THE USE OF UNILATERAL STIPULATION AS A TRIAL TACTIC IN ALABAMA AFTER *OLD CHIEF*: THE EFFECT OF THE FEDERAL RULES OF EVIDENCE ON AN INFANCY STATE

I. INTRODUCTION

Here is the scenario. The accused is on trial, charged with committing fraud. Specifically, the accused is charged with purchasing used cars, rolling back the odometers, and then selling the cars at higher prices than he would have been able to had the odometers remained at their correct readings. At trial, the government attempts to offer into evidence specific acts where the accused rolled back odometers in the past. The defense counsel stands and says, "Your Honor, I object. Under Rule 404(b), it is impermissible to offer prior acts to show the accused acted in conformity with those acts on the occasion in question." The government responds by asserting, "Your Honor, I am not offering these acts to show conformity. I am offering them for the permissible purpose of showing that the accused possessed the requisite knowledge of how to roll back the odometers." Finally, the defense counsel says, "Your Honor, although the defense denies having rolled back the odometers in the present case, we stipulate to the fact that the defendant possessed the requisite knowledge to roll back odometers. Because the defense admits to this knowledge, the purpose for submitting the evidence is proven, so the evidence is therefore immaterial and inadmissible." How should the trial judge rule?

Since the United States Supreme Court announced the decision of *Old Chief v. United States*,[1] the trial tactic of unilateral stipulation has been brought to the forefront of the judicial world. *Old Chief* was a much anticipated decision because the circuits were divided on the issue of whether the trial court should accept the proposed stipulation in cases where the defendant stipulates to his felon status.[2]

---

1. 519 U.S. 172 (1997).
2. *Compare, e.g.*, United States v. Smith, 520 F.2d 544, 548 (8th Cir. 1975)

Although courts have narrowly applied the holding in *Old Chief* to cases with nearly identical facts,[3] the case has called attention to the broader evidentiary principle of unilateral stipulation. That is, if a piece of evidence is offered by a party for a particular purpose, may the opposing party close the doorway to its admission by stipulating to that purpose?[4] This is a trial tactic that may arise in virtually any evidentiary situation, but it is particularly important in a few key areas.[5]

This Article contains a discussion of the purposes served by unilateral stipulation as a trial tactic, the most common scenarios in which the tactic may be utilized, and how the tactic may be raised. Specifically, this Article begins with a look at the sources counsel may look to in order to assert the unilateral stipulation tactic. This is followed by an analysis of *Old Chief* and its potential effects. The final sections of this Article address some specific trial situations where unilateral stipulation would most logically be used. Because Alabama recently adopted the new Alabama Rules of Evidence,[6] modeled after the Federal Rules of Evidence, Alabama has adopted as persuasive authority the

---

(holding that government is not required to accept the defendant's proposed stipulation and may prove its case however it desires), *with* United States v. Tavares, 21 F.3d 1, 3-5 (1st Cir. 1994) (en banc) (holding that the trial court must accept the stipulation when defendant offers to stipulate to his felon status).

3. *E.g.*, United States v. Rezaq, 134 F.3d 1121, 1137 (D.C. Cir. 1998) (holding that *Old Chief* did not apply and the prosecution did not have to accept the defendant's offer to stipulate to the victims' deaths in prosecution for aircraft piracy); United States v. Cottman, No. 96-1774, 1997 WL 340444, at *3 (2d Cir. June 20, 1997) (unpublished table decision) (holding that the district court properly concluded evidence was admissible regardless of stipulation); United States v. Blake, 107 F.3d 651, 652-53 (8th Cir. 1997) (reversing the decision of the district court and holding it was harmful error for the court to refuse the defendant's stipulation and admit his prior felony convictions).

4. It should be noted that unilateral stipulation should be distinguished from a standard stipulation between the parties. The difference is that a standard stipulation requires the assent of both parties. 83 C.J.S. *Stipulations* § 3 (1953). By contrast, with a unilateral stipulation the parties do not agree, but one party attempts to force the judge to accept the proposed stipulation. CHARLES W. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 20.01 (6th ed. 1997). Although there are other terms that can be used for this principle, such as judicial admission, Professor Gamble refers to it as unilateral stipulation. *Id.*

5. *See* discussion *infra* Part V.

6. The new Alabama Rules of Evidence went into effect on January 1, 1996. ALA. R. EVID. 1103.

federal cases interpreting these federal rules.[7] Therefore, this Article will treat Alabama as an infancy state and will analyze the tactic of unilateral stipulation and the effect of the federal rules. Theoretically, the information in this article should be helpful to any state which has adopted evidentiary rules modeled after the Federal Rules of Evidence.[8]

II. WHERE CAN AUTHORITY FOR UNILATERAL STIPULATION BE FOUND?

Before a discussion of unilateral stipulation may begin, it is necessary to look to the various sources which allow for its use. These sources should be kept in mind whenever counsel wishes to employ this tactic.

It has long been established that a trial begins with the premise that the prosecution carries with it the right to prove its case in any manner so desired.[9] This is based on the policy rationale that the prosecution should not be forced to accept the defendant's proposed stipulation because "[t]o substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight."[10] Although this is the general rule, the Advisory Committee's Note to Federal Rule 401 seems to open the door to the use of unilateral stipulation by hinting that there are places where the trial judge should accept a proposed stipulation.[11] Therefore, a look at the Advisory Committee's Note is the best place to begin the search for authority which allows the unilateral stipulation tactic.

---

7. ALA. R. EVID. 102 advisory committee's note.

8. Although it is generally accepted that the concept of unilateral stipulation differs in the criminal and civil settings, this article will not focus on the differences. For an excellent discussion of how they might differ, see Edward J. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 357 (1991).

9. *E.g.*, Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958).

10. Dunning v. Central R.R. Co., 39 A. 352, 356 (Me. 1897).

11. *See infra* text accompanying notes 15-22.

A. Rule 401

The first place to look for authority for unilateral stipulation would be the materiality portion of Rule 401. It is hornbook law that the first hurdle any piece of evidence must clear is that it must be material; in other words, it must be "of consequence" to the case.[12] Professor McCormick has stated that "[i]f the evidence is offered to prove a proposition which is not a matter in issue or probative of a matter in issue, the evidence is properly said to be immaterial."[13]

At first glance, once a party proffers a stipulation, it would be logical to assert the argument that the subject is no longer an issue. Stated otherwise, because of the proposed stipulation, the purpose for which the evidence was offered to prove is no longer of consequence to the case. Therefore, it should be immaterial and precluded from being admitted under the materiality portion of Rule 401. For example, in a negligence suit, the defendant may offer to stipulate to the fact that the plaintiff has suffered damages, one of the four elements of negligence, while choosing only to dispute the other three elements. Typically, the plaintiff will want to produce evidence of his damages, particularly if it will arouse juror sympathy. This is a situation where it would appear logical for the defendant to argue that because he stipulated that plaintiff did suffer damages, the evidence is no longer of consequence to the case and should be excluded under Rule 401.

