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## §4.32 Sexual History of Complainant Generally Excluded

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### §4.32 Sexual History of Complainant Generally Excluded

FRE 412, the federal “rape shield” statute, was enacted by Congress three years after the Federal Rules went into effect.<sup>1</sup> Originally the Rule applied only in criminal prosecutions for specified sex offenses. A 1994 amendment extended it to all criminal and civil proceedings involving alleged sexual misconduct.<sup>2</sup> It now applies to all criminal proceedings involving sexual misconduct even where a sex crime is not charged, such as a kidnapping prosecution where the prosecutor seeks to prove that the victim was sexually assaulted. It also covers civil proceedings involving alleged sexual misconduct, including actions for sexual battery or sexual harassment.<sup>3</sup> The Rule applies regardless whether the alleged victim or the person accused is a party to the litigation. Thus the Rule applies to litigation over discharge of an employee for sexual harassment even though the alleged victim is not a party and to litigation against an employer by the alleged victim even though the person accused is not a party.

FRE 412 represents a significant qualification on FRE 404(a)(2)(B), which might otherwise allow evidence of an alleged victim’s sexual history on the issue of consent.<sup>4</sup> The Rule is based on the same policy concerns that led to the enactment of state “rape shield” statutes. Evidence of the sexual history of a rape victim often has little if any probative value in proving consent on the occasion in question.<sup>5</sup> In most cases, it is a collateral issue having the potential to divert the jury’s attention from the facts of the charged incident.<sup>6</sup> Evidence of sexual history can be used to harass

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§4.32 1. Pub. L. No. 95-540 [H.R. 4727], 92 Stat. 2046 (1978) (entitled “Privacy Protection for Rape Victims Act of 1978”).

2. Pub. L. No. 103-22, Title IV, §40141(b), 108 Stat. 1919, Sept. 13, 1994. Although the Judicial Conference had recommended the extension to civil cases, the Supreme Court approved only the extension in criminal cases. *See* statement of Chief Justice Rehnquist, 154 F.R.D. 510 (1994). But Congress overrode the Supreme Court in the Violent Crime Control and Enforcement Act of 1994 and adopted the extension to civil cases.

3. Despite the significant expansion in scope, the Rule is still limited to civil cases involving “sexual misconduct.” Thus it does not affect tort cases where a plaintiff’s sexual history is relevant to show an alternative explanation for an injury such as infection or sterility nor does it apply to defamation cases involving statements concerning sexual misconduct offered to show the alleged defamatory statements were true or did not damage plaintiff’s reputation. *See* ACN to amended FRE 412.

4. *See* §4.13, *supra*.

5. *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993) (Posner, J.) (“The essential insight behind the rape shield statute is that in an age of post-Victorian sexual practice, in which most unmarried young women are sexually active, the fact that the woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she *consented* to engage in this activity with the defendant on the occasion on which she claims that she was raped.”).

6. *McLean v. United States*, 377 A.2d 74, 77-79 (D.C. 1977) (evidence of a complainant’s prior sexual acts “diverts the jury’s attention to collateral matters” and results in prejudice to the victim, which “greatly outweighs its

and embarrass victims of sexual misconduct, making them less likely to report or prosecute sexual offenses. The humiliation that rape victims suffered under prior law was thought to be a major factor causing rape to be an underreported crime.<sup>7</sup> According to the ACN, FRE 412 “encourages victims of sexual misconduct to institute and participate in legal proceedings against alleged offenders” and safeguards against “sexual stereotyping that is associated with public disclosure of intimate sexual details.”<sup>8</sup>

FRE 412(a) imposes a general prohibition against evidence of an alleged victim’s “other sexual behavior” or “sexual predisposition.”<sup>9</sup> It bars such evidence whether offered as substantive evidence or for impeachment, subject to four exceptions (discussed in the next section) where the probative value of the evidence is viewed as significantly outweighing potential harm to the alleged victim.

### **Other sexual behavior**

The ACN states that “sexual behavior” includes not only actual physical conduct, but also evidence that implies sexual intercourse or sexual contact, such as preliminaries or preparations that normally precede or may accompany or follow from actual contact, including the use of contraceptives or evidence of pregnancy<sup>10</sup> or venereal disease.<sup>11</sup> Some courts say that the term

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extremely limited probative value”).

7. *See* Remarks of Rep. Elizabeth Holtzman, 124 Cong. Rec. H11945 (daily ed. Oct. 10, 1978) (“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.”).

