

California Evidence Code—Federal Rules of Evidence

VII. Relevance: Definition and Limitations—Conforming the California Evidence Code to the Federal Rules of Evidence

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This article examines from a comparative perspective the rules of evidence relating to relevance and its limits. The Article compares the approaches of the California Evidence Code (“Code”) and the Federal Rules of Evidence (“Rules”) to challenges to the introduction of evidence on the grounds of irrelevance or on the basis of limits placed on the introduction of relevant evidence. Where pertinent, this Article also considers the approach of the 1999 version of the Uniform Rules of Evidence (“Uniform Rules”).

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I prepared this Article in response to a study that the California Law Revision Commission ("Commission") authorized to assess whether the Code should be conformed to the Rules. The California Legislature created the Commission in 1953 as the permanent successor to the Code Commission.¹ Its chief responsibility is to review California statutory and decisional law to discover defects and anachronisms and to recommend legislation to make needed reforms.

This Article is the seventh in the series and was submitted to the Commission on December 1, 2006.² The California and federal provisions compared were in effect as of December 2006. To assist the reader, the pertinent Rules and Code sections, respectively, are reproduced at the beginning of each section of this Article. They are followed by a Comparative Note in which the Code sections are compared with the Federal Rules.

The opinions, conclusions, and recommendations contained in this Article are those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Commission.

1.00 Relevance in General

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

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

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these

rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

**RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME**

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

§ 210. Relevant evidence

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

§ 350. Only relevant evidence admissible

No evidence is admissible except relevant evidence.

§ 351. Admissibility of relevant evidence

Except as otherwise provided by statute, all relevant evidence is admissible.

§ 352. Discretion of court to exclude evidence

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Comparative Note. These Rules and Code sections set out the fundamental condition that all evidence must satisfy if it is to be admitted: no evidence is admissible unless it is relevant. The provisions then postulate the basic rule of admissibility: unless otherwise pro-

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vided, all relevant evidence is admissible. Most of the Rules and Code sections that follow impose some kind of limitation on the use of relevant evidence.

There is no substantive difference between the federal and California definitions of relevant evidence. Rule 401, unlike Code section 210, does not expressly refer to the credibility of witnesses in its definition, but the omission is immaterial. Since the fact-finders will ultimately determine which witnesses to believe or disbelieve, evidence bearing on the credibility of witnesses is obviously of consequence to the determination of the action being tried.

Rule 401 makes clearer than Code section 210 the burden the proponent must discharge when confronted by an irrelevance objection. The proponent need only convince the judge that the proffered evidence makes the existence of any consequential fact more or less probable than the fact would be without the evidence. Though both provisions impose the same burden on the proponent of the evidence, the language of Rule 401 is superior in this respect. Accordingly, California should consider adopting Rule 401's language regarding how a judge should measure the probative value of the proffered evidence.

Neither the Code nor the Rules establishes a preference between direct and circumstantial evidence. Section 410 of the Code defines direct evidence as "evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." This section, however, does not favor direct evidence over circumstantial evidence. There is no analogous Rule. From a relevance perspective, the distinction between direct and circumstantial evidence is without significance. Either can satisfy the tests of materiality and probative value, and both are generally acceptable means of proof in civil and criminal matters. California should retain section 410.

Neither the Rules nor the Code requires a judge to admit all relevant evidence that is otherwise admissible. Rule 403 and Code section 352 embody the principle that a judge may exclude otherwise admissi-

ble evidence if its probative value on contested issues is substantially outweighed by enumerated concerns. These include the dangers that the evidence might prejudice a party unduly, confuse the issues to be decided, mislead the jury, or consume too much time. A key feature is that the rule does not come into play at all if another rule excludes the evidence. Only if the evidence is otherwise admissible may the objecting party appeal to the judge's discretion as a last resort.

There is no substantive difference between Rule 403 and Code section 352. Both emphasize that judges should not use their discretion to exclude relevant evidence unless its probative value is substantially outweighed by a countervailing factor.

1.01 Character Evidence in General

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

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

(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

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

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in

order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

RULE 405. METHODS OF PROVING CHARACTER

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

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

RULE 412. SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM’S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION

(a) **Evidence generally inadmissible.** The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim’s sexual predisposition.

(b) **Exceptions.**

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim’s guardian or representative.

(2) Before admitting the evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

§ 1100. Manner of proof of character

Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person’s conduct) is admissible to prove a person’s character or a trait of his character.

§ 1101. Evidence of character to prove conduct

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

§ 1102. Opinion and reputation evidence of character of criminal defendant to prove conduct

In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

§ 1103. Character evidence of crime victim to prove conduct; evidence of defendant's character or trait for violence; evidence of manner of dress of victim; evidence of complaining witness' sexual conduct

(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.

(2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

(b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in con-
formity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).

(c)(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, 262 or 264.1 of the Penal Code, or under Section 286, 288a, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

(2) Notwithstanding paragraph (3), evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent in any prosecution for an offense specified in paragraph (1), unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make an offer of proof outside the hearing of the jury. The court shall then make its determination and at that time, state the reasons for its ruling on the record. For the purposes of this paragraph, "manner of dress" does not include the condition of the victim's clothing before, during, or after the commission of the offense.

(3) Paragraph (1) shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.

(4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.

(5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.
(6) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this subdivision.

§ 1104. Character trait for care or skill

Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

§ 1106. Sexual harassment, sexual assault, or sexual battery cases; opinion or reputation evidence of plaintiff's sexual conduct; inadmissibility; exception; cross-examination

(a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.

(b) Subdivision (a) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator.

(c) If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff.

(d) Nothing in this section shall be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783.

Comparative Note.

General Rule of Exclusion. Rule 404(a) and Code section 1101(a) introduce the general principle that evidence of an individual's character is inadmissible as proof that the individual conformed his or her conduct on a given occasion with his or her character. Accordingly, in a civil action for making a false representation, evidence that the defendant made false representations on other occasions would be inadmissible if offered to prove that the defendant made the false rep-

14. FED. R. EVID. 404(a); CAL. EVID. CODE § 1101(a) (West 1995 & Supp. 2007).
presentation in question because he or she is the kind of person who makes such representations.

Character evidence is not excluded because it is irrelevant. Under the federal and California definitions of relevance, the evidence is relevant. Rather, the evidence is excluded on public policy grounds. First, the admission of character evidence and its counter evidence might consume too much time and too many judicial resources. Second, jurors might overestimate the value of evidence of other misconduct. Jurors might jump to the unwarranted conclusion that a party is guilty of the misconduct charged if they learn that on other occasions the party engaged in similar misdeeds. Third, in criminal cases, jurors might be tempted to return a guilty verdict that is based on the accused's "bad" character rather than on the commission of a punishable act. Having heard that the accused committed misdeeds similar to the crime charged, jurors might conclude that the accused ought to be incarcerated because he or she is a bad person. The jurors might find that the accused is deserving of removal from society even if they are not convinced that the accused is guilty of the crime charged. In our system of criminal justice, individuals should be convicted for what they do, not for who they are. Although no comparable concern applies in civil matters, the ban on the use of character evidence to prove conduct on a given occasion applies to civil cases as well.

The Mercy Rule Exception—Character of the Accused. Because life and liberty are at stake in a criminal case, Rule 404(a)(1) and Code section 1102 adopt the common law mercy rule allowing the accused to offer evidence of a good character trait as proof that he or she is not the kind of person who would commit the offense charged. If the accused makes use of this exception, then the prosecution is allowed to rebut with evidence of the accused's bad character. Under Rule 405(a) and Code section 1102, both the accused and the prosecution are limited to opinion and reputation evidence in proving the desired character trait.

16. See Mendez, supra note 10, § 3.04, at 48.
17. Id. at 49.
18. Id.
19. Id.
The Mercy Rule Exception—Character of the Crime Victim. Rule 404(a)(2) and Code section 1103(a) also allow the accused to offer evidence of a crime victim's character trait as proof of the victim's conduct on a given occasion if, under the substantive criminal law, the victim's conduct exculpates or mitigates the accused's misconduct.24 In an assault prosecution, for example, these provisions would allow the accused to offer bad character evidence of the victim's predisposition to engage in unprovoked attacks as proof that the victim was the first aggressor on the occasion in question. If the accused makes use of this exception, then the prosecution is allowed to rebut with evidence of the victim's good character.25

Under Rule 405(a), the accused and the prosecution are limited to offering only opinion and reputation evidence in proving the victim's character trait.26 But under the Code, the accused and the prosecution may, in addition, offer specific instances of the victim's conduct to prove the desired character trait.27 This departs from the traditional common law rule which limited proof of the desired character trait to reputation or opinion evidence.28

Under Rule 404(a)(1), if the accused offers evidence of the victim's bad character, the prosecution may, in addition, offer evidence of the same character trait of the accused.29 Thus, if the accused impugns the victim's character for peacefulness, the prosecution may not only rebut with evidence of the victim's good character for peacefulness but may also offer evidence of the accused's bad character for aggressiveness. This is true even if the accused refrained from offering evidence of his or her good character in his or her case-in-chief. Rule 404(a)(1) departs from the traditional common law rule which required the accused to place his or her character at issue before the prosecution was allowed to offer evidence of the accused's bad character.30

Code section 1103(b) is similar to Rule 404(a)(1) but is limited to the character trait for violence.31 If the accused offers evidence of the victim's predisposition to engage in unprovoked attacks, the prosecution may, in addition, offer evidence of the accused's character for

29. Id. at 404(a)(1).
30. See id. at 405 advisory committee's note.
violence to prove that he was the first aggressor on the occasion in question. Under the California provision, the prosecution is not limited to offering opinion or reputation evidence. It may also offer evidence of specific instances of violence by the accused to establish the pertinent character trait. Because Code section 1103(b) includes evidence of specific instances of conduct, it departs from the traditional common law rule. Code section 1103(b) also departs from the common law rule because it allows the prosecution to offer bad character evidence about the accused even though the accused may not have placed his character at issue.