While it makes common sense to exclude a piece of evidence under Rule 401 if a party offers a stipulation, a trial judge presumably would commit serious error if she excluded the stipulated evidence simply because it seemed immaterial.[14] In fact, a review of the Advisory Committee's Note indicates that the legislature did not intend for these decisions to be made under Rule 401.[15] Specifically, it states:

> *The fact to which the evidence is directed need not be in dispute.* While situations will arise which call for the exclusion of

12. CHARLES W. GAMBLE, GAMBLE'S ALABAMA RULES OF EVIDENCE § 401 (1995).
13. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 434 (2d ed. 1972).
14. *See* FED. R. EVID. 401 advisory committee's note.
15. *Id.*

> evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.[16]

The drafters of the Alabama Rules of Evidence concur with the federal position on the issue, stating that the term "of consequence" "is adopted as to include within the term 'relevant evidence' that which is not necessarily in dispute and that which is no more than an aid to the trier of fact in understanding other facts that are material or in dispute."[17] Both the Federal and Alabama rule drafters indicated that to exclude evidence just because it is not controverted would make inadmissible such helpful evidence as charts and photos.[18] Consequently, although common sense would indicate that a stipulation would make a piece of evidence no longer of consequence to the case, it seems obvious from the language of the Advisory Committee's Note that the drafters did not want this decision to be made under Rule 401.[19]

---

16. *Id.* (emphasis added).

17. ALA R. EVID. 401 advisory committee's note.

18. *See* FED. R. EVID. 401 advisory committee's note; ALA. R. EVID. 401 advisory committee's note.

19. *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 179 (1997) ("[E]videntiary relevance under Rule 401 [is not] affected by the availability of alternative proofs of the element."); United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998) ("A defendant's offer to stipulate or concede an element of an offense . . . does not deprive the government's evidence of relevance."); People v. Crawford, 582 N.W.2d 785, 792 (Mich. 1998) ("Because the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements, the elements of the offense are always 'in issue' and, thus, material.").

B. Rule 403

The next place to look for authority to effectively assert a unilateral stipulation is Rule 403, which is identical in the Federal and Alabama Rules of Evidence. It states that "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."[20] While the legislatures apparently did not want unilateral stipulation to be a Rule 401 decision, a look at Rule 403 demonstrates that they did not want the tactic to be ignored.[21] Specifically, the Advisory Committee's Note to Rule 401 indicates that "[w]hile situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent," a trial judge should consider factors set out in Rule 403 such as "waste of time" and "undue prejudice" in ruling on the admission of the unilateral stipulation, rather than only considering the materiality of the evidence.[22]

The policy rationale for excluding evidence due to waste of time has been no better stated than as follows:

> The trial court's time is a public commodity which should not be squandered. Witnesses and jurors have private lives, and ought not to be called upon to serve for longer than is necessary reasonably to resolve disputes in both the criminal and civil spheres. A tireless (perhaps resourceful) adversary should not be allowed unlimited freedom to wear down his opponent by repetitious proof or unnecessary waiting periods. In short, Rule 403 is federal evidence law's answer to the adage, "Enough is enough."[23]

Based on this principle, it is apparent that the rule drafters would want a piece of evidence to be excluded if the process of proof would be lengthy and the stipulation would not rob the evidence of its credibility.[24] Thus, it is possible to argue that

---

20. FED. R. EVID. 403; ALA. R. EVID. 403.
21. FED. R. EVID. 403; ALA. R. EVID. 403.
22. FED. R. EVID. 401 advisory committee's note.
23. 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 128 (1985).
24. *See id.*

whenever a party offers to stipulate to the purpose for which an item of evidence is offered, any further evidence offered to prove that purpose would be a waste of time and excluded under Rule 403. Of course, the counter to this argument is that because exclusion under Rule 403 requires that the probative value of the evidence must be *substantially outweighed* by consideration of waste of time, exclusion under Rule 403 should be rare.[25]

Perhaps the best argument for employing the stipulation theory is to oppose this counterargument by stating that the stipulation makes the probative value of the evidence substantially outweighed by the danger of unfair prejudice.[26] It should serve as a reminder that this provision of Rule 403 does not exclude evidence for merely being prejudicial because for evidence to serve any purpose it should carry some prejudice against the opponent.[27] Professor Gamble has stated that "all relevant evidence should be prejudicial to the party against whom it is offered. The power to exclude on this ground arises only when the prejudice rises to the level of substantially outweighing the probative value."[28]

There are two possible principles under the unfair prejudice provision which support a party's utilization of the stipulation tactic, and both are mentioned in the Advisory Committee's Note.[29] The note says:

> In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.[30]

The first principle encompassed in Rule 403 and the Advisory Committee's Note is based on the notion that "the practical and human limitations of the jury system cannot be ignored."[31] Stated otherwise, even the most stringent jury instruction can-

---

25. *See* FED. R. EVID. 403.
26. *See id.*
27. GAMBLE, *supra* note 12, § 403.
28. *Id.*
29. FED. R. EVID. 403 advisory committee's note.
30. *Id.*
31. Bruton v. United States, 391 U.S. 123, 135 (1968).

not absolutely prevent a juror from using evidence for impermissible purposes. Therefore, under this first test, if the jury is likely not to adhere to the limiting instruction, the trial judge must consider excluding the evidence.[32] In addition, in order to avoid the effect of this potentially prejudicial evidence, the trial judge is to also consider other available means of proof.[33] Obviously, counsel wishing to propose a stipulation should use this second principle in their arguments. Specifically, it should be argued that the stipulation is an "other means of proof," and the evidence must be excluded.

To summarize, though the drafters seem to preclude the use of stipulation under Rule 401, there are several ways to employ the tactic using Rule 403. First, counsel could argue the evidence is cumulative, which results in a waste of time that substantially outweighs the probative value of the evidence. Second, counsel could argue that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Finally, as part of the unfair prejudice argument, counsel can argue that there are other, less prejudicial means of proof and that the Rule 105 jury instruction will be ineffective.[34]

III. WHAT DID THE SUPREME COURT SAY IN *OLD CHIEF*?

Because *Old Chief*[35] is a recent decision in this area decided by the United States Supreme Court, it is imperative for any practitioner to be familiar with its application. The case did not involve a constitutional question, so it should be noted that it is not mandatory authority on state courts. However, it does serve as highly persuasive authority, and consequently, it is certain to be given strong consideration by trial judges.[36]

---

32. *See* FED. R. EVID. 403 advisory committee's note.

33. This concept is also mentioned in FED. R. EVID. 404 advisory committee's note.

34. There are other specific sections of the Rules of Evidence which appear to authorize the use of unilateral stipulation. These are addressed in the final section of this Article. *See infra* Part V.

