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## §4.10 Unfair Prejudice, Confusion, Delay, Collateral

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### Recommended Citation

This article addresses the exclusion of evidence under FRE 403 for unfair prejudice and the other grounds of exclusion listed in the rule such as confusion, delay, misleading the jury, and being cumulative.

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## §4.10 Unfair Prejudice, Confusion, Delay, Collateral

The first and most frequently asserted ground of exclusion in FRE 403 is “unfair prejudice.” The qualification “unfair” was included out of recognition that relevant evidence is by nature prejudicial to the opposing party.<sup>1</sup> The Rule expects courts to distinguish between prejudice resulting from the reasonable persuasive force of evidence and prejudice resulting from excessive emotional or irrational effects that could distort the accuracy and integrity of the factfinding process.<sup>2</sup>

### Unfair prejudice

FRE 403 encompasses two analytically distinct but frequently overlapping forms of unfair prejudice. The first is the injection of undue emotionalism into the proceeding arousing hostility, anger, or sympathy on the part of the jury.<sup>3</sup> The second is the likelihood that the jury will misuse the evidence in some way or give it undue weight.<sup>4</sup>

### Appeal to emotion

Because most human assessments rest at least in part on emotion, no attempt is made to exclude emotion from the trial or even all evidence likely to evoke an emotional response. Rather FRE 403 provides a trial judge with the ability to regulate the nature and extent of emotional appeals during trial.

Thus courts may exclude evidence that is found to be “inflammatory,” “shocking,” or “sensational.”<sup>5</sup> Evidence may also be excluded where it evokes the anger or punitive impulses of

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§4.10 1. *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1134 (4th Cir. 1988) (all relevant evidence is “prejudicial” in that it “may prejudice the party against whom it is admitted”).

2. *Westfield Insurance Co. v. Harris*, 134 F.3d 608, 613 (4th Cir. 1998) (“prejudice” means “a genuine risk that the emotions of the jury will be excited to irrational behavior”). *But see* Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 *Wis. L. Rev.* 1147 (questioning ability of courts to assess prejudicial effect of evidence).

3. *United States v. Huyck*, 849 F.3d 432 (8th Cir. 2017) (describing unfair prejudice in terms of evidence “so inflammatory on its face” that it would divert jury from material issues).

4. *See* ACN, FRE 403 (unfair prejudice is “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one”). *See* *United States v. Brandon*, 521 F.3d 1019, 1026 (8th Cir. 2008) (unfair prejudice refers not to “legitimate probative force” of evidence, but to “its capacity to lure a jury into declaring guilt for an improper reason”), *cert. denied*, 129 S. Ct. 314.

5. *Carter v. District of Columbia*, 795 F.2d 116, 128-132 (D.C. Cir. 1986) (abuse of discretion for trial judge to admit “highly inflammatory” information from defendants’ personnel files).

the jury,<sup>6</sup> unfairly puts a party or witness in a negative light,<sup>7</sup> appeals to the jury's prejudices,<sup>8</sup> or gives rise to overly strong sympathetic reactions.<sup>9</sup> But sometimes evidence that is "egregious" is admitted on the theory that it has even greater probative value, such as where evidence of vicious prior beatings by police officers is offered to show a municipality's tolerance of the practice.<sup>10</sup> Various forms of demonstrative evidence often have strong emotional impact justifying careful regulation under FRE 403.<sup>11</sup>

### **Limiting emotional impact**

The fact that certain evidence may be emotionally discomforting to the jury does not mean it should be excluded.<sup>12</sup> Thus gory photographs depicting injuries of the plaintiff are often received in personal injury or wrongful death cases on the issue of damages.<sup>13</sup> Photographs of dead bodies or injured victims are also often admitted in criminal cases,<sup>14</sup> although exclusion is more likely

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6. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1142 (7th Cir. 1985) (in suit for invasion of privacy by woman pictured in Hustler magazine, trial court erred under FRE 403 in admitting slide show of 128 of magazine's "worst pictures").