Under Rule 404(a)(2), the prosecution may, in a homicide prosecution, offer evidence of the victim's trait of peacefulness even if the accused did not first offer evidence of the victim's predisposition to engage in unprovoked attacks. So long as the accused offers evidence that the victim was the first aggressor on the occasion in question, the prosecution may offer evidence of the victim's trait of peacefulness in the form of opinion and reputation evidence. Since by definition the victim is dead in a homicide prosecution and cannot provide his or her version of what transpired during the homicidal attack, necessity is the justification for Rule 404(a)(2). The Rule applies, however, even if other eyewitnesses testify to the fatal attack. Moreover, the Rule does not expressly require the intended victim to be the person who dies. Accordingly, if the accused misses the victim and inadvertently kills someone else, the accused could still be tried for a homicide (e.g., murder) under the doctrine of transferred intent. The intended victim, having survived, could still testify and rebut any evidence by the accused that he was merely acting in self-defense.

The Code does not contain a similar provision. If one is enacted, it should be limited to those homicide prosecutions in which the victim is the deceased and there are no surviving eyewitnesses other than the accused.

Proof of Other Purposes. Rule 404(b) and Code section 1101(b) make explicit what is implied in the rules prohibiting the use of character evidence to prove conduct on a specified occasion. If the evidence is offered to prove some relevant proposition—other than a person's predisposition to engage in particular conduct—then the evi-

32. Id.
33. Id.
dence is admissible unless banned by some other rule. Both provisions provide similar, though not identical, non-exclusive lists of permissible propositions. Rule 404(b) differs from the Code in that it requires the prosecution in a criminal case to provide notice in advance of trial of its intention to offer evidence under the Rule. Pretrial notice is included "to reduce surprise and promote early resolution on the issue of admissibility."

The Uniform Rules go further. Uniform Rule 404 provides for pretrial notice in all cases, not just prosecutions. In addition, if the evidence is offered against the accused, Uniform Rule 404(c)(2) requires the court to conduct a hearing to determine the admissibility of the evidence. The court must exclude the evidence unless the proponent convinces the judge by clear and convincing evidence that the misdeed attributed to the accused was committed and that its probative value on contested issues outweighs the danger of unfair prejudice. The risk of unfair prejudice is highest when the prosecution offers evidence of other misdeeds that are identical or similar to the misdeed for which the accused is on trial. In these circumstances, jurors might find it especially difficult to abide by an instruction limiting their consideration of the evidence only to the admissible purpose for which it is offered. They might find treating the evidence as bad character evidence irresistible. Because evidence offered under Rule 404(b) and Code section 1101(b) can be especially prejudicial to the accused, California should consider adopting

36. FED. R. EVID. 404(b); CAL. EVID. CODE § 1101(b).
37. FED. R. EVID. 404(b) (listing "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"); CAL. EVID. CODE § 1101(b) (listing "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented").
38. FED. R. EVID. 404(b).
39. Id. at advisory committee's note (1991 Amendment).
40. UNIF. R. EVID. 404(c)(1) & comment. "Evidence is not admissible . . . unless: (1) the proponent gives to all adverse parties reasonable notice in advance of trial . . . ." Id. at 404(c)(1).
41. Id. at 404(c)(2). "Evidence is not admissible . . . unless . . . if offered in a criminal case, the court conducts a hearing to determine the admissibility of the evidence" and makes certain findings. Id.
42. Id.
43. See MENDÉZ, supra note 10, § 3.15, at 91 n.102.
the pretrial notice of the federal provision as well as the additional safeguards of the Uniform Rules.44

Character as an Element of the Cause of Action. Whenever a character trait is an element of a criminal or civil cause of action, Rule 405(b) and Code section 1101 allow the use of relevant evidence to prove the trait.45 In a defamation action, for example, a defendant is entitled to offer evidence that the plaintiff engaged in dishonest conduct in order to prove that the plaintiff is a liar. The plaintiff’s claim that the defendant defamed him or her by calling him or her a liar makes the existence of his or her trait for veracity an element of the cause of action. Although they do not use identical language, both provisions accomplish the same end.

Character for Care and Skill. Except as provided in Code sections 1102 and 1103, Code section 1104 bans the use of evidence of a trait of a person’s character with respect to care or skill to prove the quality of his or her conduct on a specified occasion.46 Code sections 1102 and 1103 refer to the mercy rules previously discussed in Part 1.01.47 The Rules do not have a counterpart. However, such a provision is unnecessary. The federal prohibition on the use of character evidence to prove conduct on a given occasion is sufficiently broad to exclude this kind of evidence.

The California provision is a specific application of the general prohibition on the use of character evidence. Its value is putting the parties and the court on notice that the prohibition applies to traits of care and skill as well, especially in personal injury cases. Accordingly, Code section 1104 should be retained.

Rape Shield Provisions. In the absence of special provisions, the rules allowing the accused to offer evidence of the victim’s character to prove conduct in conformity with that character would pose serious problems in sexual assault prosecutions. If a jury believes that the victim consented to the sexual contact charged against the accused, then under the substantive criminal law of most jurisdictions they would have to acquit.48 Prior to the adoption of the rape shield laws, the accused in California was free to offer evidence of the victim’s sexual

44. The Advisory Committee notes that the “overwhelming number” of reported cases involve the introduction of other crimes evidence by the prosecution. See Fed. R. Evid. 404 advisory committee’s note (1991 Amendment).
47. See supra text accompanying notes 21–35.
48. See, e.g., Cal. Penal Code § 261(a) (West 1999). The victim, however, must have the legal capacity to consent. Id.
conduct with others to prove the victim’s predisposition to consent to sexual contact, including on the occasion charged against the accused.\textsuperscript{49} Concern that the use of sexual history would deter victims from testifying gave rise to the rape shield laws.\textsuperscript{50}

Rule 412, the federal rape shield law, generally bars the use of a victim’s sexual behavior or predisposition in cases involving sexual misconduct, whether offered as substantive evidence or for impeachment.\textsuperscript{51} The prohibition is to be read broadly, and according to the Advisory Committee Note, should exclude such evidence as the victim’s mode of dress, speech, and lifestyle.\textsuperscript{52} Rule 412, not Rule 404, governs the use of character evidence to prove consent in sexual misconduct prosecutions.\textsuperscript{53} Rule 412 permits the accused to offer evidence of specific instances of his own sexual conduct with the victim to prove consent\textsuperscript{54} unless the judge concludes that the probative value of the evidence is substantially outweighed by the prejudicial concerns enumerated in Rule 403.\textsuperscript{55} In proving consent, the accused is not limited to prior instances of sexual activity between the victim and the accused. The Advisory Committee Note emphasizes that the accused may also offer other evidence that is probative of the victim’s predisposition to engage in consensual activities with the accused, including statements in which the victim expressed an interest in engaging in sexual activities with the accused or voiced sexual fantasies involving the accused.\textsuperscript{56} Rule 412 allows the accused to offer evidence of specific instances of the victim’s sexual conduct with others only to prove that someone other than the accused is responsible for the assault charged.\textsuperscript{57}

A 1994 amendment clarifies that Rule 412’s rape shield law also applies in civil cases involving sexual misconduct, such as sexual harassment claims.\textsuperscript{58} Rather than spell out the limited purposes for which evidence of a victim’s sexual behavior or predisposition can be received in civil cases, Rule 412 commits the admissibility of the evidence to the court’s discretion.\textsuperscript{59} If the evidence is otherwise

\textsuperscript{49} M\textsuperscript{\textregistered}N\textsuperscript{\textregistered}EZ, \textit{supra} note 10, § 3.12, at 64.
\textsuperscript{50} See, e.g., FED. R. EVID. 412 advisory committee’s note (1994 Amendment).
\textsuperscript{51} FED. R. EVID. 412(a) advisory committee’s note (1994 Amendment).
\textsuperscript{52} \textit{Id.} at advisory committee’s note (1994 Amendment).
\textsuperscript{53} \textit{Id.} at 412(b)(1)(B).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} at 412(c), 403.
\textsuperscript{56} \textit{Id.} at 412 advisory committee’s note (1994 Amendment).
\textsuperscript{57} \textit{Id.} at 412(b)(1)(A).
\textsuperscript{58} \textit{Id.} at 412(b)(2) advisory committee’s note (1994 Amendment).
\textsuperscript{59} See \textit{id.} at 412(b)(2).
admissible under the Rules, it may be received if the court finds that its probative value on contested issues substantially outweighs the danger of harm to the victim and of unfair prejudice to any party.\(^6\) This weighing formula, and not the one in Rule 403, governs the use of Rule 412 evidence in a civil case.

