United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Federal Rules of Evidence Rule 412, 28 U.S.C.A.

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

Currentness

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

CREDIT(S)

(Added Pub.L. 95-540, § 2(a), Oct. 28, 1978, 92 Stat. 2046; amended Pub.L. 100-690, Title VII, § 7046(a), Nov. 18, 1988, 102 Stat. 4400; Apr. 29, 1994, eff. Dec. 1, 1994; Pub.L. 103-322, Title IV, § 40141(b), Sept. 13, 1994, 108 Stat. 1919; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES

1994 Amendments

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

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence of for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

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

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, the evidence is subject to the requirements of Rule 404.

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

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse or sexual contact. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies of dreams. *See* 23 C. Wright and K. Graham, Jr., *Federal Practice and Procedure*, § 5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

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

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of the law that were intended to be overridden. The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

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

In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403.

Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

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

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expresses an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving that specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

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

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

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence “substantially outweighs the danger of harm to any victim and of unfair prejudice of any party.” This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it Reverses that usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the Rule 412 test puts “harm to the victim” on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. *Cf.* Fed.R.Civ.P. 35(a).

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivision it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the

rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within that prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. *Cf. Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962-63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: “Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.” On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. *See* 1 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual*, 396-97 (5th ed. 1990).

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

[Advisory Committee Note adopted by Congressional Conference Report accompanying Pub.L. 103-322. See H.R. Conf. Rep. No. 103-711, 103rd Cong., 2nd Sess., 383 (1994).]

Congressional Discussion

The following discussion in the House of Representatives of October 10, 1978, preceded passage of H.R. 4727, which enacted Rule 412. The discussion appears in 124 Cong.Record, at page H. 11944.

Mr. MANN. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, for many years in this country, evidentiary rules have permitted the introduction of evidence about a rape victim's prior sexual conduct. Defense lawyers were permitted great latitude in bringing out intimate details about a rape victim's life.

Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life.

The evidentiary rules that permit such inquiry have in recent years come under question; and the States have taken the lead to change and modernize their evidentiary rules about evidence of a rape victim's prior sexual behavior. The bill before us similarly seeks to modernize the Federal Evidentiary rules.

The present Federal Rules of Evidence reflect the traditional approach. If a defendant in a rape case raises the defense of consent, that defendant may then offer evidence about the victim's prior sexual behavior. Such evidence may be in the form of opinion evidence, evidence of reputation, or evidence of specific instances of behavior. Rule 404(a)(2) of the Federal Rules of Evidence permits the introduction of evidence of a "pertinent character trait." The advisory committee note to that rule cites, as an example of what the rule covers, the character of a rape victim when the issue is consent. Rule 405 of the Federal Rules of Evidence permits the use of opinion or reputation evidence or the use of evidence of specific behavior to show a character trait.

Thus, Federal evidentiary rules permit a wide ranging inquiry into the private conduct of a rape victim, even though that conduct may have at best a tenuous connection to the offense for which the defendant is being tried.

H.R. 4727 amends the Federal Rules of Evidence to add a new rule, applicable only in criminal cases, to spell out when, and under what conditions, evidence of a rape victim's prior sexual behavior can be admitted. The new rule provides that reputation or opinion evidence about a rape victim's prior sexual behavior is not admissible. The new rule also provides that a court cannot admit evidence of specific instances of a rape victim's prior sexual conduct except in three circumstances.

The first circumstance is where the Constitution requires that the evidence be admitted. This exception is intended to cover those infrequent instances where, because of an unusual chain of circumstances, the general rule of inadmissibility, if followed, would result in denying the defendant a constitutional right.

The second circumstance in which the defendant can offer evidence of specific instances of a rape victim's prior sexual behavior is where the defendant raises the issue of consent and the evidence is of sexual behavior with the defendant. To admit such evidence, however, the court must find that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice.

The third circumstance in which a court can admit evidence of specific instances of a rape victim's prior sexual behavior is where the evidence is of behavior with someone other than the defendant and is offered by the defendant on the issue of whether or not he was the source of semen or injury. Again, such evidence will be admitted only if the court finds that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice.

The new rule further provides that before evidence is admitted under any of these exceptions, there must be an in camera hearing--that is, a proceeding that takes place in the judge's chambers out of the presence of the jury and the general public. At this hearing, the defendant will present the evidence he intends to offer and be able to argue why it should be admitted. The prosecution, of course, will be able to argue against that evidence being admitted.

The purpose of the in camera hearing is twofold. It gives the defendant an opportunity to demonstrate to the court why certain evidence is admissible and ought to be presented to the jury. At the same time, it protects the privacy of the rape victim in those instances when the court finds that evidence is inadmissible. Of course, if the court finds the evidence to be admissible, the evidence will be presented to the jury in open court.

