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Proposed Relevancy Rules Generally Restate Law

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Logically, any code of evidence should start with general rules stating what evidence is admissible and what evidence is inadmissible, and then proceed to the special rules which may further circumscribe this general rule. This method of organization is followed by the Proposed Nebraska Rules of Evidence (hereinafter "Nebraska Rule[s]," "Nebraska proposal" or "Rule[s]") and the Proposed Federal Rules of Evidence (hereinafter "Federal Rule[s]" or "federal proposal"). Article IV of both these proposals defines generally this concept of admissibility in Rule 402, which provides:

> All relevant evidence is admissible except as otherwise provided by the Constitution of the United States or the State of Nebraska, by Act of Congress or of the Legislature of the State of Nebraska, by these rules, or by other rules adopted by the Supreme Court of Nebraska. Evidence which is not relevant is not admissible.

The more specific definition of admissibility for each proposal is set forth in Rule 401, which provides:

> "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.

The proposals' emphasis on the word "relevant" in these admissibility provisions can be traced back at least to the American Law Institute's Model Code of Evidence (hereinafter "Model Code") which was first published in 1942. The Model Code's Rule 1(12) defined "relevant evidence" to mean "evidence having any tendency in reason to prove any material matter . . . ." And in Rule 1(8) "material matter" was defined to mean "a matter, the existence or non-existence of which is provable in the action." Rule 9(f) of the Model Code stated that all relevant evidence is admis-

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sible, and Rule 10 provided that "[s]ubject to Rule 3, each Rule stating that evidence is admissible contains by implication the provision, 'if relevant and not subject to exclusion by another of these Rules.' "

The Model Code's forword, written by Professor Edmund M. Morgan, stated:

> The Code of Evidence therefore proceeds upon the theory that it is to be administered by an honest and intelligent judge; and that the trier of fact, whether or not a jury, has the capacity and desire to hear, consider and fairly evaluate all data which reasonable men would use if confronted with the necessity of solving a problem of like importance in their everyday life.
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> **Admissibility of Relevant Evidence**
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> How much weight shall be given to evidence is a question of judgment incapable of *a priori* determination. The Anglo-American law has, as Professor Thayer has said, no mandate to the logical faculty. It does, in a few instances, refuse to receive one class of evidence where an obviously better one is available; but it always concerns itself with admissibility as distinguished from weight. In any rational inquiry, logically irrelevant evidence is excluded, and in judicial inquiries some logically relevant material may be either absolutely or conditionally rejected. A code of evidence should concern itself primarily with admissibility, and in this respect it should be complete in itself. Consequently it should begin with a sweeping declaration that all relevant evidence is admissible, that no person is incompetent as a witness and that there is no privilege to refuse to be a witness or to disclose relevant matter or to prevent another from disclosing it. Then it should set up specific exceptions to this fundamental rule. The Code follows this plan.[1]

Actually, this approach predates the Model Code. Professor Thayer, in his 1898 Treatise on Evidence,[2] recognized that the two fundamental principles of the law of evidence are: (1) that, unless excluded by some rule or principle of law, all that is logically probative is admissible; and (2) that which is not logically probative is irrelevant and not admissible. Thayer pointed out that there are many exceptions and qualifications to the rule that whatever is logically relevant is admissible; some things are rejected as being of too slight a significance or having too conjectural and remote a connection, and other evidence is dangerous in the effect it may have on the jury and in the possibility it would be misused or overestimated by the jury.

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1. MODEL CODE OF EVIDENCE 10-11 (1942).
2. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264-66 (1898).

A clear and simple statement of these concepts of admissibility is the following from Professor McCormick:

> Relevance, as we shall see, is probative worth, and common sense would suggest that if there is to be any practice of excluding evidence which is offered, the first ground of exclusion should be the want of probative value. Correspondingly, in the search for the truth of the issue, reason would suggest that if evidence is logically probative it should be received unless there is some distinct ground for refusing to hear it.
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> We start, then, with the notion of materiality, the inclusion of certain questions or propositions within the range of allowable controversy in the lawsuit. Relevancy, in legal usage, embraces this test and something more. Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove. Relevancy, as employed by judges and lawyers, is the tendency of the evidence to establish a material proposition. Thus, as James points out, "evidence may be excluded as 'irrelevant' for either of these two quite distinct reasons: because it is not probative of the proposition at which it is directed, or because that proposition is not probable in the case."
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> . . . .
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> What is the standard of relevance or probative quality which evidence must meet if it is to be admitted? We have said that it must "tend to establish" the inference for which it is offered. . . . It is believed . . . that the most acceptable test of relevancy is the question, does the evidence offered render the desired inference *more probable than it would be without the evidence?* There are other formulas of relevancy found in the opinions which though expressed in more general terms seem consistent with the test suggested.[3]

