Evidence:

Rape Shield Rule

Colin Miller

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Colin Miller

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Notices

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Preface

The Rape Shield Rule, contained in Federal Rule of Evidence 412 and state counterparts is a Rule preventing the admission of evidence concerning the sexual predisposition and behavior of an alleged victim of sexual misconduct, subject to certain exceptions. Through a series of cases and hypotheticals drawn from actual cases, this chapter gives readers a roadmap for how to address any Rape Shield Rule issue in practice.

Rape Shield Rule Chapter

Introductory Note

In 2009, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Courts decided to "restyle" the Federal Rules of Evidence. The goal in this project was to make the Rules more user friendly rather than to enact substantive changes. At the end of each section of this casebook, there is a side-by-side comparison between the prior language of each portion of Rule 412 and the language of the new "restyled" Rule. Because the changes were intended to be stylistic only, everything discussed in this chapter should continue to be good law after the "restyled" Rules take effect on December 1, 2011.

I. Historical Background

For the better part of this country's history, defense attorneys in rape and sexual assault cases used to parade into court the alleged victim's sexual partners to, in effect, prove that she had a propensity to consent to sexual relations and that she acted in conformity with this propensity, and thus consented, at the time of the alleged rape or sexual assault[1]. Or, more generally, defense attorneys used this evidence to prove that the alleged victim was a liar[2].

Such displays impacted not only jurors, but also judges. For instance, in its 1895 opinion in *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895), the Supreme Court of Missouri inanely concluded that "[i]t is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman." *See* Colin Miller, *New Zealand's New Rule?: NZ's Justice Ministry Proposes Rape Shield Law*. EvidenceProf Blog, (Aug. 27, 2008.) http://lawprofessors.typepad.com/evidenceprof/2008/08/nz-rape-httpwww.html. They also led to the underreporting of rapes and historically

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1 Colin Miller, *New Zealand's New Rule?: NZ's Justice Ministry Proposes Rape Shield*, EvidenceProf Blog (Aug. 27, 2008) http://lawprofessors.typepad.com/evidenceprof/2008/08/nz-rape-httpwww.html.

2 Jason M. Price, Constitutional Law—Sex, Lies and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate, 18 W. New Eng. L. Rev. 541 (1996), http://digitalcommons.law.wne.edu/lawreview/vol18/iss2/5

low conviction rates in rape and sexual assault cases. *See, e.g., State v. Hudlow*, 659 P.2d 514, 522-23 (Wash. 1983).

This and related concerns led to the anti-rape movement, an offshoot of the civil rights movement of the 1960s and 1970s, being able to get rape shield laws passed in several states. *See id.* The Supreme Court later followed suit by creating Federal Rule of Evidence 412, the federal "rape shield" rule. In effect, rape shield rules protect complainants from having their past sexual behavior and/or predispositions exposed in the courtroom unless defense counsel can point toward a compelling theory of admissibility.

Specifically, as amended in 1994, Rule 412(a) now provides, "The following evidence is not admissible in any civil or 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. (2) Evidence offered to prove any alleged victim's sexual predisposition." Rule 412(a) applies not only in rape or sexual assault cases but also in other cases, including sexual harassment cases.

II. Rule 412(a)(1): The General Proscription

Under Rule 412(a)(1), evidence of other sexual behavior by an alleged victim is now inadmissible to prove her propensity to consent to sexual acts and her likely conformity with this propensity, and thus consent, at the time of the alleged rape or similar crime in civil and criminal cases. *See, e.g., Ledesma v. Gov't of the Virgin Is.*, 159 F. Supp.2d 863 (D.V.I. 2001). According to the Advisory Committee's Note, the phrase "other sexual behavior" includes not only "all activities that involve actual physical conduct, *i.e.* sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact," but also "activities of the mind, such as fantasies or dreams." Thus, for instance, in *United States v. Papakee*, 573 F.3d 569 (8th Cir. 2009), the Eighth Circuit found that a district court properly precluded the defendant charged with sexual abuse from introducing evidence that the alleged victim told the deputy questioning her about the crime that he was cute and asked him if he wanted to crawl into bed with her because these statements were "other sexual behavior." Courts generally have concluded that the rape shield rule precludes the admission of evidence of the victim's other nonconsensual, as well as consensual, "sexual behavior." *See, e.g. Bryan v. State*, 2010 WL 1137038 (Tex.App. 2010); Colin Miller, *Invasion Of Privacy: Court Of Appeals Of Texas Finds Trial Court Properly Excluded Evidence Of Alleged Victim's Prior Nonconsensual Sexual Acts Under Rape Shield Rule*. EvidenceProf Blog (Apr. 10, 2010)

http://lawprofessors.typepad.com/evidenceprof/2010/04/rape-shield--desmond-w-bryan-appellant-v-the-state-of-texas-state----sw3d------2010-wl-1137038texapp-fort-worth2010.html.

