

**AN AMENDMENT TO THE FEDERAL RULES OF  
EVIDENCE**

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**COMMUNICATION**

**FROM**

**THE CHIEF JUSTICE, THE SUPREME COURT  
OF THE UNITED STATES**

**TRANSMITTING**

**AN AMENDMENT TO THE FEDERAL RULES OF EVIDENCE AS  
ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2076**



**MAY 2, 1994.—Referred to the Committee on the Judiciary and ordered  
to be printed**

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**U.S. GOVERNMENT PRINTING OFFICE**



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

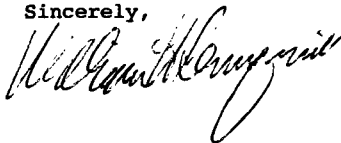
April 29, 1994

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress an amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code. The Court has withheld that portion of the proposed amendment to Rule of Evidence 412 transmitted to the Supreme Court by the Judicial Conference of the United States which would apply that Rule to civil cases. The reasons for the Court's action are set forth in the attached letter to Judge Gerry, Chairman of the Executive Committee of the Judicial Conference of the United States.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Note submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Note was not revised to account for the Court's action, because the Note is the commentary of the advisory committee.

Sincerely,



Honorable Thomas S. Foley  
Speaker of the House of Representatives  
Washington, D.C. 20515



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

April 29, 1994

The Honorable John F. Gerry  
Chair  
Executive Committee  
Judicial Conference of the United States  
Washington, D.C. 20544

Dear Judge Gerry:

I would like to express the Court's appreciation for the Judicial Conference's submission of the proposed amendments to the Federal Rules of Appellate Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. I am writing to inform you that the court has approved and forwarded the proposed changes to the Congress, with one exception.

We have withheld approval of that portion of the proposed amendments to Rule of Evidence 412 which would apply that Rule to civil cases, and make evidence of the sexual behavior or predisposition of an alleged victim admissible only if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Proposed Rule of Evidence 412(b)(2).

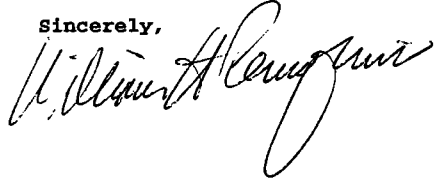
Some members of the Court expressed the view that the amendment might exceed the scope of the Court's authority under the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). This Court recognized in *Meritor Saving Bank v. Vinson*, 477 U.S. 57, 69 (1986), that evidence of an alleged victim's "sexually provocative speech or dress" may be relevant in workplace harassment cases, and some Justices expressed concern that the proposed amendment might encroach on the rights of defendants.

(V)

Honorable John F. Gerry

We think the Conference or its committee may wish to consider this proposal again in the future, in light of the comments and concerns identified in this letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "William H. Langford". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

cc: Mr. L. Ralph Meham  
Conference Secretary

The Honorable Alicemarie H. Stotler  
Chair, Committee on Rules of Practice and Procedure

SUPREME COURT OF THE UNITED STATES

FRIDAY, APRIL 29, 1994

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein an amendment to Evidence Rule 412.

[See infra., pp. \_\_\_\_ \_\_\_\_ \_\_\_\_.]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 1994, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

(1)

( / )

PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE

**RULE 412. ADMISSIBILITY OF ALLEGED VICTIM'S  
SEXUAL BEHAVIOR OR ALLEGED SEXUAL  
PREDISPOSITION**

(a) Evidence Generally Inadmissible.  
The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

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

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

(b) Exceptions.

In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove

consent or by the prosecution; and

(3) evidence the exclusion of which would violate the constitutional rights of the defendant.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

L. RALPH MECHAM  
DIRECTOR  
JAMES E. MACKLIN, JR.  
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

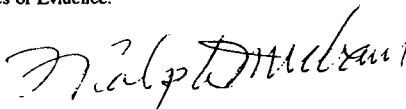
WASHINGTON, D.C. 20544

October 25, 1993

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES  
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rule 412 of the Federal Rules of Evidence. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Rules of Evidence.



L. Ralph Mecham

Enclosures



A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY

EXCERPT FROM THE  
REPORT OF THE JUDICIAL CONFERENCE  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
SEPTEMBER 1993

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

IV. Amendments to the Federal Rules of Evidence.

The Advisory Committee on Evidence submitted to your Committee proposed amendments to Evidence Rule 412 together with Committee Notes explaining their purpose and intent. The proposed amendments would clarify and extend the protection of the rule to victims of sexual misconduct in all criminal and civil cases.

