8. SPECIFIC RULES OF RELEVANCY

Over the years, a few specific rules of relevancy have developed to exclude narrow categories of evidence thought to be of low probative value and substantial prejudicial effect. They also reflect public policy decisions that exclusion was reasonably necessary to advance the public interest. They appear in Rules 407 through 411.

These rules all follow the same pattern. They define a specific type of evidence and declare it inadmissible for one or more particular purposes. If evidence does not precisely fit the definition, or is relevant for a different purpose, the rule does not apply and admissibility will be determined by the basic relevancy principles of Rules 410-403.

This creates the anomaly that the objection and response are based on different rules. For example:

> Q: After the plaintiff fell off the balcony, did you add a higher railing to all the balconies in the building?
>
> Defense: I object under Rule 407 that this is an inadmissible subsequent remedial measure.
>
> Plaintiff: We are not offering it to prove liability, but to show that the defendant was responsible for building maintenance, admissible under Rule 402 because he denied it in his Answer.

The problem, of course, is that the jurors may use the fact that the defendant repaired the balconies as evidence that they were previously unsafe. Evidence admissible for one legitimate and one improper purpose raises a Rule 403 danger of confusion of the issues. Just because the plaintiff can successfully argue that admissibility should be decided under Rule 403 rather than Rule 407 does not make it admissible. The judge could decide that the issue of ownership and control has not really been disputed at trial, so the probative value on the legitimate issue is low and the danger of the jury using it for the prohibited purpose is high, and exclude it.

A. RULE 407: SUBSEQUENT REMEDIAL MEASURES

1. Rule

A subsequent remedial measure is an action taken after an event which, if taken previously, would have made the event less likely to occur. Rule 407 provides that evidence of subsequent remedial measures is not admissible to prove negligence, culpable conduct, or the existence of a defect, but may be admissible if offered for another purpose which is genuinely at issue, such as ownership, control, or the feasibility of precautionary measures. The idea is that, if a defendant is sued for negligence based on unsafe conditions, we do not want them to delay repairs to make the condition safer for fear that their action will be interpreted as a concession that the premises were previously unsafe. *See Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383 (Ind. Ct. App. 1986) (after a tavern customer was attacked in the defendant's parking lot, the defendant installed additional outside lights). Not just physical repairs constitute remedial measures -- taking disciplinary action, reprimanding or re-assigning a careless employee following an accident

would also be an inadmissible remedial measure.

2.. Exceptions

Evidence of remedial measures is permitted to prove two things if they are genuinely disputed:

a) Ownership or control, i.e., the defendant denies that he has responsibility for the property but is the person who made or paid for the repairs.

b) The feasibility of better safety measures, if the defendant claims it was not possible to make the property or product safer but later redesigns it.

These exceptions are to be invoked infrequently because they are rarely genuinely contested, and would pose Rule 403 dangers of confusing the issues or misleading the jury.

B. RULES 408, 409 & 410: ATTEMPTS TO COMPROMISE

1. Rule

Offers to settle and statements made during negotiations to settle a civil or criminal claim are inadmissible. Evidence of a completed settlement is also theoretically inadmissible, but they appear rarely, since if the case is successfully settled, it does not go to trial. We do not want to discourage parties from trying to settle cases amicably because they are afraid that if negotiations fail, the other side will use their offer of compromise as evidence they knew their case was weak.

2. Civil Settlement Negotiations

Rule 408 provides that evidence of an offer to compromise a legal dispute is not admissible on the merits of that dispute. This includes any statements, concessions, or admissions made in the course of settlement discussions. A lawsuit need not be pending, but the controversy must be genuine and there must be a dispute about either the validity or the amount of a claim. The rule applies whether or not negotiations result in a final settlement and whether or not lawyers are involved.

Testimony about settlement negotiations may be admissible if it is offered for a genuinely relevant purpose other than the weakness of a case. The only common examples have to do with proving bias. A witness who was a potential co-defendant but ends up testifying for the prosecution, can be impeached by showing that his or her testimony as “bought” by giving them a good deal in exchange for testimony.

The rule extends to alternative dispute proceedings like mediation and arbitration, which are considered negotiations.

4. Offers to pay damages

Rule 409 addresses a gap left by Rule 408's focus on “compromise.” What if a potential defendant offers to (or does) pay all the damages? Insurance companies do this all the time -- offer to pay for all medical bills and property damage so the case doesn’t go to court. The defendant is obviously trying to avoid the additional cost of attorneys’ fees, and the risk of a large

verdict for pain and suffering or punitive damages. It's not a compromise because there has been no case filed and no claim made yet for pain and suffering or punitives, and may never be.

But the policy is the same -- we want to avoid expensive and unpredictible lawsuits, and to encourage defendants to confess responsibility and compensate injured parties. Therefore, evidence that plaintiff's medical expenses or repair bills have been paid is not admissible to show that the person paying them is liable for those damages. The plaintiff may not introduce evidence of payments by the defendant as an admission that the defendant is at fault.

The major difference between Rules 408 and 409 is that 408 protects statements made to facilitate negotiation, but 409 protects only payment or promise to pay.

5. Criminal Plea Discussions

Rule 410 makes evidence of plea bargaining and communications between the defendant and the state concerning reduction of charges or other favorable treatment inadmissible. Factual statements by the defendant concerning his participation in the crime made during negotiations are covered by the rule, and are inadmissible against him if the case eventually goes to trial. Each state has a slightly different version of this rule*, but in general, actual charges must be pending* at the time the statement was made, and the bargaining must be with the prosecutor. Statements made to the police at the investigation and arrest stage in an effort to talk one's way out of being charged are not covered by this rule because police do not have authority to enter into a binding plea agreement. Similarly, negotiations with the victim to try to talk him or her out of going to the police are not protected in most states.

Completed plea agreements that result in guilty pleas, and statements made on the record to establish a factual basis for the plea (R. Crim. P. 11) are usually admissible if relevant in some subsequent proceeding (such as a civil case against the defendant), unless the defendant is allowed to withdraw the plea.

C. RULE 411: INSURANCE

Evidence Rule 411 provides that evidence of liability insurance is not admissible to prove whether the person acted negligently. It cannot be read literally, because the existence of insurance has no probative value on the questions of liability. It makes more sense to see this as a rule about how the jury assesses damages. If they find out a defendant has a million dollar insurance policy, they are more likely to award around a million dollars in damages. Similarly, if jurors find out the defendant is uninsured, they are likely to reduce their award. Neither is proper -- damages are supposed to be based on the value of the harm cause.

Rule 411 permits evidence of insurance only if offered for a specific relevant purpose. For example:

(1) Proof of agency, e.g., that a person alleged to be defendant's agent was or was not covered by defendant's insurance policy.
(2) Proof of ownership or control, e.g., that an automobile alleged to be owned by defendant was or was not insured by defendant.

(3) Bias or prejudice of a witness, e.g., that an investigator or accident reconstruction expert is employed by defendant's insurance company.

Obviously, if an insurance company is a defendant and the real party in interest, Rule 411 does not apply. The jury is entitled to know the names of the parties.