Moreover, under Rule 412(a)(2), evidence of the sexual predisposition of alleged victims, such as their "mode of dress, speech, or life-style will not be admissible." Thus, for instance, evidence that an alleged victim of homosexual rape had previously engaged in consensual homosexual acts is inadmissible to prove her propensity to consent to such acts and her likely conformity with this propensity at the time of the alleged rape. *See, e.g., People v. Murphy*, 919 P.2d 191 (Colo. 1996). Similarly, evidence that an alleged rape victim had previously engaged in consensual extramarital affairs is inadmissible to prove her propensity to consent to such affairs and her likely conformity with that propensity at the time of an alleged rape by a man other then her husband. *See, e.g., Truong v. Smith*, 183 F.R.D. 273 (D. Colo. 1998).

Hypothetical 1

Aleksandr Maksimenko is charged with several counts of criminal sexual abuse after allegedly forcing several women to engage in sexual acts with him under threat of physical force against them. Before trial, the prosecution files a motion *in limine*, seeking to preclude the defendant from interrogating the alleged victims about their profession as exotic dancers. Should the court grant the motion? *Cf. United States v. Maksimenko*, 2007 WL 522708 (E.D. Mich. 2007).

Hypothetical 2

Mary Wilson brings a Title VII action against her former employer asserting acts of discrimination based on gender and sexual harassment. According to Wilson, these acts consisted, *inter alia*, of coworkers referring to her as a "bitch," "cunt," and "slut." The defendant seeks to present evidence of Wilson's own engagement in sexually explicit language and behavior in the workplace, such as talking about vibrators and men's sexual organs. Is this evidence inadmissible under the Rape Shield Rule? *See Wilson v. City of Des Moines*, 442 F.3d 637 (8th Cir. 2006).

Hypothetical 3

Preston Gaddis is charged with rape, sexual assault, and indecent assault after allegedly throwing a 19 year-old woman onto the floor and raping her in his Pennsylvania home. At trial, Gaddis seeks to introduce evidence of the alleged victim's relationship with another

woman to prove that the alleged victim was uncertain about her sexual preference and was using intercourse with him as an attempt to determine whether she was homosexual or heterosexual. He claimed that when the experience did not turn out the way that she expected, she leveled the charges of rape against him despite the sex being consensual. The prosecution opposes the introduction of this evidence, claiming that it was inadmissible under Pennsylvania's version of the Rape Shield Law. How should the court rule? *See* Colin Miller, *Keystone Case: Pennsylvania Court Finds Evidence of Lesbian Relationship Inadmissible Under Rape Shield Law*. EvidenceProf Blog (Jan. 24, 2008) http://lawprofessors.typepad.com/evidenceprof/2008/01/last-april-pres.html.

Prior Rules Language:	**Restyled Rules Language:**
(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or 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. **(2)** Evidence offered to prove any alleged victim's sexual predisposition.	**(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.

III. Rule 412(b)(1): Criminal Exceptions

Federal Rule of Evidence 412(b)(1), however, provides certain exceptions to this rule in criminal cases. It states that:

> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
>
> > (A) 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;
> >
> > (B) 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
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

An example of a court applying the exception contained in Rule 412(b)(1)(A) can be found in *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991), where the trial court refused to allow the defendant, who was charged with aggravated sexual abuse, to present evidence that the eight year-old alleged victim had been sexually assaulted on several occasions in the months preceding the crime at issue. On the defendant's appeal, the Tenth Circuit reversed, finding that the prosecutor presented evidence about the alleged victim's enlarged hymenal opening and a vaginal abrasion; consequently, evidence of the sexual assaults by other men was admissible, not to prove propensity and conformity, but to prove that those assaults, rather than the defendant's alleged crime, could have caused her injuries. *See, Id.* at 520.