7. *Old Chief v. United States*, 519 U.S. 172 (1997) (in prosecution for assault with dangerous weapon and possession by convicted felon of firearm, error to admit copy of defendant's prior conviction for felony assault causing bodily injury when defendant was willing to stipulate that he was a convicted felon and to have jury instructed that this element of offense was proven); *United States v. Simpson*, 910 F.2d 154, 156-158 (4th Cir. 1990) (in prosecution for trying to board plane with a firearm, reversible error to introduce evidence that defendant fit drug courier profile).

8. *In re Air Crash Disaster Near New Orleans, Louisiana, on July 9, 1982*, 767 F.2d 1151, 1154 (5th Cir. 1985) (where plaintiff sought damages for death of wife in airline crash, proper to exclude evidence that plaintiff had venereal disease; because plaintiff admitted he had once been unfaithful to wife, evidence "would have proved nothing more").

9. *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991) (no error to exclude evidence that defendant's son had cerebral palsy and that defendant had devoted life to son's care), *cert. denied*, 505 U.S. 1220.

10. *Foley v. City of Lowell, Mass.*, 948 F.2d 10, 15 (1st Cir. 1991) (where a plaintiff attempts to show similar prior acts of a municipality tolerating police misconduct, "egregiousness is a hallmark of probative value").

11. *See* §9.31.

12. *Allen v. Seacoast Prods., Inc.*, 623 F.2d 355, 365 (5th Cir. 1980) (no unfair prejudice in allowing plaintiff to demonstrate procedure for removing and replacing artificial eye).

13. *Walker v. Norris*, 917 F.2d 1449, 1453 n.9 (6th Cir. 1990) (in civil rights action against prison guards arising out of death of inmate, no error to admit photographs of decedent's body).

14. *United States v. Mehanna*, 735 F.3d 32, 61 (1st Cir. 2013) (terrorism-related evidence is often emotionally

when the nature or extent of injuries is not an element of the prosecution's case.<sup>15</sup>

The court has authority under FRE 403 and 611(a) to minimize the emotional impact of such evidence, for example, by limiting the number of photographs introduced, requiring that they be in black and white rather than color, or requiring that a drawing or diagram be offered in lieu of a photograph. In order to make exclusion more likely, the objecting party can offer to stipulate to all matters properly provable by such evidence, although the court is not bound to accept such a stipulation.<sup>16</sup>

### **Limited purpose**

The danger of jury misuse of evidence arises most often with evidence admitted for a limited purpose under FRE 105. The jury may be instructed to consider it only on a particular issue or only against a particular party. However, sometimes the evidence has such powerful or dramatic impact that it is unrealistic to expect the jury to comply with a limiting instruction.<sup>17</sup> In such situations, the court has discretion to exclude the evidence under FRE 403.<sup>18</sup>

Evidence bringing out the criminal background of a defendant<sup>19</sup> or why he was being

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charged, even "alarming" and "blood curdling," but "this emotional overlay is directly related to the nature of the crimes," and it should not surprise defendant that conspiracy to help terrorist organizations kill Americans involves "evidence offensive to the sensibilities of civilized people").

15. *Compare* United States v. Lopez, 271 F.3d 472, 482 (3d Cir. 2001) (admitting photographs of victim's mutilated hand, which "related to the charge of mayhem") with State v. Wilson, 310 S.E.2d 486, 487-488 (W. Va. 1983) (gruesome photographs are not per se excludable but are presumptively prejudicial and state must show that they have "essential value" to the case; reversible error to admit such photographs here).

16. State v. Chapple, 135 Ariz. 281, 660 P.2d 1208, 1217 (1983) (exhibits that have the tendency to cause prejudice "may often be admissible despite offers to stipulate" because testimony "may be difficult to comprehend without photographs, or exhibits may corroborate or illustrate controverted testimony"). For a discussion of offers to stipulate, see §4.9, *supra*.

17. *Cf.* Shepard v. United States, 290 U.S. 96, 103-104 (1933) (Cardozo, J.) (rejecting use of deceased wife's statement "Dr. Shepard has poisoned me" for limited purpose of showing her will to live and unlikelihood of her committing suicide; "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that the rules of evidence are framed.").

18. See ACN, FRE 105 ("availability and effectiveness" of giving a limiting instruction "must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403").