Whether offered in a civil or criminal case, the judge, before admitting evidence under Rule 412, must hold an in camera hearing at which the alleged victim and all parties are entitled to be heard.\(^6\) The proponent must file a motion at least fourteen days before the trial describing the evidence and stating the purpose for which it is offered, unless the judge, for good cause, requires a different time or permits the motion to be filed during the trial.\(^6\)

Code section 1103(c) is California's rape shield provision. Prior to its enactment, the accused could rely on Code section 1103(a)(1) to offer evidence of the victim's relations with him or her as well as with others to prove the victim's predisposition to consent on the occasion being tried.\(^6\) Now, Code section 1103(c)(3) limits the accused to evidence of the victim's sexual conduct with him or her.\(^6\) The accused may not offer evidence of the victim's sexual conduct with others unless the prosecution introduces evidence or the complaining witness gives testimony relating to the complaining witness' sexual conduct.\(^6\) If that occurs, the accused may offer evidence limited specifically to rebutting the evidence introduced by the prosecution or given by the complaining witness.\(^6\)

Although Code section 1103(c)(3) preserves the right of the accused to offer instances of the victim's sexual conduct with the accused to prove the victim's consent to the act in question, that right is not limitless. To begin with, a judge may exclude the evidence of the past relations if the judge concludes under Code section 352 that its probative value on the issue of consent is outweighed by its prejudicial effects.\(^6\) Also, in proving the victim's consent on the occasion in question, the accused may not offer evidence of the manner in which the

\(^{60}\) Id.  
\(^{61}\) Id. at 412(c)(2).  
\(^{62}\) Id. at 412(c)(1). The motion must be written and served on all other parties. Id.  
\(^{64}\) CAL. EVID. CODE § 1103(c)(3).  
\(^{65}\) Id. § 1103(c)(4).  
\(^{66}\) Id.  
\(^{67}\) CAL. EVID. CODE § 352 (West 1995). Section 1103(c)(3) is not exempted from the operation of section 352.
victim was dressed.\textsuperscript{68} That evidence is admissible only if, after a hearing outside the presence of the jury, the judge determines that it is relevant and should be admitted in the interests of justice.\textsuperscript{69}

Like Rule 412(b)(2), Code section 1106 places limits on the admissibility of the victim’s sexual conduct with others in civil actions involving sexual harassment, battery, or assault.\textsuperscript{70} Rule 412(b)(2), however, generally commits the admissibility of the evidence to the court’s discretion.\textsuperscript{71} Section 1106, in contrast, expressly prohibits the use of the victim’s sexual conduct with others to prove consent unless the injury alleged by the plaintiff involves loss of consortium.\textsuperscript{72}

Both the federal and California rape shield laws have been amended extensively.\textsuperscript{73} Their amendments reflect the difficulties each jurisdiction has faced in achieving an appropriate balance between the rights of sexual assault victims and those of the accused. California should retain its provisions.

1.02 New Exceptions to the Ban on the Use of Character Evidence

RULE 413. EVIDENCE OF SIMILAR CRIMES IN SEXUAL ASSAULT CASES

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

\textsuperscript{68} Id. § 1103(c)(2) (West 1995 & Supp. 2007).
\textsuperscript{69} Id.
\textsuperscript{70} Id. § 1106 (West 1995).
\textsuperscript{71} Fed. R. Evid. 412(b)(2).
\textsuperscript{72} Cal. Evid. Code § 1106.
(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
   (1) any conduct proscribed by chapter 109A of title 18, United States Code;
   (2) contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person;
   (3) contact, without consent, between the genitals or anus of the defendant and any part of another person’s body;
   (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
   (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

RULE 414. EVIDENCE OF SIMILAR CRIMES IN CHILD MOLESTATION CASES

   (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
   (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
   (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
   (d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
       (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
       (2) any conduct proscribed by chapter 110 of title 18, United States Code;
       (3) contact between any part of the defendant’s body or an object and the genitals or anus of a child;
       (4) contact between the genitals or anus of the defendant and any part of the body of a child;
(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

RULE 415. EVIDENCE OF SIMILAR ACTS IN CIVIL CASES CONCERNING SEXUAL ASSAULT OR CHILD MOLESTATION

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

§ 1108. Evidence of another sexual offense by defendant; disclosure; construction of section

(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.

(c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.

(d) As used in this section, the following definitions shall apply:
(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:
(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code.

(B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem.

(C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

(D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

(E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(F) An attempt or conspiracy to engage in conduct described in this paragraph.

(2) "Consent" shall have the same meaning as provided in Section 261.6 of the Penal Code, except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim.

§ 1109. Evidence of defendant's other acts of domestic violence

(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(2) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(3) Except as provided in subdivision (e) or (f) and subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. Nothing in this paragraph prohibits or limits the admission of evidence pursuant to subdivision (b) of Section 1101.
(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code.

(c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law.

(d) As used in this section:

(1) "Abuse of an elder or dependent person" means physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering.

(2) "Child abuse" means an act proscribed by Section 273d of the Penal Code.

(3) "Domestic violence" has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, "domestic violence" has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged crime.

(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

(f) Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Section 1250 of the Health and Safety Code is inadmissible under this section.

Comparative Note.

Federal Rules. The Violent Crime Control and Law Enforcement Act of 1994\(^74\) ("Act") that Congress approved in 1994 creates three exceptions to Rule 404(a)'s ban on the use of character evidence.\(^75\) Rules 413–415 allow the use of character evidence in prosecutions in

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75. Id.
which the accused is charged with sexual assault\textsuperscript{76} or child molestation\textsuperscript{77} and in civil cases in which the victim seeks compensation for having been sexually assaulted or molested.\textsuperscript{78} The new Rules authorize the use of evidence of the defendant's commission of other sexual assaults or molestations to prove any relevant matter, including the defendant's predisposition to commit the offense charged.\textsuperscript{79}

Rules 413 and 414 require the government to disclose the uncharged misdeed evidence to the defendant, including statements of witnesses or summaries of the testimony it anticipates offering, at least fifteen days prior to the trial or at a later time as the court may allow for good cause.\textsuperscript{80} Rule 415, which applies to civil actions, imposes the same disclosure requirements on the party seeking to offer the evidence the Rule allows.\textsuperscript{81}

The Act required the Judicial Conference ("Conference") to provide Congress with a report containing the Conference's recommendations on the new Rules.\textsuperscript{82} In its report, the Conference concurred with the views of the Advisory Committees on the Evidence Rules and on the Criminal and Civil Rules that adopting the new Rules was undesirable.\textsuperscript{83} Of the more than forty judges, practicing lawyers, and academicians asked to review the new Rules, only the representatives of the United States Department of Justice favored adopting them.\textsuperscript{84}

Among the reasons the Conference cited for its opposition were: (1) the lack of empirical evidence to support the proposition that evidence of past acts is predictive of future acts; (2) the danger of convicting the accused on account of his or her "bad" character; (3) the undue consumption of time and potential for confusion of issues that could emanate from the mini-trials required to prove or disprove that the defendant engaged in the uncharged misconduct; and (4) concerns that the uncharged misconduct evidence would have to be received if relevant.\textsuperscript{85} Despite this strong opposition, Congress did not

\textsuperscript{76} FED. R. EVID. 413.
\textsuperscript{77} Id. at 414.
\textsuperscript{78} Id. at 415.
\textsuperscript{79} See id. at 413(a), 414(a), 415(a).
\textsuperscript{80} See id. at 413(b), 414(b).
\textsuperscript{81} Id. at 415(b).
\textsuperscript{84} Id. at 53.
\textsuperscript{85} Id.
modify or reject the new Rules, and they went into effect in 1995 with the passage of the Act.\textsuperscript{86}

The Eighth, Ninth, and Tenth Circuits have construed the Rules as authorizing federal judges to employ Rule 403 to exclude propensity evidence offered under Rules 413–415 whenever its probative value on contested issues is substantially outweighed by its prejudicial effects.\textsuperscript{87} Rules 413–415 are silent on the applicability of Rule 403.