Additionally, under Rule 412(b)(1)(B), evidence of previous consensual sexual acts between the alleged victim and the defendant are admissible to prove that there are specific reasons to believe that the alleged victim may have consented to sexual relations with the defendant at the time of an alleged rape or sexual assault. For instance, in *State v. Sanchez-Lahora*, 616 N.W.2d 810 (Neb. App. 2000), the Court of Appeals of Nebraska found that a trial court erred by precluding a defendant charged with sexual assault from introducing evidence that he had previously engaged in sexual relations with the alleged victim when they dated to rebut her claim that they dated but never had sexual intercourse.

It is important to note that even if evidence satisfies either Rule 412(b)(1)(A) or (B), the court can still exclude it if its probative value is substantially outweighed by the danger of unfair prejudice or any of the other dangers listed in Federal Rule of Evidence 403. Thus, for instance, in *United States v. Pumpkin Seed*, 2009 WL 2045690 (8th Cir. 2009), the district court prevented the defendant charged with aggravated sexual abuse from presenting evidence that the alleged victim engaged in consensual sexual activity with other men within days of the alleged abuse. On appeal, the defendant claimed that this ruling was erroneous because it would have helped prove that the victim's injuries could have come from those acts. *See, id.* at 557. The Eight Circuit disagreed, concluding that the type and extent

of injuries suffered by the victim were generally inconsistent with consensual activity and that the evidence would have a high risk of unfair prejudice and confusion. *See Id.* at 558-59.

Finally, Rule 412(b)(1)(C) is a catch-all exception, which allows for the admission of an alleged victim's sexual history and predisposition for purposes other than those covered by Rules 412(b)(1)(A) and (B) when its exclusion would violate Constitutional rights such as the Due Process or Confrontation Clause rights of a criminal defendant. The case cited by the Advisory Committee in support of this exception involved a criminal defendant seeking to impeach his alleged victim by showing that an extramarital affair gave her a motive to lie, *Olden v. Kentucky*, 488 U.S. 227 (1988); thereafter, the exception has since most commonly been used for impeachment purposes. For instance, in *In re K.W.*, 666 S.E.2d 490 (N.C. App. 2008), the Court of Appeals of North Carolina found that a trial court erred in precluding a defendant from impeaching an alleged rape victim who claimed to be a virgin with suggestive photos and captions on her MySpace page implying that she was not a virgin. *See* Colin Miller, *It's My Space. That's Why They Call It MySpace, Take 3: North Carolina Court Makes Erroneous MySpace Ruling In Rape Shield Case*. EvidenceProf Blog (Sept., 18 2008) http://lawprofessors.typepad.com/evidenceprof/2008/09/myspace-412-in.html.

It is important to note that some state counterparts are more restrictive than Federal Rule of Evidence 412(b)(1). For instance, unlike Federal Rule of Evidence 412(b)(1)(A), Minnesota's counterpart, Minnesota Rule of Evidence 412(1)(B), does not allow a defendant to present evidence of an alleged victim's other sexual behavior to prove that someone else caused her physical injuries. *See, e.g., State v. McBroom*, 2009 WL 4251080 (Minn .App. 2009); Colin Miller, *Excepted Exception: Appeal Reveals Limited Applicability Of Minnesota's Other Source Rape Shield Exception*. EvidenceProf Blog (Dec. 6, 2009) http://lawprofessors.typepad.com/ evidenceprof/ 2009/12/412-semenstate-of-minnesota-respondent-v-james-david-mcbroom-appellant----nw2d------2009-wl-4251080minnapp2009.html. On the other hand, other state counterparts add exceptions not contained in Federal Rule of Evidence 412(b)(1). As an example, North Carolina Rule of Evidence 412(b)(4) contains an exception to North Carolina's rape shield rule for "evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged." *See* Colin Miller, *But It Was Only A Fantasy: North Carolina Opinion Reveals Troubling Exception To The State's Rape*

Shield Rule EvidenceProf Blog (Nov. 2, 2009) http://lawprofessors.typepad.com/evidenceprof/2009/11/but-it-was-only-a-fantasy-north-carolina-opinion-reveals-troubling-exception-to-the-states-rape-shie.html.