Your Committee was advised that legislation had been considered during the last Congressional session that would bypass the rulemaking process by directly amending Evidence Rule 412. To address the Congressional concern for prompt action your Committee, at the request of the Judicial Conference's Ad Hoc Committee on Violence Against Women, agreed to expedite the rulemaking process to enable Congress to consider the proposed amendments to Rule 412 during the 103rd Congressional session.

The original draft of the amendments to Evidence Rule 412 was prepared by the Advisory Committee on Criminal Rules in consultation with the Advisory Committee on Civil Rules. The proposed amendments would expand the protection of the rule to all criminal and civil cases. They were circulated for public comment under an expedited timetable in late December 1992 for a four-month period. A public hearing was held on the amendments by the newly reactivated Advisory Committee on Evidence Rules in Washington, D.C. on May 6, 1993.

Based on the comments received and the testimony at the hearing, the Advisory Committee on Evidence revised and restructured the original proposal. In particular, the committee clarified the operation and effect of the amendments in civil cases and on third party witnesses. The Committee Note was also substantially revised to clarify the meanings of several phrases used throughout the rule and explain the precise extent of the rule's protections. The changes to the original draft did not alter, however, the principal purpose of the amendments, which was to protect the privacy interests of a victim of a sexual offense in all civil and criminal cases. Your Committee adopted several additional revisions, including language explicitly allowing the prosecutor to introduce evidence of prior sexual acts by the defendant with the victim.

The proposed amendments to Rule 412 of the Federal Rules of Evidence appear in Appendix D.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

Agenda F-19  
(Appendix D)  
Rules  
September 1993

ROBERT E. KEETON  
CHAIRMAN

PETER G. McCABE  
SECRETARY

CHAIRMAN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE  
APPELLATE RULES

EDWARD LEAVY  
BANKRUPTCY RULES

SAM C. POINTER, JR.  
CIVIL RULES

WILLIAM TERRELL HODGES  
CRIMINAL RULES

RALPH K. WINTER, JR.  
EVIDENCE RULES

July 23, 1993

MEMORANDUM TO: Honorable Robert E. Keeton  
FROM: Dean Margaret A. Berger, Reporter  
SUBJECT: GAP report

Federal Rules of Evidence.

Proposed Rule 412 did not cause significant disagreement in either the Advisory Committee or in the Standing Committee. The version of the rule that was circulated for public comment had been drafted by the Advisory Committee on the Rules of Criminal Procedure. After the newly appointed Advisory Committee on the Rules of Evidence reviewed written comments and held a public hearing, the Evidence Committee made a number of stylistic changes that were unanimously approved. The Advisory Committee also selected a balancing test for civil cases (one of two proposed alternatives in the circulated version) that was the overwhelming choice of commentators on the proposed rule.

The Standing Committee made a number of additional stylistic changes. It also added language that would admit evidence, otherwise admissible, that is offered by the prosecution and relates to the alleged victim's behavior with the accused. Such evidence might, for instance, be offered pursuant to Rule 404(b) as establishing a pattern of behavior.

PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE\*

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

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

---

\*New matter is underlined; matter to be omitted is lined through.

14 any alleged victim engaged in other  
15 sexual behavior; and

16 (2) evidence offered to prove any  
17 alleged victim's sexual predisposition.

18 (b) Exceptions. ~~Notwithstanding~~  
19 ~~any other provision of law, in a criminal~~  
20 ~~case in which a person is accused of an~~  
21 ~~offense under chapter 109A of title 18,~~  
22 ~~United States Code, evidence of a~~  
23 ~~victim's past sexual behavior other than~~  
24 ~~reputation or opinion evidence is also~~  
25 ~~not admissible, unless such evidence~~  
26 ~~other than reputation or opinion evidence~~  
27 ~~is~~

28 In a criminal case, the following  
29 evidence is admissible, if otherwise  
30 admissible under these rules:

31 ~~(1) admitted in accordance with~~  
32 ~~subdivisions (c)(1) and (c)(2) and is~~  
33 ~~constitutionally required to be admitted;~~  
34 ~~or~~

35           ~~(2) admitted in accordance with~~  
36           ~~subdivision (c) and is evidence of~~

37           (1) evidence of specific instances  
38           of past sexual behavior by the alleged  
39           victim with persons other than the  
40           ~~accused,~~ offered by the accused upon the  
41           ~~issue of whether~~ to prove that a person  
42           other than the accused was or was not,  
43           ~~with respect to the alleged victim,~~ the  
44           source of semen, or injury, or other  
45           physical evidence; or

46           (2) evidence of specific instances  
47           of past sexual behavior by the alleged  
48           victim with respect to the person accused  
49           of the sexual misconduct and is offered  
50           by the accused upon the issue of whether  
51           ~~the alleged victim consented to the~~  
52           ~~sexual behavior with respect to which~~  
53           ~~such offense is alleged,~~ to prove consent  
54           or by the prosecution; and

55           (3) evidence the exclusion of which

56 would violate the constitutional rights  
57 of the defendant.