\textit{California}. Code section 1108 is California’s response to the congressional enactment of Rules 413–415. Code section 1108 differs from the Rules in three respects. First, under the California provision, the bad character evidence is limited to prosecutions and is not admissible in civil actions for damages.\textsuperscript{88} Second, the range of prosecutions in which the evidence is admissible in California is broader than under the Rules. Code section 1108 includes not only sexual assault and child molestation prosecutions but also prosecutions for possessing pornographic materials depicting minors, employing minors for sexual depictions, and distributing obscene material to minors, irrespective of whether these materials have been transported in interstate commerce.\textsuperscript{89} Like Rules 413–414, Code section 1108 requires the prosecution to notify the accused of its intention to offer the bad character evidence prior to the start of the trial.\textsuperscript{90}

Third, unlike the Rules, Code section 1108 expressly empowers trial judges to exclude the evidence of uncharged sexual misdeeds if its probative value is substantially outweighed by its prejudicial effects.\textsuperscript{91} In assessing the probative value of the evidence, the judge should consider the dissimilarities between the uncharged and charged misdeeds, the remoteness of the uncharged misdeed, the amount of time needed to receive evidence proving or disproving the uncharged misdeed, and the probability that the evidence of the uncharged misdeed might confuse the jurors.\textsuperscript{92} If the trial judge admits the evidence of the uncharged sexual misdeeds, then under Califor-
nia case law the jurors must be told not to consider the evidence against the accused unless they first find by a preponderance of the evidence that the accused committed the misdeeds. 93

If under Code section 1108 evidence of uncharged sexual misdeeds is received to prove the accused's propensity to commit the sexual misdeed charged, the accused is entitled to disprove the trait with good character evidence. 94 Code section 1108 limits the prosecution to offering evidence of specific instances of sexual misconduct in establishing the accused's propensity to commit the sexual misdeed charged. 95 But the defendant's right of rebuttal is not so limited. 96 The defendant's greater rights stem from the fact that the rebuttal evidence is governed by Code section 1100 which provides that when character evidence is admissible, the pertinent trait may be proved by evidence of reputation, opinion, or specific instances of conduct. 97

Code section 1108 is not the only recent exception to the rule banning the use of character evidence to prove conduct. Code section 1109 allows prosecutors to offer evidence of an accused's acts of domestic violence, elder or dependent-adult abuse, or child abuse as proof of the accused's propensity to commit such violence or abuse if offered in an action in which the accused is charged with an offense involving domestic violence, elder or dependent-adult abuse, or child abuse. 98 In the case of domestic abuse, the accused does not need to be charged with domestic violence for the other acts of domestic violence to be admissible. The section is triggered if the offense charged involves such acts. For example, forcibly raping a girlfriend or a spouse can be viewed as a form of domestic violence. 99 Accordingly, a charge of forcible rape can open the door to admitting evidence of other acts of domestic violence even if the other acts do not involve sexual misconduct. 100 Moreover, the prosecution is not limited to offering only acts of domestic violence with the victim of the offense charged. In proving the accused's propensity to engage in acts of do-

93. Id. § 3.17, at 110.
94. People v. Callahan, 87 Cal. Rptr. 2d 838, 855 (Ct. App. 1999).
96. Callahan, 87 Cal. Rptr. 2d at 855.
98. Id. § 1109(a) (West Supp. 2007).
100. See Garcia, 107 Cal. Rptr. 2d at 897; see also Poplar, 83 Cal. Rptr. 2d at 326.
mestic violence, the prosecution may call as witnesses other victims of the accused’s violence.¹⁰¹

Like Code section 1108, Code section 1109 requires the prosecution to inform the accused prior to the trial of its intention to offer the uncharged acts.¹⁰² As in the case of Code section 1108, the judge is empowered under Code section 1109 to exclude the uncharged acts evidence if its probative value is substantially outweighed by its prejudicial effects.¹⁰³ Evidence of uncharged acts occurring more than ten years before the charged act is generally inadmissible unless the judge determines that its admission is in the interests of justice.¹⁰⁴

Before the jurors may consider the other acts of domestic violence or abuse, they must first find by a preponderance of the evidence that the accused committed those acts.¹⁰⁵

There is no federal counterpart to Code section 1109.

1.03 Habit and Custom

RULE 406. HABIT; ROUTINE PRACTICE

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

§ 1105. Habit or custom to prove specific behavior

Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

Comparative Note. Evidence that is inadmissible as character evidence may be admissible if offered as evidence of habit or custom. For example, to prove that the victim had locked his car on the occasion when the accused was found in the car, the victim was allowed to offer evidence of his habit of locking the car’s doors.¹⁰⁶ Similarly, to prove

¹⁰¹. See Poplar, 83 Cal. Rptr. 2d at 326.
¹⁰². CAL. EVID. CODE § 1109(b).
¹⁰³. Id. § 1109(a).
¹⁰⁴. Id. § 1109(e).
¹⁰⁵. See Mendez, supra note 10, § 3.17, at 110.
that California followed certain discretionary practices in approving a particular roadway design, the state was allowed to offer evidence regarding its customs and practices in approving roadway designs.\(^\text{107}\) Rule 406 and Code section 1105 provide that evidence of a habit may be admitted to prove that on a specified occasion a person conducted himself or herself in conformity with the habit.\(^\text{108}\) Both, moreover, provide that evidence of custom or routine practice may likewise be admitted to prove that on a given occasion an organization conformed its operations to the custom or routine practice.\(^\text{109}\) Because evidence of habit or custom is beyond the ban on the use of character evidence to prove conduct, it is important for the parties and the court to distinguish between inadmissible character evidence and admissible evidence of habit and custom. The key can be found in the definition of a habit. Both the Advisory Committee Note to Rule 406 and the Comment to Code section 1105 define a habit as a "regular response to a repeated specific situation."\(^\text{110}\) This definition was taken from Dean Charles McCormick’s treatise on evidence.\(^\text{111}\) Because habits are regular responses to repeated situations, their execution does not require much thought.\(^\text{112}\) They are more probative of conduct than character because as semi-automatic, consistent responses to a specific stimulus, they say much about a person’s conduct when the person encounters the stimulus.\(^\text{113}\) Moreover, receiving evidence of custom or routine practice can be justified on the grounds of need.\(^\text{114}\) It would be unrealistic, for example, for a large business to prove through witnesses with first hand knowledge that one customer out of many was mailed a particular bill.\(^\text{115}\) Human memory simply cannot help.\(^\text{116}\)

There is no substantive difference between the federal and California approaches to evidence of habit and custom or routine practice. California should retain its rule.

108. \text{FED. R. EVID. 406; CAL. EVID. CODE} § 1105 (West 1995).
109. \text{FED. R. EVID. 406; see CAL. EVID. CODE} § 1105 cmt.
110. \text{FED. R. EVID. 406 advisory committee’s note; CAL. EVID. CODE} § 1105 cmt.
111. McCormick on Evidence, \text{supra} note 34, § 195, at 574–75.
112. Mendoza, \text{supra} note 10, § 3.19, at 116.
113. Id.
114. Id. at 117.
115. Id.
116. Id.
1.04 Subsequent Remedial Measures

RULE 407. SUBSEQUENT REMEDIAL MEASURES

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent 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 measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

§ 1151. Subsequent remedial conduct

When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

Comparative Note. Personal injury lawyers can appreciate the value of presenting the fact finder with evidence of the steps the defendant took to remedy the condition or instrumentality that harmed the plaintiff. They know that the fact finder would consider such steps as an admission by the defendant of wrongdoing, whether inadvertent or otherwise. Unfortunately for the plaintiffs' bar, Rule 407 and Code section 1151 ban the use of evidence of subsequent remedial measures when offered to prove negligence or other culpable conduct.117

The evidence is not excluded because it is irrelevant.118 Rather, it is excluded because of the belief that its use to prove negligence or other culpable conduct would discourage defendants from making repairs after an accident.119

118. The Advisory Committee that drafted the Federal Rules of Evidence takes the position that evidence of subsequent remedial measures is excluded also because it may be irrelevant. "The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence." FED. R. EVID. 407 advisory committee's note. The Committee concedes, however, that under "a liberal theory of relevancy" evidence of remedial measures does operate as an admission. Id.
119. FED. R. EVID. 407 advisory committee's note; CAL. EVID. CODE § 1151 cmt.
Code section 1151 does not apply to strict liability actions. In *Ault v. International Harvester Co.*,\(^{120}\) the California Supreme Court held that the term "culpable conduct" does not embrace strict liability.\(^{121}\) In a strict liability action against a manufacturer, "negligence or culpability is not a necessary ingredient. The plaintiff may recover if he establishes that the product was defective, and he need not show that the defendants breached a duty of due care."\(^{122}\)

At one time, the federal circuits were split on whether the subsequent repair doctrine of Rule 407, as originally enacted, applied to strict liability cases.\(^ {123}\) However, the proper construction of Rule 407 is no longer an issue. A 1997 amendment provides that evidence of subsequent remedial measures is not admissible to prove "a defect in a product" or a "defect in a product's design."\(^ {124}\)

The 1997 amendment also makes clear that Rule 407, like Code section 1151, applies only to remedial measures undertaken after the occurrence that produced the damages giving rise to the action.\(^ {125}\) "Evidence of measures taken by the defendant prior to the 'event' causing 'injury or harm' do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product."\(^ {126}\)

The sending of warning or recall notices to owners of products may be viewed as a remedial measure. But consistent with *Ault*'s holding that Code section 1151 does not apply in strict liability actions,\(^ {127}\) notices alerting consumers to take safety measures are admissible against a manufacturer in a California strict liability action.\(^ {128}\) Under Rule 407, however, such notices may not be offered to prove a design or manufacturing defect in federal court.\(^ {129}\)

Evidence of remedial measures may be admissible if relevant to some issue other than the defendant's negligence or culpable conduct. As stated in Rule 407, evidence of subsequent remedial measures need not be excluded "when offered for another purpose, such

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120. 528 P.2d 1148 (Cal. 1974).
121. *Id.* at 1150–51.
122. *Id.* at 1150.
124. *Id.*
125. *Id.*
126. *Id.*
as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." The Code does not contain an equivalent provision. No such provision is necessary, however, since the evidence would not be within the prohibition of Code section 1151.

Evidence of remedial measures undertaken by third parties independently of the defendant is not barred by the subsequent repair doctrine. It is immaterial whether the evidence is offered to prove a defective condition in a strict liability case, as in Ault, or to prove negligence or other culpable conduct. In the latter case, the policy of encouraging repairs is not undermined as "liability is not sought against the person taking the remedial action."