The effect of this legislation, therefore, is to preclude the routine use of evidence of specific instances of a rape victim's prior sexual behavior. Such evidence will be admitted only in clearly and narrowly defined circumstances and only after an in camera hearing. In determining the admissibility of such evidence, the court will consider all of the facts and circumstances surrounding

the evidence, such as the amount of time that lapsed between the alleged prior act and the rape charged in the prosecution. The greater the lapse of time, of course, the less likely it is that such evidence will be admitted.

Mr. Speaker, the principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives. It does so by narrowly circumscribing when such evidence may be admitted. It does not do so, however, by sacrificing any constitutional right possessed by the defendant. The bill before us fairly balances the interests involved--the rape victim's interest in protecting her private life from unwarranted public exposure; the defendant's interest in being able adequately to present a defense by offering relevant and probative evidence; and society's interest in a fair trial, one where unduly prejudicial evidence is not permitted to becloud the issues before the jury.

I urge support of the bill.

Mr. WIGGINS. Mr. Speaker, I yield myself such time as I may consume.

(Mr. WIGGINS asked and was given permission to revise and extend his remarks.)

Mr. WIGGINS. Mr. Speaker, this legislation addresses itself to a subject that is certainly a proper one for our consideration. Many of us have been troubled for years about the indiscriminate and prejudicial use of testimony with respect to a victim's prior sexual behavior in rape and similar cases. This bill deals with that problem. It is not, in my opinion, Mr. Speaker, a perfect bill in the manner in which it deals with the problem, but my objections are not so fundamental as would lead me to oppose the bill.

I think, Mr. Speaker, that it is unwise to adopt a per se rule absolutely excluding evidence of reputation and opinion with respect to the victim--and this bill does that--but it is difficult for me to foresee the specific case in which such evidence might be admissible. The trouble is this, Mr. Speaker: None of us can foresee perfectly all of the various circumstances under which the propriety of evidence might be before the court. If this bill has a defect, in my view it is because it adopts a per se rule with respect to opinion and reputation evidence.

Alternatively we might have permitted that evidence to be considered in camera as we do other evidence under the bill.

I should note, however, in fairness, having expressed minor reservations, that the bill before the House at this time does improve significantly upon the bill which was presented to our committee.

I will not detail all of those improvements but simply observe that the bill upon which we shall soon vote is a superior product to that which was initially considered by our subcommittee.

Mr. Speaker, I ask my colleagues to vote for this legislation as being, on balance, worthy of their support, and urge its adoption.

I reserve the balance of my time.

Mr. MANN. Mr. Speaker, this legislation has more than 100 cosponsors, but its principal sponsor, as well as its architect is the gentlewoman from New York (Ms. Holtzman). As the drafter of the legislation she will be able to provide additional information about the probable scope and effect of the legislation.

I yield such time as she may consume to the gentlewoman from New York (Ms. Holtzman).

(Ms. HOLTZMAN asked and was given permission to revise and extend her remarks.)

Ms. HOLTZMAN. Mr. Speaker, I would like to begin first by complimenting the distinguished gentleman from South Carolina (Mr. Mann), the chairman of the subcommittee, for his understanding of the need for corrective legislation in this area and for

the fairness with which he has conducted the subcommittee hearings. I would like also to compliment the other members of the subcommittee, including the gentleman from California (Mr. Wiggins).

Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.

Mr. Speaker, over 30 States have taken some action to limit the vulnerability of rape victims to such humiliating cross-examination of their past sexual experiences and intimate personal histories. In federal courts, however, it is permissible still to subject rape victims to brutal cross-examination about their past sexual histories. H.R. 4727 would rectify this problem in Federal courts and I hope, also serve as a model to suggest to the remaining states that reform of existing rape laws is important to the equity of our criminal justice system.

H.R. 4727 applies only to criminal rape cases in Federal courts. The bill provides that neither the prosecution nor the defense can introduce any reputation or opinion evidence about the victim's past sexual conduct. It does permit, however, the introduction of specific evidence about the victim's past sexual conduct in three very limited circumstances.

First, this evidence can be introduced if it deals with the victim's past sexual relations with the defendant and is relevant to the issue of whether she consented. Second, when the defendant claims he had no relations with the victim, he can use evidence of the victim's past sexual relations with others if the evidence rebuts the victim's claim that the rape caused certain physical consequences, such as semen or injury. Finally, the evidence can be introduced if it is constitutionally required. This last exception, added in subcommittee, will insure that the defendant's constitutional rights are protected.

Before any such evidence can be introduced, however, the court must determine at a hearing in chambers that the evidence falls within one of the exceptions.

Furthermore, unless constitutionally required, the evidence of specific instances of prior sexual conduct cannot be introduced at all it if would be more prejudicial and inflammatory that probative.

Mr. Speaker, I urge adoption of this bill. It will protect women from both injustice and indignity.

Mr. MANN. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. WIGGINS. Mr. Speaker, I have no further requests for time, and yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from South Carolina (Mr. Mann) that the House suspend the rules and pass the bill H.R. 4727, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

2011 Amendments

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.