Finally, across the country, courts continue to apply a common law exception to rape shield rules under which defendants can present evidence of prior false rape, sexual assault, or child molestation allegations brought by alleged victims. Although courts differ over exactly when defendants can present such evidence when (1) the alleged victim herself admitted that the prior allegation was false; or (2) the prior allegation was "demonstrably false." *See, e.g., Wells v. State*, 928 N.E.2d 651 (Ind. App. 2010).

Hypothetical 4

Basketball player Kobe Bryant is charged with sexually assaulting a 19 year-old woman at a Colorado hotel. The woman claims that she only had sex once in the days surrounding the Bryant incident and that the man wore a condom. In a closed hearing in the case, a DNA expert testifies that the accuser had another man's semen on her thigh and inside her vagina during her medical examination. It was noted that a physical exam of Bryant after the incident produced no indication of a second man's DNA, leading the expert to say that she believed that the accuser had sex with the other man in the hours after she was with Bryant. Will Bryant be able to present this evidence at trial? *See* Lance Pugmire and David Wharton, Case Shadowed Cracks, Experts Say. Los Angeles Times, Sept. 2, 2004; Order Re: Defendant's Motion to Admit Evidence Pursuant to C.R.S. § 18-3-407 and People's Motions in Limine #5 and #7 (court's rape shield ruling), *People v. Bryant*, 94 P. 3d 624 (2004) (No. 03CR204)[3].

Hypothetical 5

Monty Ramone is charged with sexually assaulting his ex-girlfriend. According to the ex-girlfriend, after they had broken up, Ramone showed up at her home drunk and high on drugs and proceeded to violently sexually assault her. As a result of this assault, the ex-girlfriend was left with a deep scalp wound along her hairline, a swollen eye, a swollen hand, a bruised hip, and lips so swollen that she was unable to speak for a day or two. Ramone admitted that he beat

[3] The court's order is available as a PDF at: http://www.courts.state.co.us/userfiles/File/Court_Probation/5th_Judicial_District/Cases_of_Interest/People_v_Bryant/07-04/ShieldOrder.pdf

his ex-girlfriend but alleged that she consented to the sexual acts. In his defense, he seeks to present evidence that his ex-girlfriend and he previously engaged in several consensual sexual acts while they were dating. Should the court allow for the admission of this evidence? *See* *United States v. Ramone*, 218 F.3d 1229 (10th Cir. 2000).

Hypothetical 6

Darrell Jackson was a family friend who babysat for A.C., a girl who was between ten and twelve years-old between 1999 and 2002. According to A.C., during this time period, Jackson sexually assaulted her more than 50 times. At trial, the prosecution emphasized that A.C.'s behavior had deteriorated in significant ways starting about the time of the alleged offenses by Jackson and continuing up until the time of trial. In his defense, Jackson sought to present evidence that between 1999 and 2002, A.C. also reported being sexually assaulted by two other juveniles, her stepfather, and an employee at the Kansas Department of Social and Rehabilitation Services. The trial court deems this evidence inadmissible because it does not quite fit within the exception contained in Rule 412(b)(1)(A). Is there another ground upon which an appellate court could reverse? *See* *State v. Jackson*, 2008 WL 538948 (Kan. Ct. App. 2008); *See* Colin Miller, *Disturbing Behavior: Court of Appeals of Kansas Finds Trial Court Failed to Apply Constitutional Exception to Rape Shield Rule,* EvidenceProf Blog (Nov. 2, 2009) http://lawprofessors.typepad.com/evidenceprof/2008/03/rule-412-state.html.

Prior Rules Language:	**Restyled Rules Language:**
(b) Exceptions.	**(b) Exceptions.**
(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:	**(1)** ***Criminal Cases.*** The court may admit the following evidence in a criminal case:
(A) 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;	**(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 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	**(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 the exclusion of which would violate the constitutional rights of the defendant.	**(C)** evidence whose exclusion would violate the defendant's constitutional rights.

IV. Rule 412(b)(2): Civil Exception

Meanwhile, Federal Rule of Evidence 412(b)(2) provides an exception to the Rape Shield Rule in civil cases:

> In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

The Advisory Committee's Note indicates that this exception was intended to be similar in effect to the criminal exception but that "[i]t 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," particularly with regard to "evolving causes of action such as claims for sexual harassment." No judge in a civil case, however, has applied Rule 412(b)(2) to allow for the admission of evidence concerning an alleged victim's sexual history or predisposition to prove a purpose not covered by one of the specific exceptions in Rule 412(b)(1).