19. United States v. Bland, 908 F.2d 471, 473 (9th Cir. 1990) (in prosecution for being an ex-felon in possession of a firearm, it was error to admit evidence that basis of arrest warrant was the torture murder of a seven-year-old girl, because it might suggest that acquittal meant "releasing an exceedingly dangerous child molester and killer").

investigated<sup>20</sup> is often found unfairly prejudicial under FRE 403. Evidence of other crimes or wrongs committed by a party may be excluded under FRE 403 even where such evidence otherwise qualifies for admission under FRE 404(b).<sup>21</sup>

Evidence of a gun or other weapon seized from the accused at the time of arrest may be admitted where the weapon is an element of the charged crime or was allegedly used during commission of the charged offense.<sup>22</sup> Otherwise such evidence is generally excluded as unfairly prejudicial,<sup>23</sup> although some decisions admit weapons found in a defendant's possession to support charges of organized criminal activity such as drug trafficking.<sup>24</sup>

### **Confusing and misleading**

Evidence may be excluded where it is likely to confuse or mislead the jury, such as by distracting them with immaterial or side issues.<sup>25</sup> There is considerable overlap between the dangers of confusing the issues and misleading the jury, and courts often cite both dangers without attempting to distinguish between them.

Examples of evidence found confusing and misleading include evidence about developments in related legal proceedings,<sup>26</sup> the failure to prosecute other parties,<sup>27</sup> reports containing ambiguous

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20. *United States v. Lamberty*, 778 F.2d 59, 60-61 (1st Cir. 1985) (in prosecution against postmaster for improperly opening package, reversible error to admit "highly prejudicial" testimony of postal inspector that defendant was being investigated because of "information" that defendant was "taking out packages which had been missent").

21. *See* §4.16, *infra*.

22. *United States v. Eatherton*, 519 F.2d 603, 611 (1st Cir. 1975) (upon proof that a weapon was used during bank robbery, court may permit introduction of that weapon or a weapon of a similar kind to show identity), *cert. denied*, 423 U.S. 987.

23. *United States v. Warledo*, 557 F.2d 721, 725 (10th Cir. 1977) ("The courts have quite uniformly condemned the introduction in evidence of testimony concerning dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.").

24. *United States v. Green*, 887 F.2d 25, 27 (1st Cir. 1989) (no error to admit proof of firearms, which are "tools of the trade" in drug trafficking).

25. *See, e.g., United States v. Zayyad*, 741 F.3d 452, 462 (4th Cir. 2014) (in trial for selling counterfeit drugs, blocking questions on "gray-market" drugs, which would "confuse, mislead, and waste time," distracting jury from "principal purpose," which was to assess defendant's "subjective belief and actual knowledge").

26. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346-1348 (5th Cir. 1978) (in products liability action where decedent was killed when gas tank exploded after car rear-ended by another driver, error to allow manufacturer to introduce guilty plea of other driver to involuntary manslaughter because such evidence was likely to be "confusing" and "potentially misleading" to jury).

27. *United States v. Steffen*, 641 F.2d 591, 596 (8th Cir. 1981) (excluding evidence offered by defendant that other

legal terminology,<sup>28</sup> and private agreements between defendants purporting to apportion any liability imposed.<sup>29</sup>

### **Inculcating third party**

An important and controversial application of this ground of exclusion is to prevent defendants from attempting to show that a third person committed the crime for which they are charged unless the court finds the proffered evidence sufficiently probative.<sup>30</sup> Although courts understandably seek to prevent improper attempts to divert the attention of the jury and put a nonparty on trial on the basis of speculative evidence,<sup>31</sup> judicial caution is warranted because of the due process dangers of excluding evidence of third party culpability that is sufficient to raise a reasonable doubt in the minds of the jury about defendant's own guilt.<sup>32</sup>

### **Waste of time, delay, cumulative**

FRE 403 permits exclusion based on considerations of "undue delay, wasting time or

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persons alleged to be involved were not prosecuted), *cert. denied*, 452 U.S. 943.