The proposed Rules 401 and 402, with respect to the definition of relevancy and admissibility of relevant evidence, may appear very broad, but these rules merely restate present Nebraska law. That the rules are a mere restatement is apparent from the Nebraska Supreme Court's decision in *Rickertsen v. Carskadon.*[4] In *Rickertsen,* the court held the rule to be that a fact must be admitted when it has an "actual and substantial tendency" to establish or disprove the fact being litigated.[5] Furthermore, the court said evidence is relevant "not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred."[6]

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3. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 314-18 (1st ed. 1954).
4. 169 Neb. 744, 100 N.W.2d 852 (1960).
5. *Id.* at 749, 100 N.W.2d at 856 (citations omitted).
6. *Id.*

Of course, even though evidence may be relevant, it may be excluded where its probative value is outweighed by other factors. As Professor McCormick has pointed out:

> It may be asked, how does the judge know whether the evidence does make more probable the truth of the fact to be inferred? . . . The answer must filter through the judge's experience, his judgment, and his knowledge of human conduct and motivation. . . .
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> Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible. But relevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors which may move the court to exclude relevant circumstantial evidence if they outweigh its probative value. In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side-issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter-proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this developement [sic] of the proof, he would be unprepared to meet it. Often, of course, several of these dangers such as distraction and time-consumption, or prejudice and surprise, emerge from a particular offer of evidence. This balancing of intangibles—probative values against probative dangers—is so much a matter where wise judges in particular situations may differ that a lee-way of discretion is generally recognized.[7]

In recognition of these policies, Proposed Rule 403 provides:

> 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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403 reflects Nebraska law as stated in *Meyer v. Moell*[8] which held that the admission of collateral or cumulative evidence rested within the court's sound discretion. Recently, the United States Court of Appeals for the Second Circuit in *United States v. Ravich*[9] recognized this discretionary role in determining admissibility. Ravich, charged with bank robbery, complained of the admission in evidence of two .38 caliber pistols and a box of .38 caliber ammunition found in the trunk of the car of one of the defendants at the time of arrest as well as cash found in defendant's

7. C. McCormick, Handbook of the Law of Evidence 318-20 (1st ed. 1954).
8. 186 Neb. 397, 183 N.W.2d 480 (1971).
9. 421 F.2d 1196 (2d Cir. 1970).

possession and .38 caliber pistols and additional cash found in Ravich's motel room. In affirming the conviction, Judge Friendly wrote:

> While Wigmore considered that legal relevancy denotes *"something more than a minimum of probative value"* he made clear that evidence *"does not need to involve demonstration* or to produce persuasion by its sole and intrinsic force, but merely to be *worth consideration by the jury."* Others have taken an even more generous view. The trial judge must weigh the probative value of the evidence against its tendency to create unfair prejudice and his determination will rarely be disturbed on appeal.
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> The guns and ammunition stand on a somewhat different footing. The evidence connecting the guns seized in Louisiana with those used in the robbery was rather attenuated. Indeed, since only three guns were used in the robbery it is perfectly plain that at least half of the proffered weapons were not used there.
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> Nevertheless, a jury could infer from the possession of a large number of guns at the date of arrest that at least some of them had been possessed for a substantial period of time, and therefore that the defendants had possessed guns on and before the date of the robbery. Direct evidence of such possession would have been relevant to establish opportunity or preparation to commit the crime charged, and thus would have tended to prove the identity of the robbers, the only real issue in this trial. Circumstantial evidence of such possession was therefore also relevant.
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> Notwithstanding the relevance of the guns and the ammunition, the trial judge would have been justified in excluding them if he decided that their probative value was outweighed by their tendency to confuse the issues or inflame the jury. He might well have done so in this case, in view of the overwhelming evidence that the defendants were the robbers, the rather small addition which the guns provided, and the undoubted effect on the jury of seeing all this hardware on the table. However, the trial judge has wide discretion in this area, and we do not find that it was abused here.[10]

A sixth circuit decision similarly recognized this discretionary role and cited proposed Rule 403. In *Olin-Mathieson Chemical Corp. v. Allis-Chalmers Manufacturing Co.*,[11] Olin sued a manufacturer of heavy electrical equipment for property damages in June 1968 caused by an equipment malfunction. During trial, Olin unsuccessfully tried to introduce evidence of a similar equipment malfunction in November 1968. There were some marked contrasts in the two incidents. In affirming the trial court's ruling excluding such evidence, Judge Peck stated:

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10. *Id.* at 1203-05 (citations omitted) (original emphasis). *See also* State v. Huerta, 191 Neb. 280, — N.W.2d —(1974).
11. 438 F.2d 833 (6th Cir. 1971).