35. 519 U.S. 172 (1997).

36. Alabama adopted a set of evidentiary rules effective January 1, 1996, based upon the Federal Rules of Evidence; therefore, it also adopted as authority the line

In *Old Chief*, Johnny Lynn Old Chief was arrested and charged under three counts: (1) using a firearm in relation to a crime of violence, (2) assault with a dangerous weapon, and (3) possession of a firearm by a convicted felon.[37] At trial, because of the nature of the third count, the prosecution had the initial burden of proving that Old Chief was a convicted felon.[38] To do so, the prosecution planned to offer the order of judgment and commitment papers from the prior conviction.[39] These documents referred to the *specifics* of his prior felony conviction and stated that "he 'did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury . . . .'"[40] Because of the nature of the prior felony conviction, Old Chief's lawyer was concerned that if the jury learned of the specifics of this prior crime, it would unduly prejudice Old Chief.[41] Therefore, in an attempt to block this evidence from the jury, the defense attorney offered to stipulate that Old Chief was a convicted felon.[42] The effect of this stipulation, Old Chief's attorney argued, would be that the evidence of the prior conviction would no longer be needed.[43] The prosecution, arguing that it was his right to prove his case how he chose, refused to agree to the stipulation.[44] The trial court refused to accept the stipulation offered by Old Chief and admitted the evidence.[45] Old Chief was subsequently convicted on all three counts, and the Ninth Circuit affirmed the conviction.[46] Old Chief's conviction was reversed by the United States Supreme Court, who held that the trial court should have accepted the stipulation; therefore, the specifics of his prior felony were erroneously admitted.[47]

---

of federal cases interpreting the federal rules. ALA. R. EVID. 102 advisory committee's note.

37. *Old Chief*, 519 U.S. at 174.
38. *See id.* at 175.
39. *Id.* at 177.
40. *Id.*
41. *Id.* at 175.
42. *Old Chief*, 519 U.S. at 175.
43. *Id.*
44. *Id.* at 177. For cases dealing with the issue that the prosecution has the right to prove its case by its own choosing, see for example Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958).
45. *Old Chief*, 519 U.S. at 177.
46. *Id.*
47. *Id.* at 172-73.

IV. THE IMPACT OF *OLD CHIEF* ON RULE 403

Although *Old Chief* was decided only recently, it has already triggered much scholarly commentary and debate.[48] However, as stated by one commentator, "[t]he question of law resolved in *Old Chief* is not particularly earth-shattering."[49] In fact, the *Old Chief* opinion specifically states that "our holding is limited to cases involving proof of felon status."[50] Consequently, cases decided subsequent to *Old Chief* have been reluctant to apply its holding outside the specific facts.[51] Therefore, unless an attorney is involved in a case identical to *Old Chief*, one may wonder if the case has any substantial importance at all. However, a careful review of the opinion helps pave a roadmap as to how a court may rule in different factual circumstances involving unilateral stipulation.

The most significant impact of the *Old Chief* decision will be under Rule 403, which is identical in the Federal and Alabama Rules of Evidence and is the heart of the *Old Chief* analysis.[52] While the first issue that Justice Souter addressed in the *Old Chief* opinion was relevance, he quickly disposed of the relevancy issue by asserting that Old Chief's prosecution papers were indeed relevant to proving his felon status.[53] After this was done, he then explained why Rule 403 was the main issue in the case: "[i]f, then, relevant evidence is inadmissible in the presence of other evidence related to it, its exclusion must rest not on the ground that the other evidence has rendered it 'irrele-

---

48. *See, e.g.*, James Joseph Duane, *Litigating Felon-With-a-Firearm Cases After* Old Chief, CRIM. JUST., Fall 1997, at 18; James Joseph Duane, *Stipulations, Judicial Notice, and a Prosecutor's Supposed "Right" to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in* Old Chief v. United States, 168 FED. RULES DECISION 405 (1996); Louis A. Jacobs, *Evidence Rule 403 After* United States v. Old Chief, 20 AM. J. TRIAL ADVOC. 563 (1997); Daniel C. Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997).

49. Richman, *supra* note 48, at 940.

50. *Old Chief*, 519 U.S. at 183 n.7.

51. United States v. Cottman, No. 96-1774, 1997 WL 340344, at *4 (2d Cir. June 20, 1997) (unpublished table decision); State v. Hamilton, 486 S.E.2d 512, 515 (S.C. Ct. App. 1997) (holding that the *Old Chief* rule only applies to generic felonies; when an element of the crime is the conviction of a specific crime, such as burglary in the first degree, the court does not have to accept the stipulation).

52. *See Old Chief*, 519 U.S. at 178-79.

53. *Id.*

vant,' but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding."[54] The Court correctly conducted its analysis under the "unfair prejudice" provision of Rule 403, rather than under Rule 401.[55]

In the opinion, Justice Souter launched into an analysis of Rule 403 and gave two possible analytical methods in which evidence can be excluded under Rule 403.[56] The first alternative would be to consider an item of evidence "as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points . . . ."[57] In other words, under this method, the Court would consider each piece of evidence separately, and the availability of other means of proof would not play a role in the decision to include or exclude.[58] Had the Court chosen this method of Rule 403 analysis, the specifics of Old Chief's prior convictions would probably have been admitted because the Court would have considered the specifics of Old Chief's convictions without considering other means of proof.[59]

However, the Court seemed to disregard the first alternative and latched onto the second analytical method of Rule 403.[60] Under this method, when deciding whether to admit a piece of evidence, the trial judge must consider whether there are other less prejudicial means of proving the same thing.[61] While this would not automatically exclude the proffered item of evidence, the trial judge "could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point."[62] Specifically, Rule 403 requires the trial court to "evaluate the degrees of probative value . . . not only for the item in question but for any actual substitutes as well."[63] This second alternative was a logical conclusion for the Court to make as it is consistent with the Advisory Committee's Note to Rule 403.[64]

---

54. *Id.* at 179.
55. *See id.* at 180.
56. *Id.* at 182.
57. *Old Chief*, 519 U.S. at 182.
58. *See id.*
59. *See id.*
60. *See id.*
61. *Id.*
62. *Old Chief*, 519 U.S. at 185.
63. *Id.* at 182.
64. The Advisory Committee's Note to Rule 403 expressly states that the trial

Once the Court decided to use this second alternative, the next step in its Rule 403 analysis was to determine if the proposed stipulation was a sufficient substitute for the actual evidence.[65] This step was necessary because Rule 403 requires the substitute be "alternative proof going to the same point."[66] Consequently, if the alternative evidence does not prove the same point, it should not be considered. The Court concluded that the stipulation was not only relevant, "but [also] seemingly conclusive evidence" of the element of the crime.[67]

The next part of the opinion is perhaps the most important. The Court addressed the prosecution's argument that according to the longstanding general rule, the government can choose the method it wants to present its own case.[68] In other words, the prosecution should not be forced to accept the stipulation; rather, the prosecution should be free to offer the evidence of past acts in whatever manner it chooses. In rejecting this argument, the Court pointed out that the rationale underlying this longstanding rule is that some evidence "tells a colorful story with descriptive richness."[69] Therefore, the rule that the prosecution may present its case in the manner it chooses should be applied in situations where it would prevent the government's case from being like a story with missing chapters. The Court, however, held that this policy rationale did not apply in this case.[70] Specifically, the Court asserted that "[t]his recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status . . . ."[71] In short, proving the element of felon status is not something that needs to be done with a lot of glamour. Therefore, the Court concluded the stipulation was a sufficient substitute, so the specifics of Old Chief's prior felony conviction should

---

judge should consider whether there are other less prejudicial means of proof in making the Rule 403 decision. *See supra* text accompanying notes 30-34.