28. *Pucalik v. Holiday Inns*, 777 F.2d 359, 363 (7th Cir. 1985) (in wrongful death action arising out of killing of security guard, no error to exclude government document finding that guard died "in the line of duty" and therefore was acting as "a licensee, not an invitee"; document was "conclusory and not based on findings under Indiana law" and its probative value was "clearly outweighed by the potential for confusing and misleading the jury").

29. *In re Air Crash Disaster at John F. Kennedy Intl. Airport on June 24, 1975*, 635 F.2d 67, 73 (2d Cir. 1980) (in litigation arising out of air crash, no error to exclude evidence that United States and airline had agreed to a 40-60 split of any damages awarded; court finds that such evidence "would have only served to mislead the jurors and confuse the issues").

30. *See, e.g., United States v. Perkins*, 937 F.2d 1397 (9th Cir. 1990) (excluding evidence of insufficiently similar crimes by third person as likely to confuse and mislead jury). *See generally* McCord, "But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else Is Guilty, 63 *Tenn. L. Rev.* 917 (1996).

31. *United States v. Jordan*, 485 F.3d 1214, 1222 (10th Cir. 2007) (no abuse of discretion to exclude evidence of possible third party guilt because it was speculative); *Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983) (court must balance legitimate interests of defendant to present a defense against interests of state in fair and reliable trial; where state interest is strong, "only the exclusion of critical, reliable and highly probative evidence will violate due process").

32. *Holmes v. South Carolina*, 547 U.S. 319 (2006) (constitutional error to exclude evidence of third party guilt merely because prosecution's case against defendant seemed strong). *See also* Everhart, Putting a Burden of Production on the Defendant Before Admitting Evidence That Someone Else Committed the Crime Charged: Is It Constitutional?, 76 *Neb. L. Rev.* 272 (1997). On the constitutional right to produce evidence, *see* §5.5, *infra*.

needlessly presenting cumulative evidence.” Such grounds for exclusion can be viewed as a “concession to the shortness of life”<sup>33</sup> as well as an acknowledgment of the limited resources of the judicial system. Pretrial conferences under FRCP 16 share the same goal of avoiding unnecessary proof at trial.<sup>34</sup>

### “Needlessly” cumulative

It is sometimes difficult to decide whether evidence is “needlessly” cumulative because it is hard to know how much evidence on a particular issue is required to convince the jury. Litigants are generally allowed to call more than one witness on a point and to introduce corroborative or duplicative evidence. But under FRE 403 courts clearly have discretion to limit the number of witnesses called,<sup>35</sup> the number of examples on the same point,<sup>36</sup> and generally to prevent unnecessary repetition.<sup>37</sup>

Courts may exclude documentary evidence offered on a point that has already been established by testimony<sup>38</sup> and similarly may refuse to require the playing of a tape recording on matters already adequately established by other evidence.<sup>39</sup> However, the trial judge should not become so concerned about keeping up the pace of the trial that a litigant is prevented from presenting evidence critical to his claim or defense.<sup>40</sup>

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33. *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 944 (1887) (Holmes, J.).

34. FRCP 16(c)(4) and (15) (subjects for consideration at pretrial conferences include “avoidance of unnecessary proof and of cumulative evidence” and “an order establishing a reasonable limit on the time allowed for presenting evidence”).

35. *United States v. Garrett*, 716 F.2d 257, 272 (5th Cir. 1983) (after eight character witnesses had already testified, trial judge did not abuse his discretion by excluding similar testimony from ten additional proposed witnesses), *cert. denied*, 466 U.S. 937.

36. *United States v. Gleason*, 616 F.2d 2, 22 (2d Cir. 1979) (limiting evidence to two out of eight examples of defendant’s alleged cohort acting unlawfully on his own), *cert. denied*, 444 U.S. 1082.

37. *Melton v. Deere & Co.*, 887 F.2d 1241, 1245 (5th Cir. 1989) (in personal injury suit against manufacturer of farm combine, no error for trial court to admit evidence of three similar accidents and exclude six others because court has discretion to exclude “unnecessarily cumulative” evidence).