8. Because FRE 412 is designed to further social policy by protecting rape victims and encouraging the reporting of sex crimes, some commentators have characterized it as a rule of privilege. *See* Tuerkheimer, A Reassessment and Redefinition of Rape Shield Laws, 50 Ohio St. L.J. 1245, 1272-1273 (1989). The prevailing view, however, is that the Rule is predominantly concerned with relevance and countervailing prejudice, a view consistent with its legislative placement in Article IV of the Federal Rules of Evidence. *See* Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 Loy. L.A. L. Rev. 757, 764 n.34 (1992).

9. The term “sexual predisposition” presumably includes sexual orientation, sexual preferences, and a person’s propensity to engage or not to engage in sexual activity of various types.

10. *But see* *State v. DeLawder*, 28 Md. App. 212, 344 A.2d 446, 454-455 (1975) (defendant constitutionally entitled to offer evidence that complainant thought she was made pregnant by someone else and falsely accused defendant because she was afraid to tell her mother of her sexual activity with others).

11. *See* *United States v. Papakee*, 573 F.3d 569, 572-573 (8th Cir. 2009) (excluding proof that alleged victim propositioned S for sex shortly after alleged assault); *Cruz-Sanchez v. Rivera-Cordero*, 835 F.2d 947, 948-949 (1st Cir. 1987) (FRE 412 would not allow evidence that alleged rape victim was pregnant at time of trial).

embraces the existence of intimate relationships, although better reasoned opinions say that the fact of such relationships, as opposed to details about sexual activities, is not itself covered by the Rule.<sup>12</sup> The ACN also makes the more questionable suggestion that “behavior” be construed to include “activities of the mind,” such as fantasies and dreams,<sup>13</sup> a view properly rejected by some courts under the prior version of the Rule.<sup>14</sup> An alleged victim’s statements about her earlier sexual activities are generally -covered by the Rule,<sup>15</sup> but courts have differed on whether activities such as posing in the nude amount to sexual behavior.<sup>16</sup> Evidence of *absence* of sexual activity, such as virginity, should qualify as sexual behavior or as evidence of sexual predisposition generally excluded by the Rule.<sup>17</sup> However, statements made by the victim to the accused at the time of the alleged attack about her virginity or lack of sexual experience may sometimes be relevant to rebut a claim of consent.<sup>18</sup>

The Rule uses the term “other” sexual behavior rather than “past” sexual behavior to make clear that behavior subsequent to the incident in question is covered by the Rule. But the Rule does not exclude evidence of sexual activity that is intrinsic to the charged incident, such as sexual foreplay or closely related sexual acts, nor does it exclude evidence that someone else was the perpetrator of the charged crime.<sup>19</sup> The Rule speaks of sexual behavior in which one “engaged,” and therefore

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12. *State v. Lavalleur*, 853 N.W.2d 203, 212 (Neb. 2014) (sexual behavior statute refers to specific instances of conduct; reversible error to exclude proof that alleged victim was in intimate relationship with another woman; it was not sexual conduct and it bore on motive).

13. *See United States v. Ogden*, 685 F.3d 600 (6th Cir. 2012) (proof that alleged victim engaged in “online conversations with other men” and mentioned “sending explicit images of herself,” was excludable under Rule 412); *Payne v. State*, 600 S.E.2d 422, 424 (Ga. App. 2004) (watching pornographic movies was sexual history; can show precocious knowledge without such proof). Even when courts adopt this interpretation, fantasies involving the defendant would nonetheless be potentially admissible under FRE 412(b)(1)(B).

14. *Jeffries v. Nix*, 912 F.2d 982, 988 (8th Cir. 1990) (holding that “delusions about sexual abuse are not ‘past sexual behavior’ as defined in Rule 412(d)”).

15. *Wood v. State*, 736 P.2d 363, 364-365 (Alaska Ct. App. 1987) (state statute barred victim’s statement to defendant that she had posed and acted in pornographic movies); *Velos v. State*, 752 P.2d 411, 414 (Wyo. 1988) (victim’s statement to defendant that she had performed fellatio on a third person barred by state statute).

16. *State v. Zaehring*, 280 N.W.2d 416 (Iowa 1979) (evidence that complainant told defendant she had posed in the nude was admissible; posing nude is not prior sexual conduct excluded by rape shield statute).

17. *State v. Penigar*, 139 Wis. 2d 569, 408 N.W.2d 28, 36 (1987) (prosecution evidence that rape victim was a virgin should generally be excluded under rape shield statute). *But see People v. Johnson*, 671 P.2d 1017, 1020 (Colo. Ct. App. 1983) (statute does not bar testimony of “*lack* of prior sexual activity”).

18. *State v. Gavigan*, 111 Wis. 2d 150, 330 N.W.2d 571, 577-578 (1983) (statement by victim concerning lack of sexual experience demonstrated her unwillingness to engage in sexual act; not barred by state rape shield statute).