Indeed, as the Advisory Committee's Note makes clear, Rule 412(b)(2) was drafted to make it more difficult to admit evidence concerning an alleged victim's sexual history or predisposition in civil cases than it was in criminal cases. This is because evidence satisfying a Rule 412(b)(1) exception is admissible as long as it does not violate Federal Rule of Evidence 403, which "tilts the balance in favor of admission" of evidence by providing that relevant evidence may only "be excluded if its probative value is substantially outweighed" by concerns such as "the danger of unfair prejudice." In such cases, relevant evidence will likely be admitted because the burden is upon the party opposing the admission of evidence to prove affirmatively that its probative value is substantially outweighed by the danger of unfair prejudice.

Consider a hypothetical in which the prosecution charges the defendant with rape and presents evidence that the alleged victim had scratches on her wrists. The defendant might seek, pursuant to Rule 412(b)(1)(A), to present evidence of the alleged victim's other sexual acts committed in the days before and after the alleged rape to prove that they could have caused her injuries. For the judge to exclude this evidence, the prosecutor would need to prove that its probative value for establishing that these other acts could have caused her injuries was substantially outweighed by the danger of unfair prejudice that the jury would misuse this evidence as an indication that the alleged victim had a propensity to consent to sexual acts and thus likely consented to the sexual act at issue. *See, e.g., United States v. Begay*, 937 F.2d 515, 523 (10th Cir. 2001) ("We feel there was an abuse of discretion in holding that such evidence was more prejudicial than probative for purposes of Rule 403 and 412").

In other words, assume that probative value and unfair prejudice were scored from 1-100. If evidence of the other sexual acts had a probative value of 60 and an unfair prejudice of 40, it would be admissible because probative value would outweigh unfair prejudice. If both probative value

and unfair prejudice were 50, the evidence would be admissible because probative value would equal unfair prejudice. Even if probative value was 48 and unfair prejudice was 52, the evidence would be admissible because probative value would be outweighed by unfair prejudice but not *substantially* outweighed by unfair prejudice. Only if probative value (*e.g.*, 40) were substantially outweighed by unfair prejudice (*e.g.,* 60) would the evidence be inadmissible.

In contrast, by stating that similar evidence offered in civil cases is admissible only if its probative value substantially outweighs its unfairly prejudicial effect, as well as its "harm to any victim," Rule 412(b)(2) "reverses the usual approach" and tilts the balance toward inadmissibility in three regards according to the Advisory Committee. First, it "raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers." Second, it "shift[s] the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence." Third, it puts "harm to the victim" "on the scale in addition to prejudice to the parties." *See, e.g., B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1104 (9th Cir. 2002).

Thus, if we tweak the facts of the above hypothetical to make it a civil sexual assault trial, it drastically alters the issue of admissibility. In this case, for the judge to admit the "other sexual act" evidence of scratches, defense counsel would need to prove that its probative value substantially outweighs (1) the danger that the jury could misuse this evidence as an indication that the alleged victim had a propensity to consent to sexual acts and thus likely consented to the sexual act at issue (its unfairly prejudicial effect); as well as (2) the harm to the victim, including the invasion of her privacy, her potential embarrassment, and the potential for the jury to engage in stereotypical thinking with regard to her. *See* Advisory Committee's Note.

Again, assume that probative value and unfair prejudice (as well as harm to the victim) were scored from 1-100. Now, if evidence of the other sexual acts had a probative value equal to or lesser than unfair prejudice and harm to the victim – *e.g.,* 50 vs. 50 (combined) – it would be inadmissible. Even if the probative value of the evidence were slightly higher than unfair prejudice – *e.g.,* 52 vs. 48 (combined) – the evidence would be inadmissible because probative value would outweigh prejudicial effect but not *substantially* outweigh prejudicial effect. Only if probative value (*e.g.,* 60) substantially outweighed unfair prejudice **and** harm to the victim (*e.g.,* 40 combined) would the evidence be admissible

Rule 412(b)(2) also provides that "[e]vidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim." Thus, if a plaintiff brings an action alleging employment discrimination based upon a sexually hostile work environment but does not seek reputational damages or make allegations relating to her professional reputation, she has not opened the door for reputational evidence to be admitted. *See, e.g., Macklin v. Mendenhall*, 257 F.R.D. 596, 604 (E.D. Cal. 2009) ("A review of the allegations and other information before the Court discloses no sufficient evidence showing that Plaintiff has placed her reputation in controversy in this matter").