65. *Old Chief*, 519 U.S. at 186.
66. FED. R. EVID. 403.
67. *Old Chief*, 519 U.S. at 186.
68. *Id.* at 186-87.
69. *Id.* at 187.
70. *Id.* at 190.
71. *Id.*

have been excluded under Rule 403.[72]

In sum, although the *Old Chief* decision has received much attention and scholarly debate, its holding is somewhat limited. However, the Court's reference to the fact that the holding applies to cases involving "legal status"[73] suggests that its effect should reach far beyond the felon-in-possession cases as was the case in *Old Chief*.[74] Indeed, the decision has ramifications in other federal and state issues, and Professor Gamble has stated that the *Old Chief* holding "would apply to prosecution under any recidivist statute . . . ."[75] For example, suppose a defendant is charged with felony DUI in an Alabama state court.[76] Just as felon status was an element of one of the crimes Old Chief was charged with, it is also an element of felony DUI in Alabama.[77] Consequently, because felony DUI is a crime where an element is "legal status," the Alabama defense counsel may be able to successfully use *Old Chief* to preclude the specifics of the prior convictions from being admitted to the jury.

The end result of *Old Chief* provides several suggestions for a practitioner who wishes to use unilateral stipulation as a trial tactic. First, an attorney who wants to utilize the *Old Chief* strategy will be most effective when using it to stipulate a defendant's legal status. However, according to the words of the opinion, an attorney may successfully employ *Old Chief* in other areas to stipulate to elements of a crime other than legal status.[78] Specifically, in its rationale, the Court reasoned that stipulation should not be forced upon a party when it would preclude evidence which tells "a colorful story with descriptive rich-

---

72. *Old Chief*, 519 U.S. at 190-92.

73. *Id.* at 190.

74. *See, e.g.*, United States v. Merino-Balderrama, 146 F.3d 758, 762-62 (9th Cir. 1998) (applying *Old Chief* to child pornography case).

75. GAMBLE, *supra* note 4, § 20.01. *See* State v. Alexander, 571 N.W.2d 662, 671 (Wis. 1997) (applying *Old Chief* to case involving Wisconsin drunk driving law where the element of the offense is two or more drunk driving convictions). *But see* Hampton v. State, No. 06-98-00033-CR, 1998 WL 553618, at *2 (Tex. App. Sept. 2, 1998) (holding that defendant's stipulation to felon status was properly refused because "in order to successfully prosecute the crime, the state must provide proof not that the defendant is a felon, but that he was convicted of a particular type of crime on two occasions").

76. ALA. CODE § 32-5A-191(h) (Supp. 1998).

77. *Id.*

78. *Old Chief*, 519 U.S. at 187.

ness."[79] Because a defendant's legal status, in the Court's opinion, presumably would not deprive the prosecution of telling such a colorful story, the Court allowed the stipulation in *Old Chief*.[80] Consequently, based on this rationale,[81] there could be other situations where a forced stipulation would not constrain the party offering the evidence in any way. Presumably, these would only be limited by the creativity of counsel. In other words, to utilize the *Old Chief* decision, a lawyer should argue that since the proffered evidence of the opposing side does not tell a colorful story, a stipulation would be an adequate substitute. On the other hand, the party arguing against the stipulation should argue to the judge that if the evidence is not presented in the manner of its choosing, the evidence would lose its descriptiveness, resulting in the loss of a colorful story.[82]

Second, presumably *Old Chief* will only apply if the prior crime was similar to the crime for which the defendant is presently charged. In the analysis, Justice Souter reasoned that "[w]here a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious."[83] If the prior act evidence is similar to the act charged, there is an extremely high danger of the jury's using the evidence to convict the defendant for being a bad person, an improper use of character evidence under Rule 404.[84] Therefore, if the prior act is not similar to the present charge, the prosecution could argue that *Old Chief* would not apply because the evidence is not likely to be unfairly prejudicial.[85]

---

79. *Id.*

80. *Id.* at 189.

81. Although not a felon-in-possession case, the court provides an excellent discussion of the "colorful story" rationale in United States v. Frank, 11 F. Supp. 2d 314, 317-20 (S.D.N.Y. 1998).

82. At least one district court has applied the "colorful story" rationale to a felon-in-possession case similar to *Old Chief*. *See* LaForce v. United States, 976 F. Supp. 402, 404 (W.D. Va. 1997) (holding that defendant's prior murder convictions provided the "'evidentiary depth needed to tell a continuous story'" based on his statement that he had "just pulled 20 years for killing two people" (quoting *Old Chief*, 519 U.S. at 190)), *appeal dismissed*, United States v. LaForce, 139 F.3d 895 (4th Cir. 1998) (unpublished table decision).

83. *Old Chief*, 519 U.S. at 185.

84. *See id.*

85. *See id.*

Third, in asserting unilateral stipulation, counsel must not forget that Rule 105 is a weapon in the Rule 403 arsenal. Specifically, the Advisory Committee's Note states that "[a] close relationship exists between [Rule 105] and Rule 403 . . . ."[86] Under Rule 105, counsel may request a limiting instruction which informs the jury of the purposes for which an item of evidence may be considered.[87] The trial judge must take into account the effectiveness of the Rule 105 jury instruction when making her decision to admit or exclude the evidence under Rule 403.[88] Therefore, even if the stipulation initially fails, an additional objection could be lodged that the probative value is substantially outweighed by the danger of unfair prejudice because the jury will disregard the Rule 105 instruction and use the evidence for an impermissible purpose.[89] Adding weight to this argument is the realization of the United States Supreme Court that "the practical and human limitations of the jury system cannot be ignored."[90] Under the facts in *Old Chief*, if the stipulation were not allowed by the court, the defendant should request and the court should grant a jury instruction which says the felony conviction can only be used for the purpose of proving the defendant's felon status. Stated differently, the felony conviction may not be used to show the defendant acted in conformity with this prior felony on the occasion in question. The defense counsel should argue that this limiting instruction would be ineffective and, therefore, the evidence should be excluded under Rule 403.

