4.07. Exclusion of Relevant Evidence

A court may exclude relevant evidence if its probative value is outweighed by the danger that its admission would:

(1) create undue prejudice to a party;

(2) confuse the issues and mislead the jury;

(3) prolong the proceeding to an unreasonable extent without any corresponding advantage to the offering party; or

(4) unfairly surprise a party and no remedy other than exclusion could cure the prejudice caused by the surprise.

Note

The Court of Appeals has held that relevant evidence is admissible as set forth in rule 1.05. The Court of Appeals, however, has also made clear that relevant evidence may be excluded by the trial court in the exercise of its discretion upon a consideration of pragmatic factors. (*See generally People v Davis*, 43 NY2d 17, 27 [1977].) These factors are set forth in subdivisions (1) – (4).

Relevant evidence may be excluded when, for example, it:

- causes undue prejudice (*see Mazella v Beals*, 27 NY3d 694, 710 [2016] [in a medical malpractice action, "any possible relevance of the consent order's contents (concerning defendant's negligent treatment of other patients) was outweighed by the obvious undue prejudice of his repeated violations of accepted medical standards"]; *People v Hudy*, 73 NY2d 40, 68 [1988]; *Davis*, 43 NY2d at 27);

- confuses the issues and misleads the jury (*see People v Santarelli*, 49 NY2d 242, 250 [1980] [in insanity cases where a mass of evidence of prior criminal conduct is offered, "the danger is particularly great that the jury will become confused by the mass of evidence presented and will decide to convict the defendant not because they find he was legally sane at the time of the act, but rather because they are convinced that he

is a person of general criminal bent"]; *Radosh v Shipstad*, 20 NY2d 504, 508 [1967]; *People v Nitzberg*, 287 NY 183, 189 [1941]);

- creates unreasonable delay or is unnecessarily cumulative (*see People v Petty*, 7 NY3d 277, 286-287 [2006] [court properly exercised its discretion in excluding a witness' testimony as to threats the victim made against the defendant as four defense witnesses, including the defendant, had already testified that victim made numerous threats against defendant]; *Hudy*, 73 NY2d at 67 ["Where the facts underlying a witness's reason to fabricate are admitted by the witness, extrinsic proof of those facts may properly be excluded, in the court's discretion, on the ground that it would be cumulative"]; *Davis*, 43 NY2d at 27 [court properly excluded the testimony as its "probative value . . . could be outweighed by dangers that the main issue would be obscured, by prolongation of trial"]; *People v Harris*, 209 NY 70, 82 [1913] [court excluded evidence "tending to obscure the main issue in the minds of the jury, to lead them away from the principal matters which require their attention and to protract trials to an unreasonable extent without any corresponding advantage to any one concerned"]); or

- unfairly surprises the opposing party (*Davis*, 43 NY2d at 27; *Nitzberg*, 287 NY at 189).

The Court of Appeals has stressed that these concerns and their presence in a given case do not mandate exclusion of offered evidence; rather, these concerns must be balanced against the probative value of the evidence (*see People v Brewer*, 28 NY3d 272, 277 [2016]; *Kish v Board of Educ. of City of N.Y.*, 76 NY2d 379, 385 [1990]).

While the Court of Appeals has consistently enumerated the factors that may lead to a discretionary exclusion of relevant and otherwise admissible evidence, the Court has described the standard in differing ways. The majority, and most recent, of the Court's decisions state that relevant evidence may be excluded if its probative value is "outweighed" by one of the enumerated factors. (*People v Brewer*, 28 NY3d 271, 277 [2016]; *Mazella*, 27 NY3d at 709; *People v Smith*, 27 NY3d 652, 668 [2016]; *People v DiPippo*, 27 NY3d 127, 135-136 [2016]; *Hudy*, 73 NY2d at 68; *Davis*, 43 NY2d at 27.) Other decisions have stated that the probative value must be "substantially outweighed" by one of the enumerated concerns. (*E.g. People v Caban*, 14 NY3d 369, 374 [2010]; *People v Scarola*, 71 NY2d 769, 777 [1988]; *People v Santarelli*, 49 NY2d 241, 255 [1980].) No decision discusses the difference between "outweighed" and "substantially outweighed." An analysis of the decisions suggests that the same result would have been reached regardless of the formulation utilized. A fair assumption, therefore, is that the differing formulations do not affect the required balance between probative value

and prejudice. The rule utilizes the formulation found in the majority of the Court's opinions.

The Court of Appeals has cautioned that exclusion under the rule may not be required when a cautionary instruction to the jury can obviate the potential for prejudice. (*See People v Mountain*, 66 NY2d 197, 203 [1985].) Decisional law, however, recognizes that in some situations a limiting instruction may not be sufficient to protect a party adequately from the jury's misuse of the evidence, and that in such situations the court may take other action, such as precluding or redacting the evidence or directing a severance. (*Bruton v United States*, 391 US 123, 135 [1968] ["(T)here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored"]; *People v Johnson*, 27 NY3d 60, 70 [2016] ["curative instructions could not avoid the substantial risk" that the jury would misuse the evidence]; *People v Cedeno*, 27 NY3d 110, 120 [2016] [redaction as made was not effective to preclude misuse of the evidence by the jury]; *Cover v Cohen*, 61 NY2d 261, 270 [1984] [evidence should be excluded where there is "substantial risk that such evidence may be over-emphasized by the jury"].)