1.05 Compromise

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

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

1. furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

2. conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

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

130. Id.
131. Magnante, 228 Cal. Rptr. at 423.
132. Id. at 422-23.
133. Id. at 423 (quoting Denolf v. Frank L. Jursik Co., 238 N.W.2d 1, 4 (Mich. 1976)). In Magnante, a boom which became disengaged from its base struck the plaintiff. Id. at 421. To prove that the boom was defectively designed, the plaintiff was permitted to show the repairs his employer undertook after the accident to prevent the boom from disengaging. Id. at 421-22. See also TLT-Babcock, Inc. v. Emerson Elec. Co., 33 F.3d 397, 400 (4th Cir. 1994), involving repair of a defective fan undertaken by a third party, and cases cited therein.
§ 1152. Offer to compromise

(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.

(c) This section does not affect the admissibility of evidence of any of the following:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.

(2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

§ 1153.5. Offer for civil resolution of crimes against property

Evidence of an offer for civil resolution of a criminal matter pursuant to the provisions of Section 33 of the Code of Civil Procedure, or admissions made in the course of or negotiations for the offer shall not be admissible in any action.
§ 1154. Offer to discount a claim

Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

Comparative Note. Life would be easier for plaintiffs and defendants if they could show that their opponents had offered to settle their claims. But to promote the public policy of compromising and settling disputes, the Code and the Rules prohibit the use of settlement offers to prove the validity or invalidity of a claim. Accordingly, a plaintiff may not prove the validity of his or her claim by evidence that the defendant offered to settle the claim, and a defendant may not prove the invalidity of the plaintiff's claim by evidence that the plaintiff was prepared to accept a lower amount. To ensure a candid exchange of views, the prohibition expressly applies to settlement conference statements and conduct, and not just the offers themselves.

To invoke the protection afforded by the prohibition, the objecting party must show that the statement was made in an effort to compromise an actual dispute over the validity of a claim or its amount. Offers to pay undisputed claims as to validity or amount are not protected. As stated by Dean Charles McCormick, "[T]here is no policy of encouraging compromises of undisputed claims. They should be paid in full." His position is reflected in those provisions of Code section 1152 which provide that the section does not affect the admissibility of evidence of

(1) [p]artial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim [and] (2) [a] debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

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137. See Fed. R. Evid. 408(a); Cal. Evid. Code §§ 1152(c)(1), 1154.
If the evidence of settlement is offered to prove not liability but some other relevant proposition, then the evidence is no longer within the prohibition of the rules.\textsuperscript{140} For example, if a defendant settles with one of several plaintiffs and then calls the dismissed plaintiff as a witness, the remaining plaintiffs may elicit the fact of settlement on cross-examination to show the witness's possible bias.\textsuperscript{141}

The protection afforded by Code section 1152 does not extend to California criminal cases. In \textit{People v. Muniz},\textsuperscript{142} the accused sought to exclude evidence that he had offered to pay for the victim's medical expenses in a sex offense prosecution.\textsuperscript{143} The court upheld the admission of the evidence, holding that Code section 1152 is limited to civil cases.\textsuperscript{144} The court refused to construe "liability" as used in the section to include criminal matters.\textsuperscript{145}

The same question has arisen in federal courts. Some hold that Rule 408's protection does not extend to criminal cases.\textsuperscript{146} A 2006 amendment to Rule 408 now allows the use of statements or conduct made during compromise negotiations "when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."\textsuperscript{147} By way of justification, the Advisory Committee Note emphasizes that "[w]here an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected."\textsuperscript{148} Accordingly, where a defendant in a civil proceeding brought by the Internal Revenue Service ("IRS") makes damaging admissions in an effort to compromise the claim, Rule 408 as amended would allow the government to offer those admissions in a subsequent prosecution for tax fraud. The judge, however, is still empowered to exclude the admissions under Rule 403 if their probative value is substantially outweighed by their

\textsuperscript{140} \textit{See} \textit{Fed. R. Evid. 408(b); Cal. Evid. Code §§ 1152(c), 1154.}
\textsuperscript{141} \textit{See} \textit{Granville v. Parsons, 66 Cal. Rptr. 149, 152–54 (Ct. App. 1968). \textit{Granville} was a pre-Code case, but the court made it clear that section 1152 would require the same ruling. \textit{See id.} at 153–54.}
\textsuperscript{142} 262 Cal. Rptr. 743 (Ct. App. 1989).
\textsuperscript{143} \textit{Id.} at 746.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{See, e.g., United States v. Prewitt, 34 F.3d 436, 439 (7th Cir. 1994) (holding that admissions of fault made while compromising a civil securities enforcement action were admissible against the defendant in a subsequent prosecution for mail fraud).}
\textsuperscript{147} \textit{Fed. R. Evid. 408(a)(2).}
\textsuperscript{148} \textit{Id.} at advisory committee's note (2006 Amendment).
prejudicial effects.\textsuperscript{149} As an example of evidence that a judge may exclude under Rule 403, the Advisory Committee cites the statements an unrepresented individual makes in a civil enforcement proceeding.\textsuperscript{150}

As amended, Rule 408 purports to distinguish between evidence of statements and conduct made during compromise negotiations and evidence that the accused offered or agreed to settle the claim.\textsuperscript{151} Accordingly, in a tax evasion prosecution, the government may not offer evidence that the accused offered to compromise the tax claim as proof of its validity but may offer the accused’s settlement statement, “I concede that I owe the back taxes,” as a party opponent admission. In the Advisory Committee’s view, an offer or an acceptance of a compromise, unlike a direct statement of liability, is not very probative of the accused’s guilt.\textsuperscript{152}

Another Code provision, section 1153.5, applies to criminal as well as civil cases.\textsuperscript{153} This section bans the use of an offer for a civil resolution of a complaint alleging a crime against property if the offer is made with the assistance of the prosecutor.\textsuperscript{154} Both the offer as well as the admissions made in the course of the negotiations are protected from disclosure in any subsequent proceeding.\textsuperscript{155}

Rule 408 differs from Code sections 1152 and 1154 in two respects. First, the Rule itself makes clear that exclusion is not required when the evidence is offered for another purpose, such as “proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.”\textsuperscript{156} This result is obtained in California by applying Code section 355, which provides that when evidence is inadmissible for one purpose but admissible for another, the court may admit it for the proper purpose with the appropriate limiting instruction.\textsuperscript{157}

Rule 408 does not include impeachment among the other permissible purposes for which settlement conference statements can be

\begin{flushleft}
149. \textit{Id.} at 403.
150. \textit{Id.} at 408 advisory committee’s note (2006 Amendment).
151. \textit{Id.} at 408.
152. \textit{Id.} at advisory committee’s note (2006 Amendment).
154. \textit{Id.} Section 1153.5 implements the policy of California Code of Civil Procedure 33, \textsc{Cal. CIV. Proc. Code} 33 (West 2006), which vests prosecutors with the discretion to assist in the civil resolution of crimes against property in lieu of filing a criminal complaint. \textsc{Cal. Evid. Code} § 1153.5.
155. \textsc{Cal. Evid. Code} § 1153.5.
156. \textsc{Fed. R. Evid.} 408(b).
\end{flushleft}
offered.\footnote{158} Whether statements made in compromise negotiations should be admitted as prior inconsistent statements to impeach a party has been controversial. Opponents point out that the value of impeaching a party through inconsistent statements made in compromise negotiations is outweighed by the negative effect such impeachment would have on the candor required for successful settlement negotiations.\footnote{159} As amended in 2006, Rule 408 adopts this view.\footnote{160} It prohibits the use of statements made in settlement negotiations if offered as a prior inconsistent statement or as evidence of contradiction.\footnote{161}

California decisions provide only indirect support for the proposed federal amendment. No appellate court has approved the use of settlement conference statements to impeach a party. Because of the importance of the concerns involved, California should consider explicitly excluding the use of settlement statements when offered as prior inconsistent statements or as evidence of contradiction.

Second, prior to the 2006 amendment, Rule 408 was also explicit in another important respect: exclusion was not required of "any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."\footnote{162} The 2006 amendment deleted this language as superfluous.\footnote{163} Accordingly, even after the amendment, a party cannot immunize information that is germane to the case by raising it in the settlement negotiations.\footnote{164} Thus, if the defendant admits at the settlement conference that his mechanic warned him that his brakes needed to be replaced, the plaintiff would be precluded from offering the defendant's admission to prove the mechanic's warning. The plaintiff, however, would be free to discover the mechanic's statement and to call the mechanic to the stand to repeat the warning he gave to the defendant. A plaintiff who sues in a California court should also have access to this evidence, since neither Code section 1152 nor Code section 1154 purports to immunize the subject matter of evidence presented at the settlement conference.