> Under federal law, we can find no authorities supporting the contention of Olin-Mathieson that the trial judge was required to admit the evidence in question. There can be no doubt that Rule 43(a) envisions a greater leniency toward the admissibility of evidence, which this court has recognized. However, this court also vests the trial judge with broad discretion over the admissibility of evidence, especially where the case is tried before a jury.
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> Reference to the Proposed Rules of Evidence for the United States District Courts and Magistrates seems appropriate. Rule 4-03 thereof states:
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> "Rule 4-03, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
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> (a) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading of the jury."
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> The rule makes exclusion of evidence such as that in the present case not merely discretionary, but mandatory. The note under the rule explains that the probative value of evidence must be weighed against the harm likely to result from its admission. It was within the spirit of this section that the trial judge made his ruling, and we find no error in his decision.[12]

A comparison of Article IV of the Nebraska proposal with the federal proposal reveals they are substantially identical. The United States House of Representatives recently passed H.R. 5463 which makes some changes in the federal proposal. Most of these changes were suggested by the Committee on the Judiciary. So far as Article IV is concerned, the following changes are the only significant ones.

The House modified Rule 402 to limit the Supreme Court's power to promulgate rules of evidence to "rules prescribed by the Supreme Court pursuant to Statutory Authority." Thus, the rule as modified, together with the subcommittee note, now reads:

> 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 [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority.* Evidence which is not relevant is not admissible.
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> Subcommittee Note
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> To accommodate the view that the Congress should not acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, and the concern that the Congress must not affect adversely whatever authority the Court does have to promulgate rules, the Subcommittee amended "by other rules adopted by the Supreme Court" to read

12. *Id.* at 838-39.

"by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other rules where the reference appears.

Rule 406 was modified by striking subparagraph (b). The subcommittee note explaining this change states:

> The subheading "(a) Admissibility" was dropped from the Rule for purposes of consistency of style in view of the Subcommittee's deletion of subsection (b).
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> The Subcommittee was also of the view that the method of proof of habit and routine practice should be left to the courts on a case by case basis and so struck out subdivision (b).

And Rule 408 was modified so that it now reads:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of [conduct or statements made in] *admissions of liability or opinions given during* compromise negotiations is likewise not admissible. *Evidence of facts disclosed during compromise negotiations, however, is not inadmissible by virtue of having been first disclosed in those negotiations.* This rule does not require exclusion when [the] evidence *of conduct or statements made in compromise negotiations* is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The parts in brackets were stricken and the parts in italics were substituted for the former language. The subcommittee's note accompanying this Rule 408 modification explains:

> Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in litigation. The second sentence of the Court draft proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of Government expressed the view that the Court formulation of the rule was likely to impede compromise negotiations. They were fearful that parties dealing with government agencies would be reluctant to furnish information at preliminary meetings and would wait until formal compromise negotiations began, thus effecting an immunity for themselves with respect to the evidence supplied. Under the rule as recast by the Subcommittee admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of facts is admissible. The latter aspect of the rule is drafted so as to preserve, however, other possible objections to the introduction of such evidence. The Subcommittee also intends no change in the present law whereby a party may protect himself from the future use of his statements by couching them in hypothetical or conditional form, such as "Let us assume for purposes of the discussion that" or "If it were the case that."

Presumably, these changes will be included in the Nebraska Proposal before it is submitted to the Nebraska Legislature. Only the adoption of Rules 405(a) and 408 would change existing Nebraska law. The House modifications in H.R. 5463 to those two rules does not alter that fact.

With both the federal proposal and the Nebraska proposal there has been a great amount of study and work. All members of the bar have a responsibility to review critically these proposed rules and make recommendations which they feel would either clarify or improve them in order that the rules can move towards prompt adoption by the Nebraska Legislature.