

AGENDA VII
Washington, D.C.
June 17-19, 1993

**REPORT
OF THE
ADVISORY COMMITTEE
ON
EVIDENCE RULES**

Rule 412. Admissibility of Victim's Sexual Behavior or Alleged Sexual Predisposition

1 (a) Evidence Generally Inadmissible. Evidence of the
2 following types is not admissible in any civil or criminal
3 proceeding involving alleged sexual misconduct except as provided
4 in subdivisions (b) and (c):

5 (1) evidence that, or offered to prove that, any
6 alleged victim engaged in other sexual behavior; and

7 (2) evidence of, or offered to prove, any alleged
8 victim's sexual predisposition.

9 (b) Exceptions.

10 (1) In a criminal case, proof of the following
11 types is admissible, if otherwise admissible under these
12 rules:

13 (A) evidence of specific instances of sexual
14 behavior by the alleged victim offered to prove that
15 another person was the source of semen, injury, or
16 other physical evidence;

17 (B) evidence of specific instances of sexual
18 behavior by the alleged victim with respect to the
19 person accused of the sexual misconduct offered to
20 prove consent; and

21 (C) evidence the exclusion of which would violate
22 the constitutional rights of the defendant.

23 (2) In civil cases, evidence of, or offered to prove,
24 sexual behavior or alleged sexual predisposition of any

May 24, 1993

25 alleged victim is admissible if it is otherwise admissible
26 under these rules, and if its probative value substantially
27 outweighs the danger of harm to any victim and of unfair
28 prejudice to any party. Proof may be made by evidence of
29 reputation or evidence in the form of an opinion only if
30 reputation has been placed in controversy by the alleged
31 victim.

32 (c) Procedure to Determine Admissibility.

33 A party offering evidence under subdivision (b) of this
34 rule must make a motion for admission, specifically describing
35 the evidence and stating the purposes for which it is offered.
36 The motion must be served upon the alleged victim and the parties
37 and must be filed no later than 14 days before trial unless the
38 court directs an earlier filing or, permits a later filing,
39 including during trial, for good cause shown. The motion, all
40 related papers, and the record of any hearing must be and remain
41 under seal unless otherwise ordered by the court. Before
42 admitting such evidence, the court must hold a hearing in camera
43 and afford the alleged victim as well as the parties the right to
44 be present and an opportunity to be heard.

May 24, 1993

RULE 412. ~~ADMISSIBILITY SEX OFFENSE CASES; RELEVANCE OF VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION~~

1 (a) ~~Evidence Generally Inadmissible. Notwithstanding any~~
2 ~~other provision of law, in a criminal case in which a person is~~
3 ~~accused of an offense under chapter 109A of title 18, United~~
4 ~~States Code, reputation or opinion evidence of the past sexual~~
5 ~~behavior of an alleged victim of such offense is not admissible.~~
6 Evidence of the following types is not admissible in any civil or
7 criminal proceeding involving alleged sexual misconduct except as
8 provided in subdivisions (b) and (c):

9 (1) evidence that, or offered to prove that, any alleged
10 victim engaged in other sexual behavior; and

11 (2) evidence of, or offered to prove, any alleged victim's
12 sexual predisposition.

13 (b) ~~Exceptions. Notwithstanding any other provision of law,~~
14 ~~in a criminal case in which a person is accused of an offense~~
15 ~~under chapter 109A of title 18, United States Code, evidence of a~~
16 ~~victim's past sexual behavior other than reputation or opinion~~
17 ~~evidence is also not admissible, unless such evidence other than~~
18 ~~reputation or opinion evidence is~~

19 (1) In a criminal case, proof of the following types is
20 admissible, if otherwise admissible under these rules:

21 (1) ~~admitted in accordance with subdivisions (c)(1) and~~
22 ~~(c)(2) and is constitutionally required to be admitted; or~~

23 (2) ~~admitted in accordance with subdivision (c) and is~~
24 ~~evidence of~~

25 (A) past evidence of specific instances of sexual
26 behavior by the alleged victim with persons other than
27 the accused, offered to prove by the accused upon the
28 issue of whether the accused was or was not, with
29 respect to the alleged victim, ~~and another person was~~
30 the source of semen, or injury, or other physical
31 evidence; or

32 (B) past evidence of specific instances of sexual
33 behavior by the alleged victim with respect to the
34 accused person accused of the sexual misconduct and is
35 offered by the accused upon the issue of whether the
36 alleged victim consented to the sexual behavior to with
37 respect to which such offense is alleged, to prove
38 consent; and

39 (C) evidence the exclusion of which would violate
40 the constitutional rights of the defendant.