The language deleted by the 2006 amendment to Rule 408 served an important purpose. It alerted the parties and the court that evi-
dence disclosed at settlement negotiations is not immunized from discovery and proof simply because it is disclosed in that setting. One should not assume that all or most lawyers who do civil litigation and judges who preside over civil trials are familiar with this principle. California should consider adding the deleted language to its rule. Such an addition would not be unprecedented since the Code includes such a provision in its chapter on mediation.\(^{165}\)

The Rules do not contain a rule on admissions made in the civil resolution of complaints alleging crimes against property. Neither do the Rules have a provision dealing with the admissibility of statements made in the course of mediation. The Code, on the other hand, has a number of provisions regarding the confidentiality of statements made in mediations.\(^{166}\)

Recognizing the increasing role of mediation in resolving disputes, the California Legislature added a chapter to the Code in 1997 that protects from disclosure information that is exchanged in the course of mediation.\(^{167}\) Mediation is defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."\(^{168}\) The chapter applies to all mediations except settlement conferences in civil cases and those undertaken pursuant to the Family Code.\(^{169}\)

Unless all of the participants otherwise agree,\(^{170}\)

No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.\(^{171}\)

Identical protection from disclosure is given to writings that are prepared "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation."\(^{172}\) All communications, negotia-

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166. *See id.* §§ 1115–1128.
167. *See id.*
168. *Id.* § 1115.
169. *Id.* § 1117. Special rules apply to family and custody conciliation proceedings. Settlement conferences are conducted under special court rules. *Id.* at cmt.
170. *Id.* § 1122(a). The agreement may be oral or in writing. *Id.*
171. *Id.* § 1119(a).
172. *Id.* § 1119(b).
tions, or settlement discussions by the participants are to remain confidential.\footnote{173}{Id. § 1119(c).}

Evidence that is otherwise admissible or subject to discovery outside the mediation or mediation consultation may not be immunized from disclosure solely by reason of its introduction or use in the mediation or mediation consultation.\footnote{174}{Id. § 1120(a).} Moreover, even communications protected by the mediation privilege can be disclosed if all the persons who participated in the mediation agree to do so in writing or orally.\footnote{175}{Id. § 1122(a).} “Participants” include the parties, the mediator, and other nonparties, such as accountants, spouses, and employees of the parties, attending the mediation.\footnote{176}{Id. § 1122 cmt.} Only matters disclosed during the mediation are protected from disclosure.\footnote{177}{See id. § 1126.} Matters disclosed after the mediation ends are not entitled to protection.\footnote{178}{See id. For a list of the ways in which a mediation can be terminated, see id. § 1125.}

The mediation provisions do not diminish in any way the protection afforded by Code sections 1152 and 1154 or other statutory provisions. Thus, if a communication is not protected by the mediation provisions but is within Code section 1152, it remains protected under this section.

The Code chapter on mediations was added to encourage the use of mediations to settle disputes. It should be retained.

1.06 Humanitarian Gestures

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

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

§1160. Admissibility of expressions of sympathy or benevolence; definitions

(a) The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made
to that person or to the family of that person shall be inadmissible as
evidence of an admission of liability in a civil action. A statement of
fault, however, which is part of, or in addition to, any of the above
shall not be inadmissible pursuant to this section.

(b) For purposes of this section:

(1) "Accident" means an occurrence resulting in injury or death
to one or more persons which is not the result of willful action by a
party.

(2) "Benevolent gestures" means actions which convey a sense of
compassion or commiseration emanating from humane impulses.

(3) "Family" means the spouse, parent, grandparent, stepmother,
stepfather, child, grandchild, brother, sister, half brother, half sister,
adopted children of parent, or spouse's parents of an injured party.

Comparative Note. The Rules and the Code protect the statements
and conduct of persons who offer or furnish humanitarian aid.179
Rule 409 provides that "[e]vidence of furnishing or offering or prom-
ising to pay medical, hospital, or similar expenses occasioned by an
injury is not admissible to prove liability for the

though it

uses different language, Code section 1152(a) has the same

effect.181

The purpose is to encourage humanitarian gestures by removing the

concern that they might be used as admissions. Neither Rule 409 nor

Code section 1152(a) requires the objecting party to show that the

humanitarian statements were made or that the conduct was under-
taken in an attempt to compromise a claim or its amount.

California has an additional provision. Recognizing that many

personal suits are prompted by anger at the defendant's failure to

apologize for the injury, the California Legislature in 2000 amended

the Code to reduce suits by encouraging defendants to apologize with-

out fear their apologies might be considered admissions.182 Code sec-
tion 1160 provides that:

The portion of statements, writings, or benevolent gestures expres-
sing sympathy or a general sense of benevolence relating to the

pain, suffering, or death of a person involved in an accident and

made to that person or to the family of that person shall be inad-
missible as evidence of an admission of liability in a civil action.183

179. FED. R. EVID. 409; CAL. EVID. CODE §§ 1152(a) (West 1995).
180. FED. R. EVID. 409.
181. See CAL. EVID. CODE § 1152(a).
182. Id. § 1160 cmt. (West Supp. 2007).
183. Id. § 1160(a).
Statements of fault, however, remain admissible even if part of protected statements, writings, and benevolent gestures. Accord-ingly, “I was using my cell phone and just didn’t see you coming” would be admissible, but not the preamble, “I’m sorry you were hurt.” California should retain its benevolent gestures provision.

1.07 Pleas and Related Statements

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

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

1. a plea of guilty which was later withdrawn;
2. a plea of nolo contendere;
3. any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
4. any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) 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.

§ 1153. Offer to plead guilty or withdraw plea of guilty by criminal defendant

Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

184. Id.
185. Id. § 1160 cmt.
Comparative Note. Prosecutors would have an easier time obtaining convictions if they could offer the jury evidence that prior to the trial the accused offered to plead guilty to the offense charged or to some lesser offense. Though such evidence would constitute an admission, Rule 410 and Code section 1153 exclude such offers in order to encourage plea bargains.\(^{186}\) Both provisions also bar the use as admissions of evidence of a guilty plea that is later withdrawn.\(^{187}\) There would be scant value in allowing a defendant to withdraw a guilty plea, enter a not guilty plea, and proceed to trial if the prosecution could use the withdrawn guilty plea as an admission.

A key question is whether the protection extends to the statements made in connection with the offer to plead guilty or the withdrawn plea. If only the words constituting an offer were protected, then knowledgeable defendants would refrain from engaging in plea bargaining since admissions made in the course of negotiations would be admissible in the event no bargain was struck. Rule 410 answers this question by extending the protection to “any statement made in the course of plea discussions” as well as the offer to plead guilty.\(^{188}\) Code section 1153 is silent on this point but has been construed as extending to the statements made in the course of plea negotiations as well as to the offers to plead guilty.\(^{189}\) Given the importance of the question, California should consider adopting the language of Rule 410 rather than relying on judicial construction.

Another important question is whether the prosecution may use the accused’s plea negotiations statements for impeachment in the event that the plea negotiations fail and the accused testifies inconsistently with his negotiation statements. Despite Code section 1153’s broad command that evidence of an offer to plead guilty is “inadmissible in any action,” People v. Crow\(^{190}\) holds that Code section 1153 does not prohibit the prosecution from using the statements for impeachment purposes.\(^{191}\) Only their use as admissions is barred.\(^{192}\)

Rule 410 provides the accused greater protection. It bars the use of plea negotiations statements against the accused without distin-

\(^{186}\) See, e.g., Fed. R. Evid. 410 advisory committee’s note; see also Cal. Evid. Code § 1153 (West 1995).


\(^{188}\) Fed. R. Evid. 410.


\(^{190}\) 33 Cal. Rptr. 2d 624 (Ct. App. 1994).

\(^{191}\) Id. at 631.

\(^{192}\) See id.
guising between admissions and impeachment, a construction the United States Supreme Court has recognized.\textsuperscript{193} The Court, however, has held that Rule 410 does not prohibit the prosecution, as part of the plea bargaining process, from requiring the accused to relinquish the right not to be impeached by statements made during the plea negotiations.\textsuperscript{194}

Whether the accused should be impeached by statements made in plea discussions presents difficult choices between promoting plea bargains on the one hand and discouraging criminal defendants from testifying inconsistently with their prior statements on the other. Rule 410 strikes the balance in favor of plea bargaining by prohibiting the use of plea discussion statements for impeachment unless the accused relinquishes the Rule's protection as a condition to entering into plea negotiations.\textsuperscript{195} Code section 1153 appears to be as broad as Rule 410. It provides that evidence "of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature."\textsuperscript{196} Despite the distinction drawn by Crow, Code section 1153 plainly does not distinguish between impeachment and admissions.

Code section 1153 does not define the participants in plea negotiations. Offers and related statements made to prosecuting attorneys qualify for protection, but so may statements to police officers if made in the course of bona fide plea negotiations.\textsuperscript{197} Rule 410 is less protective. It protects only those statements made by the accused or his lawyer to "an attorney for the prosecuting authority."\textsuperscript{198}

The California provision does not expressly limit bona fide plea discussions to discussions with attorneys employed by the county district attorney or the California Attorney General.\textsuperscript{199} Police officers


\textsuperscript{194}See id. at 210.

\textsuperscript{195}See Fed. R. Evid. 410.


\textsuperscript{197}Compare People v. Posten, 166 Cal. Rptr. 661, 669 (Ct. App. 1980) (holding that the accused's admissions to transporting police officers were admissible at his trial because there was no evidence that the accused made the admissions in the course of bona fide plea negotiations), with People v. Magana, 22 Cal. Rptr. 2d 59, 62 (Ct. App. 1993) (excluding transporting police officers from the participants in the plea bargaining process).

