence as a whole must be sufficient to permit the issue to be decided by the trier of fact. Each item of evidence, however, need only advance the inquiry.

RULE 402: ADMISSIBILITY OF RELEVANT EVIDENCE

Rule 402 is the general provision governing the admissibility of evidence. Under that rule, relevant evidence is admissible in the absence of a rule of exclusion and irrelevant evidence is inadmissible. Rules of exclusion may be based on a number of sources, including state and federal constitutional and statutory provisions, other rules of evidence, and other procedural rules prescribed by the Ohio Supreme Court.

U.S. Constitution

Many of the criminal procedure provisions of the federal Bill of Rights are protected by an exclusionary rule, and consequently evidence obtained in violation of these constitutional provisions must be excluded in state trials. For example, evidence discovered or seized in violation of the Fourth Amendment is subject to exclusion. *See* Mapp v. Ohio, 367 US 643 (1961) (Fourth Amendment). Similarly, statements obtained from criminal defendants in violation of the U.S. Constitution may be subject to exclusion. *See* Miranda v. Arizona, 384 US 436 (1966) (self-incrimination clause); Brewer v. Williams, 430 US 387 (1977) (right to counsel). Evidence of pretrial identifications obtained in violation of constitutional rights also may be excluded. *See* Moore v. Illinois, 434 US 220 (1977) (right to counsel); Manson v. Braithwaite, 432 US 98 (1977) (due process). Moreover, the Sixth Amendment right of confrontation may preclude the admission of evidence — principally hearsay. *E.g.,* Barber v. Page, 390 US 719 (1968).

Ohio Constitution

The Constitution of Ohio contains a Bill of Rights, which includes many provisions analogous to the federal Bill of Rights. For example, Article I, section 10 provides for the right of confrontation, the right to compulsory process, and the privilege against compelled self-incrimination. Similarly, section 14 of Article I prohibits unreasonable searches and seizures.

Although there is a substantial overlap between the federal and Ohio Bill of Rights, state courts may interpret state constitutions to provide greater protection to criminal defendants and thus exclude evidence that would be admissible in federal trials. The U.S. Supreme Court has acknowledged this aspect of federalism on a number of occasions. *See* Lakeside v. Oregon, 435 US 330 (1978); Lego v. Twomey, 404 US 477 (1978); Cooper v. California, 386 US 58 (1967); Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

For example, in State v. Gallagher, 38 OS(2d) 291, 313 NE(2d) 396 (1974), the Court held that an in-custody parolee was entitled to *Miranda* warn-

ings before being questioned by his parole officer. The U.S. Supreme Court granted certiorari but then remanded the case because it was "unable to determine whether the Ohio Supreme Court rested its decision upon the Fifth and Fourteenth Amendments to the Constitution of the United States, or Art. 1, § 10, of the Ohio Constitution, or both." Ohio v. Gallagher, 425 US 257, 259 (1976). On remand, the Ohio Court reinstated its prior decision, stating that it was "independently constrained to the result we reached by the Ohio Constitution." State v. Gallagher, 46 OS(2d) 225, 228, 348 NE(2d) 336, 338 (1976).

State and Federal Statutes

Rule 402 provides that relevant evidence may be excluded "by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio . . . ." A number of provisions of the Revised Code exclude certain types of evidence or impose conditions on admissibility. *E.g.,* R.C. 2907.02 (evidence of sexual activity in rape prosecutions); R.C. 4511.19 (evidence of blood-alcohol content). These exclusionary statutes are controlling if "not in conflict with a rule of the Supreme Court of Ohio." This provision of Rule 402 is based on Article IV, § 5(B) of the Constitution of Ohio, which authorizes the Supreme Court to promulgate rules of practice and procedure that do "not abridge, enlarge, or modify any substantive rights."

Although the phrase "Act of Congress," which appears in Federal Rule 402, was deleted from the Ohio rule, some federal statutes are intended to operate in state as well as federal court, and under the supremacy clause these provisions would preempt contrary state evidentiary law. For example, the federal wiretapping and eavesdropping statute provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, *a State, or a political subdivision thereof* if the disclosure of that information would be in violation of this chapter. 18 U.S.C. § 2515 (emphasis added).