41 (2) In civil cases, evidence of, or offered to prove, sexual
42 behavior or alleged sexual predisposition of any alleged victim
43 is admissible if it is otherwise admissible under these rules,
44 and if its probative value substantially outweighs the danger of
45 harm to any victim and of unfair prejudice to any party. Proof
46 may be made by evidence of reputation or evidence in the form of
47 an opinion only if reputation has been placed in controversy by
48 the alleged victim.

49 (c) Procedure to Determine Admissibility.

50 ~~(e)(1) If the person accused of committing an offense under~~

May 24, 1993

51 ~~chapter 109A of title 18, United States Code intends to offer~~
52 ~~under subdivision (b) evidence of specific instances of the~~
53 ~~alleged victim's past sexual behavior, the accused shall make a~~
54 ~~written motion to offer such evidence not later than fifteen days~~
55 ~~before the date on which the trial in which such evidence is to~~
56 ~~be offered is scheduled to begin, except that the court may allow~~
57 ~~the motion to be made at a later date, including during trial, if~~
58 ~~the court determines either that the evidence is newly discovered~~
59 ~~and could not have been obtained earlier through the exercise of~~
60 ~~due diligence or that the issue to which such evidence relates~~
61 ~~has newly arisen in the case. Any motion made under this~~
62 ~~paragraph shall be served on all other parties and on the alleged~~
63 ~~victim.~~

64 ~~(2) The motion described in paragraph (1) shall be~~
65 ~~accompanied by a written offer of proof. If the court determines~~
66 ~~that the offer of proof contains evidence described in~~
67 ~~subdivision (b), the court shall order a hearing in chambers to~~
68 ~~determine if such evidence is admissible. At such hearing the~~
69 ~~parties may call witnesses, including the alleged victim, and~~
70 ~~offer relevant evidence. Notwithstanding subdivision (b) of rule~~
71 ~~104, if the relevancy of the evidence which the accused seeks to~~
72 ~~offer in the trial depends upon the fulfillment of a condition of~~
73 ~~fact, the court, at the hearing in chambers or at a subsequent~~
74 ~~hearing in chambers scheduled for such purpose, shall accept~~
75 ~~evidence on the issue of whether such condition of fact is~~
76 ~~fulfilled and shall determine such issue.~~

May 24, 1993

77 ~~(3) If the court determines on the basis of the hearing~~
78 ~~described in paragraph (2) that the evidence which the accused~~
79 ~~seeks to offer is relevant and that the probative value of such~~
80 ~~evidence outweighs the danger of unfair prejudice, such evidence~~
81 ~~shall be admissible in the trial to the extent an order made by~~
82 ~~the court specifies evidence which may be offered and areas with~~
83 ~~respect to which the alleged victim may be examined or~~
84 ~~cross-examined.~~

85 A party offering evidence under subdivision (b) of this rule
86 must make a motion for admission, specifically describing the
87 evidence and stating the purposes for which it is offered. The
88 motion must be served upon the alleged victim and the parties and
89 must be filed no later than 14 days before trial unless the court
90 directs an earlier filing or, permits a later filing, including
91 during trial, for good cause shown. The motion, all related
92 papers, and the record of any hearing must be and remain under
93 seal unless otherwise ordered by the court. Before admitting
94 such evidence, the court must hold a hearing in camera and afford
95 the alleged victim as well as the parties the right to be present
96 and an opportunity to be heard.