\textsuperscript{198}Fed. R. Evid. 410. The original rule was not limited to the attorney for the prosecuting authority and was construed to include other law enforcement officials, including postal inspectors who had custody of the accused. See id. at advisory committee's note (1979 Amendment) (citing Fed. R. Crim. P. 11(e)(6) and advisory committee's note (1979 Amendment)).

and other law enforcement personnel sometimes participate in plea negotiations. Accordingly, this aspect of the California provision should be retained. Any uncertainty about who qualifies as a plea participant for the prosecution can be resolved by an amendment to Code section 1153.200

Guilty pleas, unlike offers to plead guilty and guilty pleas later withdrawn, are not protected from disclosure. Thus, if a defendant pleads guilty to a speeding violation, that plea can then be offered against the defendant as an admission by any plaintiff injured by the defendant’s driving. Because that prospect may discourage criminal defendants from negotiating a plea to charges stemming from occurrences that injure others, California Penal Code section 1016(3)201 permits a plea of nolo contendere by providing that:

[P]lea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.202

In 1982, however, this protection was limited to "cases other than those punishable as felonies."203 The limitation is designed to "assist the efforts of victims of crime to obtain compensation for their injuries from the criminals who inflicted those injuries."204

Rule 410, on the other hand, continues the traditional approach. It prohibits the use of a plea of nolo contendere in any civil or criminal proceeding regardless of the grade of the offense.205 The Penal Code’s exclusion of felonies from the protection accorded to nolo contendere pleas in civil actions reflects California policy and should be retained.

200. The application of some Code provisions hinges on a person’s perceptions of the role occupied by others. For example, a client who reasonably believes that the person with whom he or she is consulting is a lawyer allows the client to claim the attorney-client privilege, even if the other person is not a lawyer. See id. § 950. Similarly, a patient who reasonably believes that the person with whom he or she is consulting is a physician or psychotherapist allows the patient to claim the physician-patient or the psychotherapist-patient privilege, even if the other person is not a physician or psychotherapist. See id. §§ 990, 1010 (West 1995 & Supp. 2007). A similar approach could be taken with respect to section 1153. An amendment could provide that plea participants could include anyone the accused reasonably believes is authorized to engage in bona fide plea negotiations.

202. Id.
203. Id.
1.08 Liability Insurance

RULE 411. LIABILITY INSURANCE

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

§ 1155. Liability insurance

Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.

Comparative Note. Rule 411 and Code section 1155 prohibit the use of evidence of insurance as proof of negligence or other wrongdoing. Two concerns account for the prohibition. One is that the evidence might be irrelevant because possessing liability insurance simply does not make one more or less careful on a given occasion. The other is the risk that the fact finder might be tempted to return a verdict against an insured defendant, regardless of the strength or weakness of the evidence of fault, because of the belief that the defendant will not have to pay the judgment from his own resources.

If possessing liability insurance is not probative of fault, then not possessing such insurance is likewise not probative of the absence of fault. Rule 411 proceeds on this assumption. It provides that "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Code section 1155 does not contain a similar provision. Accordingly, in California courts, the party opposing evidence of the lack of liability insurance must object on irrelevance grounds. Consideration should be given to conforming the California rule to the federal rule.

206. Id. at 411; CAL. EVID. CODE § 1155 (West 1995).
207. MCCORMICK ON EVIDENCE, supra note 138, § 201, at 357.
208. See id.
209. See FED. R. EVID. 411.
210. Id. at 411 (emphasis added).
Evidence of liability insurance may be admissible if offered for a purpose other than to prove negligence or other wrongdoing. In the words of Rule 411, exclusion is not required when the evidence is "offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." Even when offered for such a purpose, the trial judge may nonetheless exclude the evidence if its probative value is substantially outweighed by the risk that the jury might misuse the evidence. If the evidence is received, upon request, the opposing party is entitled to an instruction limiting the jury's consideration of the evidence to the purpose for which it was received.

1.09 Other Limitations on Relevant Evidence

§ 1156. Records of medical or dental study of in-hospital staff committee

(a) In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such medical or dental studies are subject to Title 4 (commencing with Section 2016.010 of Part 4) of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical or medical-dental staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) This section does not affect the admissibility in evidence of the original medical or dental records of any patient.

211. Id.
212. Id. at 403; Cal. Evid. Code § 352 (West 1995).
(d) This section does not exclude evidence which is relevant evidence in a criminal action.

§ 1156.1. Records of medical or psychiatric studies of quality assurance committees

(a) A committee established in compliance with Sections 4070 and 5624 of the Welfare and Institutions Code may engage in research and medical or psychiatric study for the purpose of reducing morbidity or mortality, and may make findings and recommendations to the county and state relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such committees relating to such medical or psychiatric studies are subject to Title 4 (commencing with Section 2016.010 of Part 4) of the Code of Civil Procedure but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him or her to such committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014. However, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) This section does not affect the admissibility in evidence of the original medical or psychiatric records of any patient.

(d) This section does not exclude evidence which is relevant evidence in a criminal action.

§ 1157. Proceedings and records of organized committees having responsibility of evaluation and improvement of quality of care; exceptions

(a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, marriage and family therapist, licensed clinical social worker, or veterinary staffs in hospitals, or of a peer review body, as defined in Section 805 of the Business and Professions Code, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietitian review or veterinary review or acupuncturist review committees of local medical, dental, dental hygi-
enist, podiatric, dietetic, veterinary, acupuncture, or chiropractic societies, marriage and family therapist, licensed clinical social worker, or psychological review committees of state or local marriage and family therapist, state or local licensed clinical social worker, or state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions in this section do not apply to medical, dental, dental hygienist, podiatric, dietetic, psychological, marriage and family therapist, licensed clinical social worker, veterinary, acupuncture, or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct or practice is being reviewed.

(c) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, or at the 1990 portion of the 1989-90 Regular Session of the Legislature, or at the 2000 portion of the 1999-2000 Regular Session of the Legislature, do not exclude the discovery or use of relevant evidence in a criminal action.

§ 1157.6. Proceedings and records of quality assurance committees for county health facilities

Neither the proceedings nor the records of a committee established in compliance with Sections 4070 and 5624 of the Welfare and Institutions Code having the responsibility of evaluation and improvement of the quality of mental health care rendered in county operated and contracted mental health facilities shall be subject to discovery. Except as provided in this section, no person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery or testi-
mony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting, or to any person requesting facility staff privileges.

§ 1159. Animal experimentation in product liability actions

(a) No evidence pertaining to live animal experimentation, including, but not limited to, injury, impact, or crash experimentation, shall be admissible in any product liability action involving a motor vehicle or vehicles.

(b) This section shall apply to cases for which a trial has not actually commenced, as described in paragraph (6) of subdivision (a) of Section 581 of the Code of Civil Procedure, on January 1, 1993.

Comparative Note. In addition to the limitations that have been noted, the Code contains a number of other limitations on the use of relevant evidence that are omitted in the Rules.

Code section 1156 promotes research to reduce morbidity and mortality by in-hospital medical or medical-dental staff committees of licensed hospitals by limiting the admissibility of the written records of the interviews, reports, statements, and memoranda connected with the research.\(^{214}\)

Code section 1156.1 promotes research to reduce morbidity and mortality by committees established to undertake medical or psychiatric study by limiting the admissibility of the written records of the interviews, reports, statements, and memoranda connected with the research.\(^{215}\)

Code section 1157 applies to the proceedings and records of committees charged with evaluating and improving the quality of care rendered by a variety of health professionals, including medical doctors, dentists, and therapists.\(^{216}\) In addition to exempting the proceedings and records from discovery,\(^{217}\) subject to certain exceptions, section 1157 provides that “no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.”\(^{218}\)

\(^{215}\) Id. § 1156.1.
\(^{216}\) Id. § 1157(a).
\(^{217}\) Id.
\(^{218}\) Id. § 1157(b).
Code section 1157.6 extends Code section 1157's prohibitions on discovery and testimony to the proceedings and records of committees charged with evaluating and improving the quality of mental health rendered in county-operated and -contracted mental health facilities.\footnote{199} Code section 1157.7 extends Code section 1157's prohibitions on discovery and testimony to the proceedings and records of any committee established by a local governmental agency to monitor, evaluate, and report on the necessity, quality, and level of specialty care provided by a general acute care hospital which has been designated or recognized by the local governmental agency as qualified to render specialty care services, including trauma care.\footnote{200} Code section 1159 prohibits the use of evidence pertaining to live animal experimentation in any product liability action involving a motor vehicle.\footnote{221}

All of these Code provisions address special concerns and should be retained.

1.10 Recommendations

The breadth of topics covered in this Article makes generalizations difficult. Nonetheless, when it comes to relevance and its limits, the conceptual overlap between the Rules and the Code is striking. Both define relevance in almost identical terms and vest judges with discretion to exclude otherwise admissible evidence when its probative value is substantially outweighed by similar enumerated concerns.

In addition, the Rules and the Code have similar provisions for excluding categories of relevant evidence in order to advance important policies: subsequent remedial measures are excluded to encourage the making of repairs; offers to plead guilty and related statements are banned to promote plea bargaining; pleas of nolo contendere are excluded to encourage defendants to settle criminal cases; humanitarian gestures are promoted by eliminating the risk that they might be used as admissions; and the settlement of civil claims is encouraged by banning the use of settlement conference statements to prove the validity or invalidity of the claims.