In sum, although *Old Chief* is a relatively recent decision, the early returns indicate its rather limited holding. First, any ideas that convicted felons in situations similar to Old Chief had of racing to the courthouse to have their convictions overturned were quickly put to rest in some cases. Decisions subsequent to *Old Chief* have held that even if the trial judge erred in not accepting the stipulation, the conviction will not be overturned if it is harmless error.[91] Another indication of its limited holding

---

86. FED. R. EVID. 105 advisory committee's note.

87. FED. R. EVID. 105.

88. FED. R. EVID. 403 advisory committee's note.

89. *See id.*

90. Bruton v. United States, 391 U.S. 123, 135 (1968).

91. Although the Court in *Old Chief* expressed no opinion on the possibility of harmless error, appellate courts have. *E.g.*, United States v. Daniel, 134 F.3d 1259,

came from a South Carolina appellate court, a state which, like Alabama, has rules modeled after the Federal Rules of Evidence. In *State v. Hamilton*,[92] the court held that *Old Chief* only applied to generic felonies.[93] In other words, in *Hamilton*, where the defendant was charged with first degree burglary, the prerequisite elements under South Carolina law required at least two prior convictions of burglary or housebreaking.[94] Therefore, because this case required specific felonies, burglary or housebreaking, instead of generic felonies, *Old Chief* was not followed.[95] The court reasoned that the specifics of the defendant's prior arrest were required to prove he had the requisite felon status since the requisite felon status required specific felonies.[96]

Notwithstanding the limited application of its holding, counsel always should be aware of *Old Chief*. More importantly, counsel should always be ready to use the tactic of unilateral stipulation in other situations. Some of these situations, in both criminal and civil cases, are addressed in the following section.

V. Specific Applications and Examples of Unilateral Stipulation

Although the unilateral stipulation tactic theoretically could be used in an infinite number of situations, there are a few

---

1262-65 (6th Cir. 1998) (holding that district court's refusal to accept stipulation to felon status was harmless because of the abundance of other evidence); United States v. Cunningham, 133 F.3d 1070, 1076 (8th Cir. 1998) (same); United States v. Taylor, 122 F.3d 685, 688-89 (8th Cir. 1997) (same); United States v. Horsman, 114 F.3d 822, 829 (8th Cir. 1997) (same). *But see* United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997) (holding it was not harmless error for district court to refuse to accept defendant's stipulation to felon status because other evidence against the defendant was not overwhelming).

92. 486 S.E.2d 512 (S.C. Ct. App. 1997).

93. *Hamilton*, 486 S.E.2d at 515.

94. *Id.*

95. *Id.*

96. *Id. See also* Hampton v. State, No. 06-98-00033-CR, 1998 WL 553618 at *2 (Tex. App. Sept. 2, 1998) (holding that *Old Chief* did not apply in felony DWI case which required two prior DWI convictions; defendant's stipulation was properly refused because "in order to successfully prosecute the crime, the State must provide proof not that the defendant is a felon, but that he was convicted of a particular type of crime on two occasions").

areas where its application is more prevalent than others. Some of these areas are highlighted in this section to give counsel an idea of when it can and cannot be used.

A. Subsequent Remedial Measures

Here is the scenario. Merle is a passenger on an airplane. When the plane arrives at the terminal and Merle opens the overhead compartment, several objects fall out, hitting him on the head and causing him serious injury. Merle sues the airline for his injuries under a theory of negligence. At trial, Merle wants to offer as evidence the fact that the airline installed safety nets after his accident, thereby eliminating the possibility of an accident similar to Merle's from happening again. Upon the airline's objection that subsequent remedial measures are inadmissible to prove negligence, Merle responds by arguing that the purpose of the evidence is not to prove negligence. Rather, it is to show the feasibility of precautionary measures, a purpose expressly permitted in Rule 407.[97] How should the trial judge rule?

An obvious example of where the doctrine of unilateral stipulation commonly may be used is in Rule 407, which precludes the use of subsequent remedial measures to prove negligence or culpable conduct.[98] This rule is particularly inviting for unilateral stipulation in that the text of the rule explicitly states that the purpose for which the evidence is offered must be controverted.[99] The Advisory Committee's Note to Federal Rule 407 suggests the rigidity of the controverted requirement, stating "[t]he requirement that the other purpose be controverted calls for *automatic exclusion* unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission."[100] Apparently, this statement gives counsel the authority to stipulate to the purpose for a piece of evidence and get it excluded.

Although the Alabama rule is not completely identical to the

---

97. ALA. R. EVID. 407.
98. *Id.*
99. *Id.*
100. FED. R. EVID. 407 advisory committee's note (emphasis added).

federal rule, the Alabama rule does incorporate the "if controverted" requirement from the federal rule.[101] In fact, the Advisory Committee's Note to Alabama Rule 407 points to the long line of cases that carried the controverted requirement even before the adoption of the current rules.[102]

The pivotal Alabama case concerning this issue is *Standridge v. Alabama Power Company*,[103] in which the widow of an Alabama Power employee brought a wrongful death action against the company for negligently causing her husband's death.[104] Her husband suffered a heart attack while on a construction site, and the basis of her complaint was that Alabama Power was negligent in not providing adequate medical services to treat a heart attack victim.[105] At trial, the widow attempted to admit into evidence the fact that shortly after her husband's death, Alabama Power had improved the medical facilities at the construction site.[106] Aware of the fact that evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct, the widow stated that the evidence was offered for the proper purpose of showing that Alabama Power had control over the medical facility.[107] The Alabama Supreme Court ruled that the subsequent remedial measure was properly excluded because the issue of control was not controverted by Alabama Power.[108] It was the company's defense that it simply had no duty to provide such a medical facility.[109] Thus, since Alabama Power stipulated to the fact that it had control, it is reasonable to conclude it was able to "plead out" this prejudicial evidence, thus closing the doorway to its admissibility.

Rule 407 is perhaps the easiest of the rules by which to employ unilateral stipulation because the actual text of the rule states that the evidence must be controverted.[110] If a trial judge were to refuse a stipulation for a Rule 407 piece of evi-

---

101. ALA. R. EVID. 407.
102. ALA. R. EVID. 407 advisory committee's note.
103. 418 So. 2d 84 (Ala. 1982).
104. *Standridge*, 418 So. 2d at 86.
105. *Id.*
106. *Id.* at 87.
107. *Id.*
108. *Id.* at 88.
109. *Standridge*, 418 So. 2d at 88.
110. ALA. R. EVID. 407.

dence, this would be contrary to the express language of the rule. Moreover, the "if controverted" element under Rule 407 is alive and well under both the federal and Alabama rules.[111] Thus, if a party were to stipulate to the purpose for which the subsequent remedial measure is used to prove, by definition, because the purpose is no longer controverted, the evidence would be inadmissible. Thus, in the hypothetical which began this subsection, the airline should be able to block the admission of this subsequent remedial measure by offering to stipulate to the feasibility of precautionary measures.