97 ~~(4) For purposes of this rule, the term "past sexual~~
98 ~~behavior" means sexual behavior other than the sexual behavior~~
99 ~~with respect to which an offense under chapter 109A of title 18,~~
100 ~~United States Code is alleged.~~

May 24, 1993

COMMITTEE NOTE

1 Rule 412 has been revised to diminish some of the confusion
2 engendered by the original rule and to expand the protection
3 afforded alleged victims of sexual misconduct. Rule 412 applies
4 to both civil and criminal proceedings. The rule aims to
5 safeguard the alleged victim against the invasion of privacy,
6 potential embarrassment and sexual stereotyping that is
7 associated with public disclosure of intimate sexual details and
8 the infusion of sexual innuendo into the factfinding process. By
9 affording victims protection in most instances, the rule also
10 encourages victims of sexual misconduct to institute and to
11 participate in legal proceedings against alleged offenders.

12 Rule 412 seeks to achieve these objectives by barring
13 evidence relating to the alleged victim's sexual behavior or
14 alleged sexual predisposition, whether offered as substantive
15 evidence or for impeachment, except in designated circumstances
16 in which the probative value of the evidence significantly
17 outweighs possible harm to the witness. The rule further
18 regulates the form of proof, the inferences that may be drawn,
19 and the procedural protections that apply when evidence is
20 proffered pursuant to the specified exceptions.

21 The revised rule applies in all cases involving sexual
22 misconduct in which there is evidence that someone was a victim,
23 without regard to whether the alleged victim or person accused is
24 a party to the litigation. Rule 412 extends to "pattern"
25 witnesses in both criminal and civil cases whose testimony about

26 other instances of sexual misconduct by the person accused is
27 relevant and otherwise admissible. When the case does not involve
28 alleged sexual misconduct, evidence relating to a third-party
29 witness' alleged sexual activities is not within the ambit of
30 Rule 412. The witness will, however, be protected by other rules
31 such as Rules 404 and 608, as well as Rule 403.

32 The terminology "alleged victim" is used because there will
33 frequently be a factual dispute as to whether sexual misconduct
34 occurred, and not to connote any requirement that the misconduct
35 be alleged in the pleadings. Rule 412 does not, however, apply
36 unless the person against whom the evidence is offered can
37 reasonably be characterized as a "victim of alleged sexual
38 misconduct." When this is not the case, as for instance in a
39 defamation action involving statements concerning sexual
40 misconduct in which the evidence is offered to show that the
41 alleged defamatory statements were true or did not damage the
42 plaintiff's reputation, neither Rule 404 nor this Rule will
43 operate to bar the evidence; Rules 401 and 403 will continue to
44 control. Rule 412 will, however, apply in a Title VII action in
45 which the plaintiff has alleged sexual harassment.

46 The reference to a person "accused" is also used in a non-
47 technical sense. There is no requirement that there be a criminal
48 charge pending against the person or even that the misconduct
49 would constitute a criminal offense. Evidence offered to prove
50 allegedly false prior claims by the victim can raise troublesome
51 issues as to whether the prior claim was in fact "false" as

52 compared to "unsubstantiated" or "withdrawn," and whether the
53 circumstances of the earlier charges are probative with regard to
54 the present complaint. Because evidence of false claims does not
55 on its face constitute evidence barred by Rule 412, and because
56 the court will often have to determine whether the evidence
57 proves something more than mere propensity in ruling on
58 admissibility, these claims fall more appropriately within the
59 framework of Rule 404 than Rule 412.

60 Subdivision (a). As amended, Rule 412 bars evidence of
61 offered to prove the victim's sexual behavior and alleged sexual
62 predisposition. Evidence, which might otherwise be admissible
63 under Rules 402, 404(b), 405, 607, 608, 609, or some other
64 evidence rule, must be excluded if Rule 412 so requires. The
65 word "other" is used to suggest some flexibility in admitting
66 evidence "intrinsic" to the alleged sexual misconduct. Cf.
67 Committee Note to 1991 amendment to Rule 404(b).