Other Rules of Evidence

Relevant evidence also may be excluded by the operation of other rules of evidence. A number of exclusionary rules are found elsewhere in the Rules of Evidence. *E.g.,* Rule 410 (certain types of pleas and offers to plead in criminal cases); Rule 501 (privileges); Rule 802 (hearsay). Consequently, an item of evidence may meet the relevancy standard of Rule 401 and nevertheless be inadmissible because it fails to satisfy the requirements of some other provision of the Rules of Evidence.

Other Court Rules

Rule 402 also provides that relevant evidence may be inadmissible due to "other rules prescribed by the Supreme Court of Ohio," which would include the Rules of Criminal and Juvenile Procedure. For example, Criminal Rule 12.1 requires notice of intent to offer evidence of alibi. The requirement imposed by this rule must be satisfied.

RULE 403: EXCLUSION OF RELEVANT EVIDENCE

Rule 403 specifies the conditions under which a trial judge is required or permitted to exclude relevant evidence. The application of Rule 403 requires a three-step process. First, the trial court must determine the probative value of proffered evidence. Second, the court must identify the presence of the dangers enumerated in Rule 403(A) — unfair prejudice, confusion of issues, or misleading the jury; or the considerations enumerated in Rule 403(B) — undue delay or the needless presentation of cumulative evidence. Finally, the court must balance the probative value against the identified dangers or considerations. If the enumerated dangers substantially outweigh the probative value of the evidence, exclusion is mandatory under Rule 403(A). If the enumerated considerations substantially outweigh probative value, exclusion is discretionary under Rule 403(B).

Unfair Prejudice

Rule 403(A) requires the exclusion of relevant evidence if the risk of unfair prejudice substantially outweighs its probative value. In one sense, all evidence introduced by one party against another is *prejudicial* to the latter's case in the sense that it damages that party's position at trial. This is not the concern of the rule. Only if the evidence is prejudicial in the sense that the jury cannot properly evaluate it, does Rule 403 come into play. Numerous Ohio cases have recognized unfair prejudice as a factor affecting admissibility. *E.g.,* State v. Strodes, 48 OS(2d) 113, 116, 357 NE(2d) 375, 378 (1976) (evidence admitted because its "probative value . . . was not outweighed by the danger of prejudicial effect . . . ."); State v. Woodards, 6 OS(2d) 14, 25, 215 NE(2d) 568, 577, *cert. denied,* 385 U.S. 930 (1966).

Confusion of Issues; Misleading the Jury

Rule 403(A) requires the exclusion of evidence whose probative value is substantially outweighed by the dangers of confusion of issues or of misleading the jury. These factors involve the "probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues." C. McCormick, Evidence 439 (2d ed. 1972). The Ohio cases have recognized confusion of the issues as a proper factor in considering the admissibility of relevant evidence. *See* State v. Curry, 43 OS(2d) 66, 330 NE(2d) 720 (1975); Cottman v. Federman Co., 71 App 89, 47 NE(2d) 1009 (1942). *See also* Whiteman v. State, 119 OS 285, 164 NE 51 (1928) ("It is the province of the court to determine whether such testimony would be misleading . . .") (syllabus, para. 4).

Discretionary Exclusion

Rule 403(B) permits, but does not require, the

trial court to exclude evidence whose probative value is substantially outweighed by the considerations of undue delay or the needless presentation of cumulative evidence. These factors involve "the likelihood that the evidence offered and the counter proof will consume an undue amount of time." C. McCormick, Evidence 439-440 (2d ed. 1972). In contrast to the dangers enumerated in Rule 403(A), the factors of undue delay and the needless presentation of cumulative evidence are not intended to protect the integrity of the factfinding process. They entail "no serious likelihood of a miscarriage of justice . . ." Advisory Committee's Note, Fed. R. Evid. 403, 51 F.R.D. 345 (1971) (revised draft). Instead these factors are designed to conserve judicial resources.

The Ohio cases have recognized the trial judge's authority to exclude cumulative evidence. In Bird v. Young, 56 OS 210, 46 NE 819 (1897), the trial court limited the number of witnesses on an issue to six for each side, "refusing to listen to cumulative testimony on the same facts and questions by thirteen other persons." The Supreme Court held that "the matter is within the discretion of the trial court, and it does not appear affirmatively that the court abused its discretion in this ruling." *Id.* at 223-224; *accord,* Borschewski v. State, 13 App. 362 (1920).