B. Expert Witnesses

Here is the scenario. The plaintiff recently underwent back surgery to correct a herniated disk. The surgeon negligently performed the operation, resulting in the plaintiff's paralysis. At trial, the plaintiff calls to the stand an expert witness who has a Harvard medical degree, has authored numerous texts and articles on back surgery, and is generally regarded to be the nation's premier authority in the field. As the plaintiff's attorney begins to qualify him as an expert by questioning him about his qualifications and experience, the defense attorney stands and says, "Your honor, I stipulate to the fact that this witness is an expert. Therefore, it is unnecessary for him to be asked about his qualifications." The plaintiff refuses to stipulate. How should the trial judge rule?

In the federal courts, it has long been established as the general rule that the duty of deciding how much weight to give testimony of an expert lies in the hands of the jury.[112] Thus, it follows that the jury is in a better position to determine what weight to give the expert testimony if it is made privy to the expert's qualifications and experiences.[113] Consequently, the concept of unilateral stipulation to block an expert's qualifications from the jury would seem to undercut these longstanding

---

111. FED. R. EVID. 407 advisory committee's note; ALA. R. EVID. 407 advisory committee's note.

112. Trowbridge v. Abrasive Co. of Phil., 190 F.2d 825, 829 (3d Cir. 1951).

113. *See, e.g.*, United States v. 25.406 Acres of Land, 172 F.2d 990, 993 (4th Cir. 1949).

principles.

The federal courts appear to be in unison when faced with a situation similar to the hypothetical which began this section. For example, in *Murphy v. National Railroad Passenger Corp.*,[114] the plaintiff called to the stand two physician expert witnesses.[115] Seeking to block their qualifications from the jury, the defense counsel offered to stipulate that the physicians were experts.[116] The trial court accepted the defense proposal and refused to admit the experts' qualifications into evidence.[117] The Fourth Circuit held that this was reversible error, especially in light of the fact that the jury was instructed to disregard the experts' opinions if it was of the belief that they were not qualified.[118] The Fourth Circuit held that the jury should have been made privy to the experts' qualifications to determine how much weight to give their testimony.[119]

Notwithstanding the holding in *Murphy*, the language of the *Murphy* opinion does seem to leave a small crack in the door for unilateral stipulation in an expert witness situation, although it is a very small crack. The *Murphy* court reasoned that *"[i]f a court curtails an expert's testimony because his qualifications are conceded*, it should not instruct the jury to disregard his opinion for lack of education or experience."[120] Thus, counsel wishing to employ the stipulation tactic in the expert witness context could argue that curtailing his qualifications would be proper as long as the jury was instructed appropriately. This argument, however, would be tough to win because courts tend to be firmly committed to allowing the expert's qualifications to be disclosed to the jury.[121] Although the *Murphy* case may imply that a party possibly could stipulate out an expert's qualifications, it is unlikely that this would ever be upheld. It is simply a longstanding rationale that "[t]he assessment of witness credibility is one of

---

114. 547 F.2d 816 (4th Cir. 1977).
115. *Murphy*, 547 F.2d at 817.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Murphy*, 547 F.2d at 817 (emphasis added).
121. *See, e.g.*, Wolff v. Puerto Rico, 341 F.2d 945, 948 (1st Cir. 1965) (holding that it was error for court to accept the stipulation of expert's qualifications because it hindered the jury from deciding what weight to give the expert's testimony).

the principle functions of the jury."[122] Further, "[t]he jury cannot intelligently decide how much weight to ascribe to the evidentiary matter without knowing the witness' precise credentials."[123] Thus, although this evidence technically may be cumulative under Rule 403, the scales should tip in favor of admitting the evidence because it plays such a critical part in the jury deliberations.

C. Witness Impeachment and Rule 609

Here is the scenario. In a criminal trial, the defendant takes the witness stand to testify on his own behalf. After he gives his testimony, on cross-examination, the prosecution plans to impeach his credibility by asking about his past felony convictions.[124] To prevent the specifics of these past convictions from being heard by the jury, the defense counsel stipulates to the fact that the defendant was a convicted felon. To add weight to this argument, the defense argues that in light of *Old Chief*, the court must accept the stipulation. The prosecution refuses to stipulate. How should the trial judge rule?

Rule 609 allows the use of prior convictions for impeachment purposes, but these prior convictions can be particularly prejudicial if the witness being impeached is the defendant. Although the defense is allowed to request a jury instruction limiting the purpose for which the evidence is to be used,[125] there is still a danger that it will be used for an improper purpose. After all, jurors are human, and it is difficult for any juror

---

122. 2 LOUISELL & MUELLER, *supra* note 23, § 126, at 48-50.

123. Imwinkelried, *supra* note 8, at 357.

124. Rule 609 in both the federal and Alabama rules permits the impeachment of a witness by inquiring about his past felony convictions. FED. R. EVID. 609(a); ALA. R. EVID. 609(a). It states in pertinent part:

> (a) General Rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

FED. R. EVID. 609(a); ALA. R. EVID. 609(a).

125. GAMBLE, *supra* note 4, § 145.10(22).

not to use these prior convictions essentially to convict the accused for being a bad person. In order to limit this problem, the drafters added to Rule 609 a stringent balancing test that must be passed when the accused is the one being impeached by prior convictions.[126]

The Seventh Circuit addressed this issue in *United States v. Smith*.[127] In this case, the defendant was charged with bank robbery by intimidation.[128] At trial, Smith took the stand on his own behalf and admitted to robbing the bank, but he argued that his actions did not rise to the level of intimidation.[129] On cross-examination, the prosecution intended to impeach his credibility by asking him about his prior felony convictions of robbery, armed robbery, kidnapping, and attempted sexual assault.[130] To prevent the jury from hearing the specific details of these prior crimes, the defense offered to stipulate to the number of these prior convictions if the specific crimes were kept from the jury.[131] After the prosecution refused the stipulation, the convictions were admitted, and Smith was convicted.[132] On appeal, Smith argued that in light of the *Old Chief* decision, the court erred in not accepting the stipulation.[133] However, the Seventh Circuit held that because the evidence was used for impeachment purposes rather than as substantive evidence, the *Old Chief* decision was not controlling.[134] Therefore, the district court had not erred in admitting the prior convictions under Rule 609 despite the defendant's stipulation offer.[135]

The *Smith* case is just another example of the limited appli-

---

126. FED. R. EVID. 609(a)(1). In this Rule 609 balancing test, for an accused to be impeached by prior convictions, the probative value of the evidence must substantially outweigh the unfair prejudice. *Id.* On the other hand, if it is a witness other than the accused, the prior convictions evidence only has to pass the normal balancing test of Rule 403. *Id.*

127. 131 F.3d 685, 687 (7th Cir. 1997).