The Rules and the Code take similar, though not identical, approaches to the admissibility of character evidence. When character is
not an element of the cause of action, both posit a general rule disfavoring the use of character evidence to prove that on a given occasion a person conformed his or her conduct to a particular character trait. Both build on the common law exceptions that allow criminal defendants to offer evidence of their character to counter evidence of guilt and of their victims' character to disprove or diminish their culpability for the crime charged. In addition, the Rules and the Code have come to recognize new exceptions which disfavor the accused. In sexual assault cases, for example, federal and California prosecutors may now offer evidence of uncharged sexual misdeeds as proof of the accused's propensity to commit the sexual misdeed charged.

The Rules and the Code seek to protect the victims of sexual assaults through rape shield laws that limit the kind of evidence the accused may offer to prove consent or to discredit the victim as a witness. In addition, both permit the use of evidence of habit and routine practices because the evidence does not raise the concerns associated with character evidence.

But despite the overlap, some significant differences between the Rules and the Code remain. In some instances, one set of rules will contain provisions the other set does not. The Code provisions on mediation are a good example. Because of the importance of mediation as a conflict resolution tool, the Code devotes an entire chapter to rules promoting mediation. The Rules are silent on mediation. In other instances, the approach of one set of rules is superior to the other set's approach. The Rules, for example, expressly prohibit the use of a statement made in settlement negotiations if offered as a prior inconsistent statement or as evidence of contradiction. The Code says nothing about this important matter.

The purpose of this Article is to help identify those provisions of the Code that should be retained and those that should be changed when the Rules or the Uniform Rules offer a better approach. Below is a summary of the major recommendations reached in the article.

(1) Rule 401 makes clearer than Code section 210 the burden the proponent must discharge when confronted by an irrelevance objection. The proponent need only convince the judge that the proffered evidence makes the existence of any consequential fact more or less probable than the fact would be without the evidence. Though both provisions impose the same burden on the proponent of the evidence, the language of Rule 401 is superior in this respect. Accordingly, California should consider adopting Rule 401's language on
how a judge should measure the probative value of the proffered evidence.

(2) Neither the Code nor the Rules establishes a preference between direct and circumstantial evidence. In section 410, however, the Code at least defines direct evidence. The Rules do not have an analogous provision. California should retain section 410.

(3) Under Rule 404(a)(2), the government may, in a homicide prosecution, offer evidence of the victim’s trait of peacefulness even if the accused did not first offer evidence of the victim’s predisposition to engage in unprovoked attacks. So long as the accused offers evidence that the victim was the first aggressor on the occasion in question, the prosecution may offer evidence of the victim’s trait of peacefulness in the form of opinion and reputation evidence. The Rule applies, however, even if other eyewitnesses testify to the fatal attack.

The Code does not contain a similar provision. If one is enacted, it should be limited to those homicide prosecutions in which the victim is the deceased and there are no surviving eyewitnesses other than the accused.

(4) Rule 404(b) and Code section 1101(b) provide similar, though not identical, non-exclusive lists of permissible propositions that may be proved by seemingly inadmissible character evidence. Rule 404(b) differs from the Code in that it requires the prosecution in a criminal case to provide notice in advance of trial of its intention to offer evidence under the Rule. Pretrial notice is included to reduce surprise and promote early resolution of the issue of admissibility.

The Uniform Rules go further. Uniform Rule 404 provides for pretrial notice in all cases, not just prosecutions. In addition, if the evidence is offered against the accused, Uniform Rule 404(c)(2) requires the court to conduct a hearing to determine the admissibility of the evidence and to exclude the evidence unless the proponent convinces the judge by clear and convincing evidence that the misdeed attributed to the accused was committed and that its probative value on contested issues outweighs the danger of unfair prejudice. Because evidence offered under Rule 404(b) and Code section 1101(b) can be especially prejudicial to the accused, California should consider adopting the pretrial notice of the federal provision as well as the additional safeguards of the Uniform Rules.

(5) Code section 1104 bans the use of evidence of a trait of a person’s character with respect to care or skill to prove the quality of his or her conduct on a specified occasion. The Rules do not have a
counterpart. The California provision is a specific application of the general prohibition on the use of character evidence. Its value is putting the parties and the court on notice that the prohibition applies to traits of care and skill as well, especially in personal injury cases. Accordingly, Code section 1104 should be retained.

(6) Both the federal and California rape shield laws have been amended extensively. Their amendments reflect the difficulties each jurisdiction has faced in achieving an appropriate balance between the rights of sexual assault victims and those of the accused. California should retain its provisions.

(7) There is no substantive difference between the federal and California approaches to evidence of habit and custom or routine practice. Because California practitioners and judges are familiar with the Code provision, California should retain its rule.

(8) With regard to subsequent repairs, California should retain its own rule. As construed in *Ault*, it embodies the important policy that the state's subsequent repair doctrine should not apply in strict liability actions.

(9) Rule 408 does not include impeachment among the permissible purposes for which settlement conference statements may be offered. Whether statements made in compromise negotiations should be admitted as prior inconsistent statements to impeach a party has been controversial. Opponents point out that the value of impeaching a party through inconsistent statements made in compromise negotiations is outweighed by the negative effect such impeachment would have on the candor required for successful settlement negotiations. As amended in 2006, Rule 408 adopts this view. It prohibits the use of a statement made in settlement negotiations if offered as a prior inconsistent statement or as evidence of contradiction. The Code is silent on this point. Because of the importance of the concerns involved, California should consider explicitly excluding the use of settlement statements when offered as prior inconsistent statements or as evidence of contradiction.

(10) Prior to the 2006 amendment, Rule 408 was also explicit in another important respect: exclusion was not required of any evidence otherwise discoverable merely because it was presented in the course of compromise negotiations. The 2006 amendment deleted this provision as unnecessary. Neither Code section 1152 nor Code section 1154 purports to immunize the subject matter of evidence presented at the settlement conference. The language deleted by the 2006 amendment to Rule 408 served an important purpose. It alerted
the parties and the court that evidence disclosed at settlement negotiations is not immunized from discovery and proof simply because it is disclosed in that setting. California should consider adding the deleted language to its rule. Such an addition would not be unprecedented. The Code includes such a provision in its chapter on mediation.

(11) The Code chapter on mediation was added to encourage the use of mediation to settle disputes. It should be retained.

(12) California has an additional provision relating to the policy of excluding evidence of humanitarian gestures. Recognizing that many personal suits are prompted by anger at the defendant's failure to apologize for the injury, the California Legislature in 2000 amended Code section 1160 to reduce suits by encouraging defendants to apologize without fear their apologies might be considered admissions. California should retain its benevolent gestures provision.

(13) An important question is whether the protection afforded to an offer to plead guilty or a withdrawn guilty plea extends also to the statements made in connection with the offer or the withdrawn plea. Rule 410 answers this question in the affirmative by extending the protection to any statement made in the course of plea negotiations as well as the offer to plead guilty. Code section 1153 is silent on this point but has been construed as extending to the statements made in the course of plea negotiations as well as to the offers to plead guilty. Given the importance of the question, California should consider adopting the language of Rule 410 rather than relying on judicial construction.

(14) Whether the accused should be impeached by statements made in plea discussions presents difficult choices between promoting plea bargains, on the one hand, and discouraging criminal defendants from testifying inconsistently with their prior statements, on the other. Rule 410 strikes the balance in favor of plea bargaining by prohibiting the use of plea discussion statements for impeachment unless the accused relinquishes the Rule's protection as a condition to entering into plea negotiations. Code section 1153 appears to be as broad as Rule 410. Despite the distinction drawn by Crow, Code section 1153 plainly does not distinguish between impeachment and admissions. Consideration should be given to amending the Code to overturn Crow.

(15) Code section 1153 does not define the participants in plea negotiations. Offers and related statements made to prosecuting attorneys qualify for protection, but it is less clear whether police officers
and others who participate in bona fide plea negotiations on behalf of the prosecution qualify as plea participants. Code section 1153 does not expressly limit bona fide plea discussions to discussions with attorneys employed by the county district attorney or the California Attorney General. Police officers and other law enforcement personnel sometimes participate in plea negotiations. To eliminate uncertainty about who else qualifies as a plea participant for the prosecution, California should consider amending Code section 1153.

(16) Rule 410, following the traditional approach, prohibits the use of a plea of nolo contendere in any civil or criminal proceeding regardless of the grade of the offense. Section 1016(3) of the California Penal Code excludes felonies from the protection afforded to nolo contendere pleas in civil actions. Section 1016(3) reflects a considered California policy and should be retained.

(17) If possessing liability insurance is not probative of fault, then not possessing such insurance is likewise not probative of care. Rule 411 proceeds on this assumption. It provides that evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. Code section 1155 does not contain a similar provision. Accordingly, in California courts, the party opposing evidence of the lack of liability insurance must object on irrelevance grounds. Consideration should be given to conforming the California rule to the federal rule.

(18) Code section 1153.5 bans the use of an offer for a civil resolution of a complaint alleging a crime against property if the offer is made with the assistance of the prosecutor. Both the offer as well as the admissions made in the course of the negotiations are protected from disclosure in any subsequent proceeding. The Rules do not have an equivalent provision. Section 1153.5 should be retained.