Limitations on the amount of evidence or the number of witnesses offered by an accused in a criminal case must also be evaluated in light of the Sixth Amendment guarantee of compulsory process. In Washington v. Texas, 388 US 14 (1967), the Court commented:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts . . . [The defendant] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Id.* at 19.

See also Ohio Const., art. I, § 10. Consequently, in criminal cases a trial court should exercise its discretion more cautiously when excluding evidence proffered by the accused.

Balancing

If the probative value of proffered evidence is substantially outweighed by the dangers of unfair prejudice, or confusion of the issues, or of misleading the jury, exclusion is mandatory under Rule 403(A). If the probative value of proffered evidence is substantially outweighed by considerations of undue delay or needless presentation of cumulative evidence, exclusion is discretionary under Rule 403(B). The balancing recognized in Rule 403 is not new to Ohio law. In State v. Smith, 50 App(2d) 183, 362 NE(2d) 1239 (1976), the court observed: "[E]vidence, though relevant, should be excluded when its probative value is substantially outweighed by the risk that its admission will cause undue or unfair prejudice." *Id.* at 197.

Application of Rule 403 requires the trial court to make a reasoned ad hoc judgment in the context of a particular case. Although the rule requires a case-by-case analysis, several points deserve comment. First, the rule manifests a definite bias in favor of admissibility; the dangers or considerations must *substantially* outweigh probative value before evidence should be excluded. Second, the federal drafters have indicated that other factors, such as limiting instructions and alternative means of proof, should play a part in the trial court's decision: "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. . . . The availability of other means of proof may also be an appropriate factor." Advisory Committee's Note, Fed. R. Evid. 403. "Other means of proof" includes stipulations. As one court has stated: "In achieving this balance [under Rule 403], the court has the power to require the government to accept a tendered stipulation in whole or in part as well as to permit it to reject the offer to stipulate in its entirety." United States v. Grassi, 602 F(2d) 1192, 1197 (5th Cir. 1979).

RULE 404: CHARACTER EVIDENCE

Rule 404(A) governs the circumstantial use of character evidence, i.e., the admissibility of evidence of a character trait to prove that a person acted in conformity with that trait on a particular occasion. The rule generally prohibits the circumstantial use of character evidence. Three exceptions are recognized; the exceptions relate to (1) a criminal defendant's character, (2) a victim's character, and (3) a witness' character.

Character of the Accused

An accused in a criminal case may offer evidence of his character. Rule 405(A) limits the methods by which the accused may introduce character evidence; under that provision only opinion and reputation evidence may be used, not specific instances of conduct. Moreover, in prosecutions for rape and gross sexual imposition, R.C. 2907.02(D) and R.C. 2907.05(D) control rather than the rule.

The exception recognized in Rule 404(A)(1) permits the accused to introduce only evidence of a "pertinent trait of his character." In other words, the character trait must be relevant to the crime charged. For example, in Griffin v. State, 14 OS 55 (1862), the Supreme Court held that "[t]he general character which is the proper subject of inquiry should also have reference to the nature of the charge against the defendant. Thus, in the present case, the defendant being charged with a crime necessarily importing dishonesty, called witnesses who gave evidence tending to show a general good character for honesty." *Id.* at 63. *See also* Sabo v. State, 119 OS 231, 239, 163 NE 28, 31 (1928).

Once the accused has introduced evidence of a pertinent character trait, the prosecution may offer character evidence in rebuttal. The same limitations that apply to character evidence offered by the defense apply to the prosecution. First, the

character trait that is the subject of rebuttal must be "pertinent" to the crime charged. For example, in a theft case the defense character witnesses should only be allowed to testify concerning the defendant's character for honesty. Similarly, the rebuttal witnesses' testimony should be limited to the same trait, i.e., dishonesty. Second, Rule 405(A) controls the methods of proof which are available for the presentation of rebuttal evidence. Thus, the prosecution, like the accused, is limited to opinion or reputation evidence.