38. *United States v. Lomax*, 598 F.2d 582, 584-585 (10th Cir. 1979) (proper to refuse to receive stolen check as an exhibit to impeach prosecution witness where witness already admitted stealing the check).

39. *United States v. Hearst*, 563 F.2d 1331, 1348 (9th Cir. 1977) (court refused to allow playing of one hour and forty-five-minute tape of psychiatric interview of defendant; tape found needlessly cumulative), *cert. denied*, 435 U.S. 1000.

40. *Bower v. O’Hara*, 759 F.2d 1117, 1123-1124 (3d Cir. 1985) (error to exclude evidence “plainly relevant to the issue of damages” where the trial court ruling “seemed to have been prompted chiefly if not solely by the court’s

## Collateral

Although not listed as a ground for exclusion in FRE 403, evidence can be excluded if it is “collateral,” which may encompass several grounds listed in the Rule including unfairly prejudicial, confusing, misleading, waste of time and undue delay. “Collateral” is a durable term carried forward from common law tradition. In a general sense, the term describes testimony and other evidence far removed from what is important or central in a case. Such proof is usually seen as tangential, unimportant, or trivial, hence distracting or time-consuming, and often prejudicial. In practice, the term “collateral” appears in several specific settings where it describes important limits on various evidential doctrines.

First, it is often said that impeachment on collateral points is improper. The central idea is that evidence should not be admitted if it tends only to contradict or refute other evidence that is unimportant in a case. Contradiction is one of the recognized methods of impeachment, and in this setting the term “collateral” has developed into a hard-edged limit with well-defined meaning. Putting aside details, the idea is that counterproof may be admitted to contradict only testimony or other evidence that really counts.<sup>41</sup> If a witness says he was wearing a coat when he saw the accident, proof that he was in his shirtsleeves might well be excluded as impeachment on a collateral point.

Another recognized method of impeachment involves the use of prior statements by a witness that conflict with his testimony. Here too it is sometimes said that impeachment on collateral points is improper although the limit is not so carefully observed in this setting.<sup>42</sup>

In connection with impeaching attacks that seek to show bias or defects in mental or sensory capacity, extrinsic evidence is generally admissible. Essentially that means that one witness may be called to testify on such facts as they relate to another witness, and this outcome is often explained by the comment that such issues and such evidence are not collateral.<sup>43</sup>

Second, it is often said that the “open door” doctrine does not pave the way for evidence on collateral points. Essentially, the idea of the open door doctrine is that affirmative party strategies in offering evidence or questioning witnesses bear importantly on what other parties may do by way of reply or counterproof. But when such strategies result in introducing evidence that is unimportant and likely to have little effect, or when counterproof that might refute such evidence would introduce risks of prejudice that are out of all proportion to the original proof, the counterproof may properly be excluded, and often it is labeled as collateral.<sup>44</sup>

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impatience about the length of trial”).

41. See the discussion in §6.47, *infra*. In connection with attempts to show a witness is untruthful, extrinsic evidence of acts by the witness is excludable (testimony by another witness), and courts sometimes explain the point by saying extrinsic evidence is inadmissible on such collateral points. See FRE 608(b) and the discussion in §6.27, *infra*.

42. See the discussion in §6.40, *infra*.

43. See the discussion of bias in §6.19 and the discussion of capacity in §6.21, *infra*.

44. See generally the discussion of the open door doctrine in §1.4 and §4.2, *supra*.

Underlying these uses of the term “collateral” are the concerns embodied in FRE 403. Far preferable to quick and careless use of the term is a more direct explanation of underlying concerns. If the concern is that probative worth is slight when compared to the complexity of the argument or issue, or the time required to explore the matter, it helps to say that. If the concern is that the evidence, while relevant on the point in question, has an unintentional spillover effect posing a risk of serious prejudice to the parties or humiliation or harassment for the witness, it helps to say that as well. Occasionally courts exhibit impatience with use of the label alone.<sup>45</sup>

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45. *United States v. Robinson*, 530 F.2d 1076, 1081 (D.C. Cir. 1976) (analysis is cursory when judge comments that evidence is only collateral in impeaching character; preferable to confront problem by “acknowledging and weighing” prejudice and probative worth).