128. *Smith*, 131 F.3d at 686.

129. *Id.*

130. *Id.* at 687.

131. *Id.*

132. *Id.*

133. *Smith*, 131 F.3d at 687.

134. *Id.; see also* United States v. Crawford, 130 F.3d 1321, 1323 (8th Cir. 1997) (implying that specifics of prior felonies are admissible for impeachment purposes in felon-in-possession cases even with the proposed stipulation).

135. *Smith*, 131 F.3d at 687.

cation of *Old Chief*. This case was properly decided because the trial judge, in his discretion, must have decided that the past convictions of the accused passed the stringent balancing test of Rule 609.[136] In other words, the trial judge determined that the probative value of those prior felony convictions *substantially outweighed* the danger of unfair prejudice to the defendant. Because the trial judge held that the past convictions were admissible under the stricter balancing test of Rule 609, even if *Old Chief* were applicable it would be a tough battle for the defense to win because the prior convictions were of such high probative value.

D. Rule 404(b) Intent Evidence

Here is the scenario. A criminal defendant is charged with knowingly possessing cocaine. At trial, the prosecution attempts to offer evidence that the accused previously furnished cocaine to a third party. The prosecution argues that this evidence is offered to prove intent, and thus, is permissible under Rule 404(b). In response, the defense offers to stipulate to the element of intent in an attempt to block the admission of this prior bad acts evidence. The prosecution refuses to agree to the stipulation. How should the trial judge rule?

Rule 404(b) is another rule under which the stipulation tactic effectively may be argued.[137] The text of the rule is very inviting and expressly opens the door to an offer of stipulation.[138] While Rule 404 begins with the general exclusionary rule that evidence of other acts cannot be used to prove conformity therewith on the occasion in question, the rule is one of inclusion in that it lists several permissible purposes for which prior acts may be admitted.[139] Thus, the logical argument to

---

136. *See* FED. R. EVID. 609(a)(1).

137. FED. R. EVID. 404(b).

138. Rule 404(b) states in pertinent part:

> 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.

Id.

139. The words "such as" which precede the list of purposes in the rule for which

make would be that if a party stipulates to the purpose for which the evidence is offered, there is no longer a viable purpose to admit the prior bad acts under Rule 404(b). Arguably, the stipulated evidence would then have no probative value, would be cumulative, and would be highly prejudicial.[140]

In an article advocating a per se rule for allowing stipulation to the intent element in a 404(b) case, Professor Daniel Buzzetta stated:

> Admission of prior-bad-act evidence in the face of an intent stipulation is, therefore, highly prejudicial because it tends to weigh so heavily as to over-persuade a jury to convict a defendant, not because she is guilty of the crime charged, but because she has committed bad acts in the past. This result conflicts with the firmly rooted notion that a person ought not to be convicted of doing a specific bad act because she is a bad person generally; rather, the accused need only answer for the crime with which she is currently charged.[141]

Stated otherwise, "in our system of jurisprudence, we try cases, rather than persons."[142]

Although Rule 404(b) evidence could theoretically be admitted for an infinite number of purposes, when analyzing the use of stipulation under Rule 404(b), it is best to review it in the context of attempting to block evidence offered to prove intent. The reason for this is that intent "is the most common evidentiary theory under which bad acts evidence is introduced."[143] In criminal cases, the circuits are split as to whether to allow the defendant to stipulate to the element of intent and close the doorway to the prejudicial evidence that the prosecution offers to prove intent.[144] This split is perhaps best demonstrated by re-

---

404(b) evidence may be offered indicate that the list is not intended to be exhaustive. *Id.* Therefore, it is entirely possible for a creative counsel to argue purposes which are not expressly articulated in the rule.

140. Daniel J. Buzzetta, *Balancing the Scales: Limiting the Prejudicial Effect of Evidence Rule 404(b) Through Stipulation*, 21 FORDHAM URB. L.J. 389, 392 (1994).

141. *Id.* at 391.

142. People v. Allen, 420 N.W.2d 499, 504 (Mich. 1988).

143. Catherine Bonaker, *Limiting the Unfairly Prejudicial Impact of Bad Acts Evidence on Conspiracy Defendants*, 59 TEMP. L.Q. 83, 86 (1986).

144. *Compare, e.g.*, United States v. Jemal, 26 F.3d 1267, 1269 (3d Cir. 1994) (noting that court should accept the stipulation to the element of intent when it is sufficiently made), *and* United States v. Garcia, 983 F.2d 1160, 1173-74 (1st Cir.

viewing cases from the Ninth and Second Circuits.

The Second Circuit follows the rule that for prior bad acts to be admitted to prove intent, the issue of intent must be controverted.[145] Therefore, defense counsel in this circuit could effectively assert a unilateral stipulation because that stipulation would preclude intent from being a controverted issue.[146] However, the Second Circuit also requires that for intent to be removed as an issue in the case, it must be a *clear and unequivocal stipulation* by which the defendant admits intent.[147] This example is best illustrated in *United States v. Colon*.[148]

In *Colon*, the defendant was charged with distributing heroine.[149] Specifically, an undercover police officer had approached Colon and asked where he could get some heroine.[150] In response, Colon pointed in the direction of two men.[151] After the undercover agent made a purchase, Colon was arrested.[152] At trial, pursuant to Rule 404(b), the government proffered evidence of two prior steering convictions to prove Colon's intent and knowledge.[153] In response, Colon offered to stipulate that "[i]f the government proves that [Colon] knew [the drug dealer] and was in fact directing the undercover officer to [the drug dealer] specifically in saying that you can buy the drugs from him, then [Colon] will acknowledge that he intended to violate the federal narcotics law and intended to aid in the sale of drugs."[154] The trial judge refused the stipulation and Colon was convicted.[155]

1993) (holding that court may accept defendant's stipulation of element of intent and block the admission of prior acts), *with, e.g.*, United States v. Brown, 34 F.3d 569, 573 (7th Cir. 1994) (holding that prosecution may prove its case in the manner in which it chooses), *and* United States v. Zalmen, 870 F.2d 1047, 1056 (6th Cir. 1989) (holding that government must accept the stipulation for intent evidence to be excluded).

145. *E.g.*, United States v. Manafzadeh, 592 F.2d 81, 87 (2d Cir. 1979).
146. *See Manafzadeh*, 592 F.2d at 81.
147. *E.g.*, United States v. Colon, 880 F.2d 650, 659 (2d Cir. 1989).
148. *Colon*, 880 F.2d at 659.
149. *Id.* at 653.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Colon*, 880 F.2d at 653.
154. *Id.* at 654.
155. *Id.* at 655.