This *per se* portion of Rule 412(b)(2), however, only precludes evidence related to an alleged victim's *reputation* (*e.g.,* for promiscuity). In *Seybert v. International Group, Inc.*, 2009 WL 3297304 (E.D. Pa. 2009), the court rejected the plaintiff's argument that emails she sent containing sexual stories, jokes, images, and metaphors were *per se* inadmissible under Rule 412(b)(2), concluding that "none of the emails bear on Mrs. Seybert's personal sexual "reputation" *per se,* in that none of them involve her actual or alleged personal sexual activity." *Id.* at *3.

Rule 412(b)(2) technically only applies to the admissibility of evidence at trial while Federal Rule of Civil Procedure 26 addresses the extent to which evidence about an alleged victim's sexual behavior and/or predisposition is discoverable. That said, the Advisory Committee's Note to Rule 412 states that

> 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…. Confidentiality orders should be presumptively granted as well.

Numerous courts have relied upon this language to issue protective orders and confidentiality orders when defendants seek discovery of evidence of plaintiffs' sexual pasts when such evidence is unlikely to be admissible under the rape shield rue. *See, e.g., E.E.O.C. v. Donohue*, 746 F. Supp.2d 662, 665 (W.D. Pa. 2010).

Hypothetical 7

Tanya Giron brings a Section 1983 action for violation of her Eighth Amendment rights against Torres, claiming that she was forcibly raped by him while she was an inmate. During discovery, Torres asks Giron to respond to an interrogatory that asks her to identify and give extensive information about *all* persons with whom she had had sexual contact, without any time restriction. The Magistrate Judge entered an order compelling Giron to respond to the interrogatory by listing "persons with whom she has had sexual contacts in the five years prior to and the time period since the rape which forms the basis of the complaint." You represent Giron in her appeal of this order. What arguments do you make on her behalf? *See Giron v. Corrections Corp. of America*, 981 F. Supp. 1406 (D. N.M. 1997).

Hypothetical 8

Rebecca Collins, a former assistant prosecutor, brings a civil action against Michael Allen, her former boss, sounding in sexual harassment and retaliation. Before trial, Allen files a counterclaim in which he seeks to present evidence of Collins' reputation for promiscuity on the basis that Collins "put her reputation into question when she filed her frivolous sexual harassment claim." Will he be able to present this evidence? *See Collins v. Allen*, 2005 WL 1073369 (S.D.Ohio 2005).

Prior Rules Language:	Restyled Rules Language:
(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.	***(1) 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.

V. Rule 412(c): Procedure for Admissibility in Criminal Cases

Federal Rule of Evidence 412(c) contains procedures for providing notice and determining the admissibility of evidence offered in criminal cases pursuant to the exceptions contained in Rule 412(b)(1)(A), (B), or (C). The purpose of this Rule is to give notice to the opposing party in a criminal case to a similar degree as the notice that Federal Rule of Civil Procedure 26 affords to civil litigants as part of the discovery process. Cf. *Sonia F. v. Eighth Judicial Dist. Court*, 315 P.3d 705 (Nev. 2009); Colin Miller, *Rape Shield Redux: Supreme Court Of Nevada Finds Rule 26 Applies Where Rape Shield Law Doesn't.* EvidenceProf Blog (Sep. 15, 2009) http://lawprofessors.typepad.com/evidenceprof/2009/09/rape-shield-redux-supreme-court-of-nevada-finds-rule-26-applies-where-rape-shield-law-doesnt.html . According to the Rule,

> (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.