19. *United States v. Yazzie*, 59 F.3d 807, 814-815 (9th Cir. 1995) (in sexual abuse trial, error to exclude defense

could be interpreted as meaning conduct that was voluntary. Under this interpretation, evidence of prior nonconsensual sexual behavior would not necessarily be excluded by the Rule (although it also would rarely be relevant).<sup>20</sup> However, many courts view proof that the complainant had been raped or molested before as prior sexual behavior.<sup>21</sup>

Going beyond the original Rule, FRE 412 now bars evidence of the alleged victim's "sexual predisposition," which the ACN describes as evidence that "may have a sexual connotation for the factfinder," such as evidence relating to dress, speech, or lifestyle.<sup>22</sup>

### **Victim's sexual "predisposition"**

The Advisory Committee's interpretation of the Rule seems overbroad in some circumstances. It could result in excluding nearly every prior act by the complaining witness that could be relevant to the more common issues in trials for sex crimes. For example, an alleged victim's "speech" (i.e., the actual words spoken to the defendant and perhaps to others) will sometimes be highly relevant on the issue of consent. If the defendant offers credible evidence that the alleged rape was actually an act of prostitution, FRE 412 should not be construed as automatically excluding evidence that the complainant's "lifestyle" included being a prostitute. Moreover, courts need to assess carefully whether the activity was sexual behavior or merely related to sex.<sup>23</sup> What a person says, reads, watches or thinks, even if of a sexual nature, does not necessarily qualify as sexual behavior.<sup>24</sup> If FRE 412(a)(2)

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testimony describing very behavior at issue in case, apparently indicating that alleged victim was actually the perpetrator; FRE 412 only applies to sexual conduct other than conduct at issue in case).

20. *Lemacks v. State*, 207 Ga. App. 160, 427 S.E.2d 536, 537 (1993) (sexual behavior does not include proof of victim's prior rape).

21. *See, e.g., United States v. Nez*, 661 F.2d 1203, 1205-1206 (10th Cir. 1981) (blocking cross-examination of complainant on statement she made to investigator that she had been raped twice before); *State v. Muyingo*, 171 Or. App. 218, 15 P.3d 83, 87 (2000) (past sexual behavior includes proof that victim had been raped before).

22. *See Williams v. State*, 263 Ga. App. 597, 588 S.E.2d 790, 792 (2003) (excluding mode of dress and marital history); *State v. Hill*, 309 Minn. 206, 244 N.W.2d 728, 730 (1976) (excluding evidence of cohabitation with another); *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1105 (9th Cir. 2002) (excluding evidence of fantasies and autoerotic sexual practices).

23. *Compare State v. Currier*, 148 N.H. 203, 808 A.2d 527, 531 (2002) (viewing pornographic video was not covered by rape shield law) *with Sweeney v. State*, 233 Ga. App. 862, 506 S.E.2d 150 (1998) (making phone-sex audio tape was sexual behavior). *See also Bobo v. State*, 267 Ark. 1, 589 S.W.2d 5, 8 (1979) (posing nude in magazine was not sexual conduct).

24. *See Jeffries v. Nix*, 912 F.2d 982, 988 (8th Cir. 1990) ("delusions about sexual abuse" are not "past sexual behavior" under FRE 412); *State v. Thompson*, 139 N.C. App. 299, 533 S.E.2d 834, 841 (2000) (sexual behavior does not include "language or conversations whose topic might be sexual behavior"); *State v. Wright*, 97 Or. App. 401, 776 P.2d 1294, 1297-1298 (1989) ("past sexual behavior" does not include evidence that complaining witness "wrote sexually explicit notes" to a schoolmate, "received sex counseling" or described oral copulation to a

is construed too expansively, it will increase the number of cases where the excluded evidence will be found to be constitutionally required and hence admissible under FRE 412(b)(1)(C).

### **Prior false charges**

As the ACN acknowledges, the making of prior false charges of sexual misconduct is not “sexual behavior” and is not excluded by the Rule.<sup>25</sup> Most courts had reached the same conclusion under the previous version of the Rule.<sup>26</sup>

If there is insufficient evidence that the complainant victim fabricated the previous charges, courts generally exclude the evidence on the ground that it is irrelevant under FRE 401, substantially outweighed by the considerations set forth in FRE 403, or involves sexual behavior excluded by FRE 412.<sup>27</sup> The mere fact that prosecution was declined or charges dismissed does not establish the falsity of the charges and may reflect more on law enforcement priorities or resources than the credibility of the complainant.<sup>28</sup> Even an acquittal proves only the existence of reasonable doubt as to whether the offense was committed, not that the charge was fabricated.<sup>29</sup> But recantation of the charges by the complainant is usually sufficient.<sup>30</sup>

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counselor, or “watched pornographic films” or “spoke freely about sex” or was “preoccupied” with sex).