58 (c) Procedure to Determine  
59 Admissibility.

60 ~~(c)(1) — If the person accused of~~  
61 ~~committing an offense under chapter 109A~~  
62 ~~of title 18, United States Code intends~~  
63 ~~to offer under subdivision (b) evidence~~  
64 ~~of specific instances of the alleged~~  
65 ~~victim's past sexual behavior, the~~  
66 ~~accused shall make a written motion to~~  
67 ~~offer such evidence not later than~~  
68 ~~fifteen days before the date on which the~~  
69 ~~trial in which such evidence is to be~~  
70 ~~offered is scheduled to begin, except~~  
71 ~~that the court may allow the motion to be~~  
72 ~~made at a later date, including during~~  
73 ~~trial, if the court determines either~~  
74 ~~that the evidence is newly discovered and~~  
75 ~~could not have been obtained earlier~~  
76 ~~through the exercise of due diligence or~~

77 ~~that the issue to which such evidence~~  
78 ~~relates has newly arisen in the case.~~  
79 ~~Any motion made under this paragraph~~  
80 ~~shall be served on all other parties and~~  
81 ~~on the alleged victim.~~

82 ~~(2) The motion described in~~  
83 ~~paragraph (1) shall be accompanied by a~~  
84 ~~written offer of proof. If the court~~  
85 ~~determines that the offer of proof~~  
86 ~~contains evidence described in~~  
87 ~~subdivision (b), the court shall order a~~  
88 ~~hearing in chambers to determine if such~~  
89 ~~evidence is admissible. At such hearing~~  
90 ~~the parties may call witnesses, including~~  
91 ~~the alleged victim, and offer relevant~~  
92 ~~evidence. Notwithstanding subdivision~~  
93 ~~(b) of rule 104, if the relevancy of the~~  
94 ~~evidence which the accused seeks to offer~~  
95 ~~in the trial depends upon the fulfillment~~  
96 ~~of a condition of fact, the court, at the~~  
97 ~~hearing in chambers or at a subsequent~~

98 ~~hearing in chambers scheduled for such~~  
99 ~~purpose, shall accept evidence on the~~  
100 ~~issue of whether such condition of fact~~  
101 ~~is fulfilled and shall determine such~~  
102 ~~issue.~~

103 ~~(3) If the court determines on the~~  
104 ~~basis of the hearing described in~~  
105 ~~paragraph (2) that the evidence which the~~  
106 ~~accused seeks to offer is relevant and~~  
107 ~~that the probative value of such evidence~~  
108 ~~outweighs the danger of unfair prejudice,~~  
109 ~~such evidence shall be admissible in the~~  
110 ~~trial to the extent an order made by the~~  
111 ~~court specifies evidence which may be~~  
112 ~~offered and areas with respect to which~~  
113 ~~the alleged victim may be examined or~~  
114 ~~cross-examined.~~

115 (1) A party intending to offer  
116 evidence under subdivision (b) must:

117 (A) file a written motion at  
118 least 14 days before trial

119 specifically describing the evidence  
120 and stating the purpose for which it  
121 is offered unless the court, for  
122 good cause requires a different time  
123 for filing or permits filing during  
124 trial; and

125 (B) serve the motion on all  
126 parties and notify the alleged  
127 victim or, when appropriate, the  
128 alleged victim's guardian or  
129 representative.

130 (2) Before admitting evidence under  
131 this rule the court must conduct a  
132 hearing in camera and afford the victim  
133 and parties a right to attend and be  
134 heard. The motion, related papers, and  
135 the record of the hearing must be sealed  
136 and remain under seal unless the court  
137 orders otherwise.

138 ~~(d) For purposes of this rule, the~~  
139 ~~term "past sexual behavior" means sexual~~

140 ~~behavior other than the sexual behavior~~  
141 ~~with respect to which an offense under~~  
142 ~~chapter 109A of title 18, United States~~  
143 ~~Code is alleged.~~

#### COMMITTEE NOTE

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 or 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, this 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, or 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 and sexual contact, or that imply 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 or dreams. See 23 C. Wright & 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 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 expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the 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 in 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 the 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 the 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 and any record of a hearing on 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 the 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 an 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.