R.C. 2945.56, which permitted the prosecution to rebut defense character evidence by introducing the defendant's prior convictions for crimes involving moral turpitude, is superseded by Rule 405(A).

Character of the Victim

Rule 404(A)(2) permits an accused to present evidence of a pertinent character trait of the alleged victim of the charged offense. Once the accused has introduced such evidence, the prosecution may offer rebuttal evidence. The prosecution, however, is prohibited from introducing evidence of the victim's character until the defense "opens the door." *See* State v. White, 15 OS(2d) 146, 150-51, 239 NE(2d) 65, 69-70 (1968). Rule 405(A) limits the methods of proof that the accused and prosecution may use to show or to rebut the character of a victim; only reputation or opinion evidence is permitted.

A victim's character may be relevant in two types of cases: on the issue of self-defense in homicide and assault cases and on the issue of consent in rape and gross sexual imposition cases. In the latter cases, R.C. 2907.02(D) and R.C. 2907.05(D) control rather than the rule. Consequently, Rule 404(A)(2) will be applicable principally on the issue of self-defense. For example, a homicide defendant could introduce evidence of the victim's violent and aggressive character to show that the victim was the first aggressor, thereby establishing one element of self-defense. Once evidence of the victim's character is introduced by the accused, the prosecution may introduce rebuttal evidence of the victim's character for peacefulness.

The prosecution's right to introduce evidence of the victim's character, however, is not limited to cases in which the defendant introduces evidence of the victim's character. Any evidence that the victim was the first aggressor in a homicide case triggers the prosecution's right to introduce evidence of the victim's peaceful character.

Character of a Witness

The third exception to the general prohibition against the use of character evidence concerns the character of witnesses. This exception, recognized in Rule 404(A)(3), involves the impeachment use of character evidence and is therefore limited to the character trait of truthfulness. Rule 404(A)(3) does not specify the conditions under which character evidence may be used to impeach a witness. Instead, the rule contains a cross-reference to Rules 607, 608 and 609 which govern the impeachment use of character evidence.

Other Crimes, Wrongs, or Acts

Rule 404(B) provides that evidence of other crimes, wrongs, or acts, although not admissible to prove character, may be admissible for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. For example, if a person steals a gun and later uses that weapon to commit a murder, the theft may be relevant in the homicide prosecution to show the identity of the murderer. Thus, although evidence of the theft incidentially evidences larcenous character, it is not being offered for that purpose. *See* State v. Watson, 28 OS(2d) 15, 275 NE(2d) 153 (1971). Rule 404(B) supersedes R.C. 2945.59 ("similar acts" statute).

Rule 404(B) only provides that evidence of other crimes, wrongs, or acts *may* be admissible; the rule is not mandatory. The rule, however, provides no standard for deciding when such evidence may be admitted. Since admission in this instance involves questions of relevance, Rules 401-403 are the controlling provisions. Rules 401-403, read in light of the prior Ohio cases, would seem to require that evidence of other acts is admissible only if the prosecution can establish that (1) the evidence is offered to prove a consequential or material fact; (2) such consequential or material fact is an actual issue in the case; (3) the evidence tends to prove the consequential fact, and (4) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence.

RULE 405: METHODS OF PROVING CHARACTER

Rule 405 specifies the permissible methods of proving character. It governs *how* character may be proved but not *when* character may be proved. The latter issue is governed by Rule 404(A). That provision prohibits the circumstantial use of character unless one of the three enumerated exceptions discussed above is applicable.

Reputation and Opinion Evidence

Rule 405(A) permits the use of reputation evidence to prove character. Reputation is not synonymous with character; it is only one method of proving character. The Ohio cases have recognized the use of reputation to prove character. *See* State v. Elliott, 25 OS(2d) 249, 267 NE (2d) 806 (1971), *vacated on other grounds,* 408 US 939 (1972); State v. Cochrane, 151 OS 128, 84 NE(2d) 742 (1949); 4 Ohio Jury Instructions § 411.05 (1974 Provisional).