25. *United States v. No Neck*, 472 F.3d 1048, 1054 (8th Cir. 2007) (error to block defense effort to cross-examine complainant on prior accusations; defense had right to ask whether she falsely accused brother of similar offense).

26. *Clinebell v. Commonwealth*, 368 S.E.2d 263, 266 (Va. 1988) (error to exclude evidence of child’s prior false accusations; such statements are not “conduct” under rape shield statute, and defendant has constitutional right to present evidence if “reasonable probability of falsity exists”); *State v. LeClair*, 83 Or. App. 121, 730 P.2d 609, 613 (1986) (evidence of “previous false *accusations* by an alleged victim is not evidence of *past sexual behavior* within the meaning of the Rape Shield Law and, therefore, is not inadmissible” under that law), *rev. denied*, 303 Or. 74, 734 P.2d 354 (1987).

27. *United States v. Kenyon*, 481 F.3d 1054, 1063-1064 (8th Cir. 2007) (in child sex abuse prosecution, no error to block defense cross-examination of child about claimed false allegations against another, because accusations were “never made to an authority figure” and amounted to “childish gossip” rather than “actual accusations,” and evidence of falsity was weak).

28. *Hughes v. Raines*, 641 F.2d 790, 792 (9th Cir. 1981) (failure of district attorney to prosecute does not prove falsity of allegations); *State v. Anderson*, 686 P.2d 193, 201 (Mont. 1984) (dismissal of charges does not establish falsity; mother did not want victim to go through trial).

29. *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830, 833 (1984) (acquittal “can never be taken to establish that the charges brought were based on false accusations”); *People v. Alexander*, 116 Ill. App. 3d 855, 452 N.E.2d 591 (1983) (hung jury does not prove falsity).

30. *State v. Boggs*, 588 N.E.2d 813 (Ohio 1992); *People v. Burrell-Hart*, 237 Cal. Rptr. 654, 657 (Cal. Ct. App. 1987); *Smith v. State*, 377 S.E.2d 158 (Ga. 1989).

Evidence of prior sexual offense charges that are demonstrably false or threats to file false charges should normally be admissible to impeach the veracity of the complainant whenever she testifies as a witness because evidence bearing on animus and motivation has special relevance in a sexual assault prosecution.<sup>31</sup> FRE 608(b) sometimes presents an independent obstacle to proof of such matters. Although FRE 608(b) allows inquiry upon cross-examination into prior conduct bearing on truthfulness or untruthfulness (which certainly encompasses the making of false sexual assault charges), the Rule *bars* extrinsic evidence of such conduct. Nonetheless, FRE 608(b) does not restrict extrinsic proof offered under other theories of impeachment, such as to show bias, and in some circumstances a defendant is constitutionally entitled to offer such proof.<sup>32</sup> Evidence of a “plan” or “scheme” to file false charges may also be admissible under FRE 404(b).<sup>33</sup>

While proving that prior *claims* of sexual misconduct are false is generally beyond the scope of FRE 412, proving that an alleged victim’s *denials* of sexual activity are false does trigger application of the Rule.<sup>34</sup>

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31. This remains true even where proving the falsity of the earlier charges requires proving prior consensual sexual relations (which the complainant later claimed falsely to be nonconsensual). *See State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982) (evidence that complainant made a false rape accusation against former boyfriend should have been admitted; “[W]e question whether one who has falsely accused another of rape has standing to claim she is harassed by evidence of that false accusation.”).

32. *United States v. Bartlett*, 856 F.2d 1071, 1088 (8th Cir. 1988) (defendant has qualified constitutional right to offer evidence of prior false accusations by rape victim to show bias, prejudice, or ulterior motive but not to attack general credibility of victim), *cert. denied*, 479 U.S. 934.

33. *United States v. Stamper*, 766 F. Supp. 1396, 1405-1406 (W.D.N.C. 1991) (evidence that child sexual abuse victim had made prior false accusations against three other persons admissible under FRE 404(b) as demonstrating the “complainant’s scheme of fabricating sexual abuse allegations”), *aff’d*, 959 F.2d 231 (4th Cir. 1992).

34. *United States v. White Buffalo*, 84 F.3d 1052 (8th Cir. 1996) (FRE 412 prevents defendant from introducing laboratory tests to prove complainant falsely told doctor at hospital that she had not had consensual sexual intercourse with anyone other than defendant in last 72 hours; even if this statement were false, FRE 412 precludes evidence of victim’s sexual activities with others).