68 Past sexual behavior connotes all activities that involve
69 actual physical conduct, i.e. sexual intercourse and sexual
70 contact, or that imply sexual intercourse or sexual contact. See,
71 e.g., United States v. Galloway, 937 F.2d 542 (10th Cir. 1991),
72 cert. denied, 113 S.Ct. 418 (1992) (use of contraceptives
73 inadmissible since use implies sexual activity); United States v.
74 One Feather, 702 F.2d 736 (8th Cir. 1983) (birth of an
75 illegitimate child inadmissible); State v. Carmichael, 727 P.2d
76 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible).
77 In addition, the word "behavior" should be construed to include

78 activities of the mind, such as fantasies or dreams. See Charles
79 A. Wright & Kenneth A. Graham, Jr., Federal Practice and
80 Procedure, §5384 at p. 548 (1980) ("While there may be some doubt
81 under statutes that require 'conduct,' it would seem that the
82 language of Rule 412 is broad enough to encompass the behavior of
83 the mind.").

84 The rule has been amended to also exclude all other evidence
85 relating to an alleged victim of sexual misconduct that is
86 offered to prove or to imply a sexual predisposition. This
87 amendment is designed to exclude evidence that does not directly
88 refer to sexual activities or thoughts but that the proponent
89 believes may have a sexual connotation for the factfinder.
90 Admission of such evidence would contravene Rule 412's objectives
91 of shielding the alleged victim from potential embarrassment and
92 safeguarding the victim against stereotypical thinking.
93 Consequently, unless the (b)(2) exception is satisfied, evidence
94 such as that relating to the alleged victim's mode of dress,
95 speech, or life style will not be admissible.

96 The amendment eliminates the confusing introductory phrase,
97 ("(n)otwithstanding any other provision of law"); the limitation
98 of the rule to "a criminal case in which a person is accused of
99 an offense under chapter 109A of title 18, United States Code;"
100 and the absolute statement that "reputation or opinion evidence
101 of the past sexual behavior of an alleged victim of such offense
102 is not admissible." The Committee believes that these
103 eliminations will promote clarity without reducing unnecessarily

104 the protection afforded to alleged victims.

105 The introductory phrase in subdivision (a) was deleted
106 because it lacked clarity and contained no explicit reference to
107 the other provisions of law that were intended to be overridden.
108 The reason for extending the rule to all criminal cases is
109 obvious. If a defendant is charged with kidnapping, and evidence
110 is offered, either to prove motive or as background, that the
111 defendant sexually assaulted the victim, the need to protect the
112 victim is as great as it would be in a prosecution for sexual
113 assault. The strong social policy of protecting a victim's
114 privacy and encouraging victims to come forward to report
115 criminal acts is not confined to cases that involve a charge of
116 sexual assault. Although a court might well exclude sexual
117 history evidence under Rule 403 in a kidnapping or similar case,
118 the Advisory Committee believes that Rule 412 should be extended
119 so that it explicitly covers all criminal cases in which a claim
120 is made that a person is the victim of sexual misconduct.

121 The reason for extending Rule 412 to civil cases is equally
122 obvious. The need to protect alleged victims against invasions
123 of privacy, potential embarrassment, and unwarranted sexual
124 stereotyping, and the wish to encourage victims to come forward
125 when they have been sexually molested do not disappear because
126 the context has shifted from a criminal prosecution to a claim
127 for damages or injunctive relief. There is a strong social policy
128 in not only punishing those who engage in sexual misconduct, but
129 in also providing relief to the victim. Thus, Rule 412 applies

130 in any civil case in which a person claims to be the victim of
131 sexual misconduct, such as actions for sexual battery or sexual
132 harassment.

133 The conditional clause, "except as provided in subdivisions
134 (b) and (c)" is intended to make clear that evidence of the types
135 described in subdivision (a) is admissible only under the
136 strictures of those sections. Subdivision (b) notes that the
137 exceptions only apply if the evidence is otherwise admissible
138 under other rules of evidence. For example, in determining
139 admissibility, the court must consider Rules 402 and 403, and
140 perhaps other Rules such as Rules 404 and 405. In addition, the
141 evidence must satisfy the procedural requirements for
142 admissibility contained in subdivision (c).