The offering party must lay a proper foundation establishing the witness' qualifications to testify about a person's reputation in the community: "The preliminary qualifications of the [character] witness must be such as to advise the court and the jury that he has the means of knowing such general reputation of the [person] in the community . . ." Radke v. State, 107 OS 399, 140 NE 586 (1923) (syllabus, para. 1). In addition, the commu-

nity may not be too "remote," i.e., in a place "where he has never lived, and where he is not shown to be generally known or acquainted . . ." Griffin v. State, 14 OS 55 (1862) (syllabus, para. 5). It is the accused's or victim's reputation at the time of the charged offense that is relevant for this purpose.

Rule 405(A) permits the use of opinion as well as reputation evidence to prove character if character is admissible under Rule 404(A). Thus, a witness who is sufficiently acquainted with the accused or the victim may give his opinion of that person's character. The Staff Note indicates that Rule 405 "expands Ohio law by permitting the use of opinion evidence as to character . . . . At common law, proof of character was only by evidence of reputation."

Specific Instances; Cross-Examination

In addition to opinion and reputation evidence, character could be proved by evidence of specific instances of conduct. Although evidence of specific instances of conduct may be the strongest evidence of character, Rule 405(A) prohibits its use. This follows prior Ohio law. *See* State v. Cochrane, 151 OS 128, 134, 84 NE(2d) 742, 745 (1949); Hamilton v. State, 34 OS 82, 86 (1877); Griffin v. State, 14 OS 55, 63 (1862). If character, however, is an element of a crime or defense, specific instances may be admitted under Rule 405(B). Because few, if any, crimes or defenses include character as an element, Rule 405(B) rarely will be applicable in criminal cases.

Rule 405(A) also provides that on "cross-examination, inquiry is allowable into relevant specific instances of conduct." The purpose of this inquiry is to test the witness' qualifications for testifying about another's reputation in the community. In State v. Elliott, 25 OS(2d) 249, 267 NE(2d) 806 (1971), *vacated on other grounds,* 408 US 939 (1972) the Supreme Court commented:

> A character witness may be cross-examined as to the existence of reports of particular acts, vices, or associations of the person concerning whom he has testified which are inconsistent with the reputation attributed to him by the witness — not to establish the truth of the facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given his testimony. Such inconsistent testimony tends to show either that the witness is unfamiliar with the reputation concerning which he has testified, or that his standards of what constitutes good repute are unsound. *Id.* (syllabus, para. 2)

RULE 406: HABIT EVIDENCE

Rule 406 provides that evidence of the habit of a person and the routine practice of an organization when offered to prove that a person or organization acted in conformity with that habit or routine practice on a particular occasion is admissible. The phrase "routine practice of an organization" refers to the "habits" of an organization, commonly known as business practice, usage or custom. The rule specifically provides that the admissibility of evidence of habit does not depend on either the presence of eyewitness or corroboration. Rule 406 provides only that evidence of habit or routine practice as proof of conduct is relevant. Consequently, Rules 402 and 403 also must be consulted to determine the admissibility of habit evidence.

Evidence of habit must be distinguished from evidence of character because the former is admissible under Rule 406, whereas the latter generally is inadmissible under Rule 404(A). Rule 406, however, does not define habit. Nevertheless, the Advisory Committee's Note to Federal Rule 406 quotes extensively from McCormick's description of habit and character:

> Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. 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. The doing of the habitual acts may become semi-automatic.

The key elements in determining whether conduct is habit are specificity, repetition, and the semi-automatic nature of the conduct. The factor of semi-automatic or nonvolitional conduct is illustrated by Levin v. United States, 338 F(2d) 265 (DC Cir 1964). In *Levin* the defendant offered evidence of his "habit" of observing the Sabbath in support of an alibi defense. The D.C. Circuit upheld the exclusion of this evidence, stating, "It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." *Id.* at 272.

In Walton v. Elftman, 64 Misc 45, 410 NE(2d) 1282 (C.P. 1980), the court, citing Rule 406, admitted evidence of a person's "habit" of travelling home from work by a certain route.