Courts consistently have held that a defendant's failure to file a motion for a Rule 412(c) hearing under seal is a "flagrant violation" of the Rule, justifying a decision by the trial judge to exclude the proffered evidence. *See, e.g.,* *S.M. v. J.K.*, 262 F.3d 914, 919 (9th Cir. 2001). Only one federal appellate court has addressed the issue of whether an alleged victim can immediately appeal a trial court's decision to admit evidence of her sexual behavior and/or predisposition after a Rule 412(c) hearing without violating the final judgment rule contained in 28 U.S.C. § 1291. Under § 1291, courts of appeals only have jurisdiction over final decisions, but courts have chosen to given the final judgment rule a "practical rather than a technical construction." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964). In *Doe v. United States*, 666 F.2d 43 (4th Cir 1981), the Fourth Circuit applied § 1291 practically to allow an immediate appeal by an alleged victim of an adverse rape shield ruling because "the injustice to rape victims in delaying an appeal until after the conclusion of the criminal trial is manifest." *See also* Colin Miller, *Passing Judgment: 10th Circuit Case Cites to 4th Circuit Case Allowing Immediate Appeal of Rape Shield Ruling*. EvidenceProf Blog, (Dec. 4, 2008) http://lawprofessors.typepad.com/evidenceprof/2008/12/passing-judgm-1.html.

Although most courts have not addressed the issue, it seems likely that a court's failure to hold a Rule 412(c) hearing will not entitle a defendant to a new trial because the Rule is designed to protect the alleged victim rather than the defendant. Instead, as long as the trial court allows the defendant to present arguments for why the evidence he seeks to introduce qualifies for admission under an exception to the Rape Shield Rule, failure to hold a Rule 412(c) hearing should not lead to reversal as long as the record is sufficient for the appellate court to review his evidentiary appeal. *See* *Nevelow v. State*, 2011 WL 2899377 (Tex.App.-Houston [14 Dist. 2011]); Colin Miller, *Can You Hear Me?: Court of Appeals of Texas Finds Failure to Hold in Camera Rape Shield Hearing Isn't Reversible Error*. EvidenceProf Blog (Aug. 29, 2011) http://lawprofessors.typepad.com/evidenceprof/2011/08/can-you-hear-me-court-of-appeals-of-texas-finds-failure-to-hold-in-camera-rape-shield-hearing-isnt-r.html. That said, a trial court likely violates the Rape Shield Rule or the right to counsel if it holds a Rule 412(c) hearing but does

not allow the defendant to attend or be represented at it by an attorney. *See* LaPointe v. State, 225 S.W.3d 513, 520-21 (Tex. Crim. App. 2007).

Hypothetical 9

Danny Raplinger is charged with sexually exploiting a minor. At the close of the prosecution's case, Raplinger offers Defendant's Exhibits A, B, C, and D as "a late attachment" to a previously filed Sealed Motion. These Exhibits consist of previously sent sexually explicit letters from the alleged victim's Yahoo! Profile to Raplinger and a sexually explicit digital image posted next to her name. Raplinger claims that this evidence is admissible under Rule 412(b)(1)(B), but the prosecution counters that the evidence is inadmissible because the alleged victim statutorily could not have consented to her exploitation. Is there another reason why the evidence is inadmissible? *See United States v. Raplinger*, 2006 WL 3455266 (N.D. Iowa 2006).

Hypothetical 10

Jonathan Pablo is charged with rape. At trial, he seeks to present evidence (1) that the alleged victim was seen undressed with two other men on the night of the rape; and (2) that the alleged victim made sexual advances towards Pablo's co-defendant on the night of the alleged rape. Pablo acknowledges that this argument is covered by Rule 412 but believes that it qualifies for admission under Rule 412(b)(1)(C). Pablo did not file a written motion under Rule 412(c)(1)(A). Pablo, however, claims that the government relieved him of his obligation to comply with Rule 412(c) by providing its own written notice to the court a month before indicating that Pablo might introduce some evidence that would fall within Rule 412's scope. Is he correct? *See United States v. Pablo*, 625 F.3d 1285 (10th Cir. 2010).

Prior Rules Language:
(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.

Restyled Rules Language:
(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.

VI. Rape Shield Pleadings

Some concise examples of motions connected to evidence sought to be admitted or excluded under the Best Evidence Rule can be found at:

• *Velez-Lopez v. Long Life Home, Inc.*, 2009 WL 2590030 (D.Puerto Rico 2009) (Defendants' Opposition to Plaintiff's Motion in Limine);

- *Maner & Goodman III v. Board of Education of Fayette County*, 2007 WL 4300140 (Ky. Cir. Ct. 2007) (Response to Plaintiff Maner's Motion in Limine); and

- *Horne v. Russell County Commissioner*, 2005 WL 2302984 (M.D. Ala. 2005) (Plaintiff's Motion in Limine Regarding Sexual History).