143 Subdivision (b). Subdivision (b) spells out the specific
144 circumstances in which some evidence may be admissible that would
145 otherwise be barred by the general rule expressed in subdivision
146 (a). As amended, Rule 412 will be virtually unchanged in criminal
147 cases, but will provide protection to any person alleged to be a
148 victim of sexual misconduct regardless of the charge actually
149 brought against an accused. A new exception has been added for
150 civil cases.

151 In a criminal case, subdivision (b)(1) may admit evidence
152 pursuant to three possible exceptions, provided the evidence also
153 satisfies other requirements for admissibility specified in the
154 Federal Rules of Evidence, including Rule 403. Subdivisions
155 (b)(1)(A) and (b)(1)(B) require proof in the form of specific

156 instances of sexual behavior in recognition of the limited
157 probative value and dubious reliability of evidence of reputation
158 or evidence in the form of an opinion.

159 Under subdivision (b)(1)(A), evidence of specific instances
160 of sexual behavior with persons other than the person whose
161 sexual misconduct is alleged may be admissible if it is offered
162 to prove that another person was the source of semen, injury or
163 other physical evidence. Where the prosecution has directly or
164 indirectly asserted that the physical evidence originated with
165 the accused, the defendant must be afforded an opportunity to
166 prove that another person was responsible. See United States v.
167 Begay, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered
168 for the specific purpose identified in this subdivision may still
169 be excluded if it does not satisfy Rules 401 or 403. See, e.g.,
170 United States v. Azure, 845 F.2d 1503, 1505-06 (8th Cir. 1988)
171 (10 year old victim's injuries indicated recent use of force;
172 court excluded evidence of consensual sexual activities with
173 witness who testified at in camera hearing that he had never hurt
174 victim and failed to establish recent activities).

175 Under the exception in subdivision (b)(1)(B), evidence of
176 specific instances of sexual behavior with respect to the person
177 whose sexual misconduct is alleged is admissible if offered to
178 prove consent. Admissible pursuant to this exception might be
179 evidence of prior instances of sexual activities between the
180 alleged victim and the accused, as well as statements in which
181 the alleged victim expressed an intent to engage in sexual

182 intercourse with the accused, or voiced sexual fantasies
183 involving the specific accused. Evidence relating to the victim's
184 alleged sexual predisposition is not admissible pursuant to this
185 exception.

186 Under subdivision (b)(1)(C), evidence of specific instances
187 of conduct may not be excluded if the result would be to deny a
188 criminal defendant the protections afforded by the Constitution.
189 For example, statements in which the victim had expressed an
190 intent to have sex with the first person encountered on a
191 particular occasion might not be excluded without violating the
192 due process right of a rape defendant seeking to prove consent.
193 Recognition of this basic principle was expressed in subdivision
194 (b)(1) of the original rule. The United States Supreme Court has
195 recognized that in various circumstances a defendant may have a
196 right to introduce evidence otherwise precluded by an evidence
197 rule under the Confrontation Clause. See, e.g., Olden v.
198 Kentucky, 488 U.S. 227 (1988) (defendant in rape cases had right
199 to inquire into alleged victim's cohabitation with another man to
200 show bias).

201 Subdivision (b)(2) governs the admissibility of otherwise
202 prescribed evidence in civil cases. It employs a balancing test
203 rather than the specific exceptions stated in subdivision (b)(1)
204 in recognition of the difficulty of foreseeing future
205 developments in the law. Greater flexibility is needed to
206 accommodate evolving causes of action such as claims for sexual
207 harassment.

208 The balancing test requires the proponent of the evidence to
209 convince the court that the probative value of the proffered
210 evidence "substantially outweighs the danger of harm to any
211 victim and of unfair prejudice to any party." This test for
212 admitting evidence offered to prove sexual behavior or sexual
213 propensity in civil cases differs in three respects from the
214 general rule governing admissibility set forth in Rule 403.
215 First, it reverses the usual procedure spelled out in Rule 403 by
216 shifting the burden to the proponent to demonstrate admissibility
217 rather than making the opponent justify exclusion of the
218 evidence. Second, the standard expressed in subdivision (b)(2) is
219 more stringent; it raises the threshold for admission by
220 requiring that the probative value of the evidence substantially
221 outweigh the specified dangers. Finally, the Rule 412 test puts
222 "harm to the victim" on the scale in addition to prejudice to the
223 parties.