RULE 410: PLEAS AND OFFERS TO PLEAD GUILTY AND NO CONTEST

Rule 410 governs the admissibility of evidence of (1) withdrawn pleas of guilty, (2) pleas of no contest, including equivalent pleas from another jurisdiction, (3) pleas of guilty in a violations bureau, (4) offers to plead guilty or no contest, and (5) statements made in connection and relevant to such pleas and offers. The rule provides that evidence of all the above is inadmissible in both civil and criminal cases if offered against the person who made the offer, plea, or statement. This exclu-

sionary rule also covers the impeachment use of offers, pleas, and related statements. The rule, however, carves out an exception for perjury and false statement prosecutions.

Withdrawn Guilty Pleas

Rule 410 provides that withdrawn guilty pleas as well as statements made in connection with and relevant to such pleas are inadmissible. The Advisory Committee Note to Federal Rule 410 sets forth two reasons for exclusion in this context. First, the Note cites Kercheval v. United States, 274 US 220 (1927), for the proposition that admission of a withdrawn guilty plea "would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial." Second, the Note cites People v. Spitaleri, 9 NY(2d) 168, 212 NYS(2d) 53, 173 NE(2d) 35 (1961), for the proposition that admission of a withdrawn guilty plea would "compel [the] defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea." *See also* State v. Gray, 60 App 418, 399 NE(2d) 131 (1979).

Pleas of No Contest

Rule 410 provides that evidence of pleas of no contest or an equivalent plea from another jurisdiction as well as statements made in connection with and relevant to such pleas are inadmissible. Criminal Rule 11(A) permits a criminal defendant to plead no contest with the consent of the court. The exclusion of evidence of pleas of no contest and related statements is necessary to preserve the distinction between pleas of no contest and pleas of guilty. In this respect, Rule 410 follows Criminal Rule 11(B)(2) which provides: "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." Rule 410 goes beyond Criminal Rule 11(B)(2) by specifically excluding statements made in connection with and relevant to no contest pleas.

Guilty Pleas in Violations Bureau

Rule 410 provides that evidence of a guilty plea in a violations bureau and related statements are inadmissible if offered against the person who made the plea. Traffic Rule 13(A) establishes traffic violation bureaus for all courts except juvenile courts. Traffic violation bureaus are authorized to dispose of all traffic offenses except for certain enumerated serious offenses. Traf. R. 13(B). Traffic Rule 13(D) specifies the procedures for pleas of guilty. Rule 11 of the Rules of Superintendance for Municipal Courts and County Courts establishes violation bureaus for minor misdemeanors. Criminal Rule 4.1 prescribes the procedures for such cases.

Offers to Plead Guilty or No Contest

Rule 410 provides that evidence of offers to plead guilty or no contest as well as statements made in connection with and relevant to such offers are inadmissible. The exclusion of evidence of offers to plead guilty or no contest and related statements applies to all offers and statements made during an in-court inquiry into the providency of a guilty or no contest plea. Criminal Rule 11(C)-(E) establishes detailed procedures for determining the voluntariness of pleas of guilty or no contest. Under Rule 410 statements made during Rule 11 hearings are inadmissible if the plea is later withdrawn or rejected. This is consistent with Criminal Rule 11(G). Rule 410 goes beyond Criminal Rule 11(G) by specifically excluding statements as well as offers to plead guilty or no contest.

In addition to in-court statements, Rule 410 covers certain out-of-court offers and statements that are made in connection with and relevant to offers to plead guilty or no contest. This clearly covers offers and statements made during discussions between defense attorneys and prosecutors. Several federal cases have read Rule 410 broadly to cover some "plea bargain" statements made during discussions between defendants and law enforcement officers. *See* United States v. Herman, 544 F(2d) 791, 795-99 (5th Cir 1977); United States v. Brooks, 536 F(2d) 1137, 1138-39 (6th Cir 1976); United States v. Smith, 525 F(2d) 1017, 1020-22 (10th Cir. 1975). In United States v. Robertson, 582 F(2d) 1356 (5th Cir 1978) (en banc), the Fifth Circuit established the following test for determining whether statements fall within the exclusionary coverage of Federal Rule 410:

> The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances. *Id.* at 1366.

Certainly, the language of Rule 410 does not preclude such an interpretation. Moreover, exclusion is required under Rule 410 notwithstanding the reading of *Miranda* warnings. These federal cases led to the amendment of Federal Rule 410. Federal Rule 410(4) now limits exclusion to "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."