On appeal, despite the fact that the Second Circuit normally allows the use of intent stipulations to block prejudicial evidence, Colon's conviction was upheld because his proposed stipulation was illusory.[156] Specifically, the court implied that the stipulation merely said that "if you can prove I did it, I admit that I intended it."[157] Therefore, this circular reasoning was not enough to rise to the level of being a clear and unequivocal stipulation. The First, Fifth, Eighth, Eleventh and D.C. Circuits are in accord with the Second Circuit, allowing stipulations to the element of intent.[158]

The Ninth Circuit disagrees with the circuits noted above in that it does not allow the use of a stipulation to preclude the admission of evidence to demonstrate intent. In *United States v. Hadley*,[159] the defendant, a former elementary school teacher, was indicted and charged with eleven counts of sexual abuse involving minors.[160] At trial, the court admitted testimony, pursuant to Rule 404(b), of witnesses who claimed they were sexually abused by Hadley as children, and Hadley was subsequently convicted.[161] On appeal, Hadley argued that intent was not a material issue in the case because his defense was not lack of intent; rather, it was that he did not commit the crime.[162] In addition, Hadley offered to stipulate to the element of intent.[163]

The Ninth Circuit disagreed with Hadley's argument and upheld his conviction.[164] In its reasoning, the court stated that "Hadley cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime. Hadley's choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means."[165] Therefore, at least in the Ninth Circuit, stipulation of intent cannot be utilized to preclude prior bad acts evidence from being

156. *Id.* at 657.
157. Buzzetta, *supra* note 140, at 395-96.
158. *Id.* at 398 nn.56-64.
159. 918 F.2d 848 (9th Cir. 1990).
160. *Hadley*, 918 F.2d at 850.
161. *Id.* at 850.
162. *Id.* at 851.
163. *Id.* at 852.
164. *Id.* at 853.
165. *Hadley*, 918 F.2d at 852.

admitted.[166] The Seventh Circuit is in accord with the Ninth Circuit.[167]

At least one commentator has suggested that the United States Supreme Court case of *Estelle v. McGuire*[168] could indicate the expanded use of uncharged prior bad acts to prove intent.[169] In *Estelle*, McGuire was charged with second degree murder for killing his infant daughter.[170] At trial, although McGuire's defense was that he did not commit the murder, the trial court admitted evidence of prior injuries to the child, indicating that she was abused for most of her life.[171] Consequently, McGuire was convicted by the jury of second degree murder.[172] The Ninth Circuit overturned this conviction and granted McGuire's request for a writ of habeas corpus.[173] The circuit court reasoned that because there was no evidence to link McGuire as the cause of the prior injuries of his daughter, the prior acts should not have been admitted.[174] On appeal, the United States Supreme Court reversed the decision of the Ninth Circuit and reinstated McGuire's conviction.[175] Writing for the Court, Chief Justice Rehnquist stated:

> *[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.* In the federal courts, "[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged."[176]

In other words, just because McGuire made the tactical decision not to contest the element of intent, the prosecution still had the burden to prove intent. Further, even though there was no evidence that McGuire had caused the prior injuries to his daughter, the court admitted the acts anyway to prove in-

---

166. *See id.*
167. Buzzetta, *supra* note 140, at 402 n.84.
168. 502 U.S. 62 (1991).
169. Buzzetta, *supra* note 140, at 402.
170. *Estelle*, 502 U.S. at 64.
171. *Id.* at 65.
172. *Id.* at 66.
173. *Id.*
174. *Id.*
175. *Estelle*, 502 U.S. at 75.
176. *Id.* at 69-70 (quoting Matthews v. United States, 484 U.S. 58, 64-65 (1988)) (emphasis added).

tent.[177] In its reasoning, the Court noted that "the evidence demonstrated that [the infant's] death was the result of an intentional act by *someone*, and not an accident."[178]

Professor Buzzetta has argued that *Estelle v. McGuire* "dramatically expands the use of prior bad acts evidence" when compared to the traditional standard that was set out in *United States v. Huddleston*.[179] Professor Buzzetta specifically argues:

> In *Huddleston,* the Court held that similar act evidence is admissible pursuant to Rule 404(b) only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Yet, in [*Estelle*], the Court found the evidence of prior injuries admissible even though the government could not prove that the *defendant* caused the injuries.[180]

Thus, there is an argument that *Estelle* stands for the proposition of liberal admission of prior bad acts. If this is the case, it would obviously make it more difficult for a party to utilize the stipulation tactic to preclude the admission of prior acts. However, as Professor Buzzetta notes, because "[*Estelle*] never formally offered to stipulate that the infant had been intentionally injured by someone, though not him," it is possible that such a stipulation would have removed intent as an issue in the case.[181] Therefore, it is unclear what effect, if any, *Estelle* has on unilateral stipulation.

Some courts have inferred that in light of *Old Chief*, the Rule 404(b) question is answered and a defendant should not be allowed to stipulate his way out of prejudicial evidence.[182] However, this argument seems to lose some of its merit when one considers that the *Old Chief* Court held that the district court should have accepted the stipulation. Trial courts will continue to wrestle with this issue.

---

177. *Id.* at 69.

178. *Id.*

179. Buzzetta, *supra* note 140, at 403 (citing United States v. Huddleston, 485 U.S. 681 (1988)).

180. *Id.* at 403-04 (quoting *Huddleston*, 485 U.S. at 683).

181. *Id.* at 404.

182. *See, e.g.*, United States v. Spence, 125 F.3d 1192, 1194 n.2 (8th Cir. 1997) (implying that language in *Old Chief* that "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good grounds" could indicate that a Rule 404(b) stipulation should not be accepted).

Alabama is left with a tough decision as to which circuit to follow in the 404(b) cases. The Alabama courts must separately decide how to handle criminal and civil cases because authority exists to indicate that the ability to stipulate is much greater in a civil case than in a criminal case.[183] Stated otherwise, "the prevailing view is that a civil party may 'plead out' specific issues and thereby block the admission of evidence relevant only to those issues. In short, a civil litigant has a 'formidable weapon' which the criminal accused is usually denied."[184] Since the federal courts appear to be split on this issue, it is unpredictable which way Alabama will go.

VI. CONCLUSION

Although the *Old Chief* decision has brought about a great deal of commentary on the unilateral stipulation tactic, one look at the Advisory Committee's Note to several of the federal rules indicates that the strategy has been around for some time. Because Alabama is still in the infancy stage with its rules of evidence, the federal cases are certain to serve as persuasive authority on this issue for many years to come. However, even the federal circuits are divided in some areas. Therefore, until the Alabama Supreme Court speaks on these matters, the Alabama trial courts are going to have some tough decisions to make.

Terry W. McCarthy

183. C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5194 (1978).

184. Imwinkelried, *supra* note 8, at 344.