224 Reputation and character evidence may be received in a civil
225 case only if the alleged victim has put his or her reputation
226 into controversy. The victim may do so without making a specific
227 allegation in a pleading. Cf. Fed.R.Civ.P. 35(a).

228
229 **Subdivision (c).** Amended subdivision (c) is more concise
230 and understandable than the subdivision it replaces. The
231 requirement of a motion before trial is continued in the amended
232 rule, as is the provision that a late motion may be permitted for
233 good cause shown. In deciding whether to permit late filing, the

234 court may take into account the conditions previously included in
235 the rule: namely whether the evidence is newly discovered and
236 could not have been obtained earlier through the existence of due
237 diligence, and whether the issue to which such evidence relates
238 has newly arisen in the case. The rule recognizes that in some
239 instances the circumstances that justify an application to
240 introduce evidence otherwise barred by Rule 412 will not become
241 apparent until trial.

242 The amended rule requires that all papers connected with the
243 motion and any record of a hearing on the motion be kept and
244 remain under seal during the course of trial and appellate
245 proceedings unless otherwise ordered. This is to assure that the
246 privacy of the alleged victim is preserved in all cases in which
247 the court rules that proffered evidence is not admissible, and in
248 which the hearing refers to matters that are not received, or are
249 received in another form.

250 The amended rule provides that before admitting evidence
251 that falls within the prohibition of Rule 412(a), the court must
252 hold a hearing in camera at which the alleged victim and any
253 party must be afforded the right to be present and an opportunity
254 to be heard.

255 The procedures set forth in subdivision (c) do not apply to
256 discovery of a victim's past sexual conduct or predisposition in
257 civil cases, which will be continued to be governed by Fed. R.
258 Civ. P. 26. In order not to undermine the rationale of Rule 412,
259 however, courts should enter appropriate orders pursuant to Fed.

260 R. Civ. P. 26 (c) to protect the victim against unwarranted
261 inquiries and to ensure confidentiality. Courts should
262 presumptively issue protective orders barring discovery unless
263 the party seeking discovery makes a showing that the evidence
264 sought to be discovered would be relevant under the facts and
265 theories of the particular case, and cannot be obtained except
266 through discovery. In an action for sexual harassment, for
267 instance, while some evidence of the alleged victim's sexual
268 behavior and/or predisposition in the workplace may perhaps be
269 relevant, non-work place conduct will usually be irrelevant. Cf.
270 Burns v. McGregor, ___ F.2d ___ (8th Cir. 1993) (posing for a
271 nude magazine outside work hours is irrelevant to issue of
272 unwelcomeness of sexual advances at work). Confidentiality orders
273 should be presumptively granted as well.

274 One substantive change made in subdivision (c) is the
275 elimination of the following sentence: "Notwithstanding
276 subdivision (b) of rule 104, if the relevancy of the evidence
277 which the accused seeks to offer in the trial depends upon the
278 fulfillment of a condition of fact, the court, at the hearing in
279 chambers or at a subsequent hearing in chambers schedules for
280 such purpose, shall accept evidence on the issue of whether such
281 condition of fact is fulfilled and shall determine such issue."
282 On its face, this language would appear to authorize a trial
283 judge to exclude evidence of past sexual conduct between an
284 alleged victim and an accused or a defendant in a civil case
285 based upon the judge's belief that such past acts did not occur.

286 Such an authorization raises
287 questions of invasion of the right to a jury trial under the
288 Sixth and Seventh Amendments. See 1 S. SALTZBURG & M. MARTIN,
289 FEDERAL RULES OF EVIDENCE MANUAL, 396-97 (5th ed. 1990).

290 The Advisory Committee concluded that the amended rule
291 provided adequate protection for all persons claiming to be the
292 victims of sexual misconduct, and that it was inadvisable to
293 continue to include a provision in the rule that has been
294 confusing and that raises substantial constitutional issues.