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Rule 412: Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Disposition

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RULE 412: SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL DISPOSITION

Federal Rule of Evidence 412 states:

(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.

(b) Exceptions.

(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.

(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.

(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.¹

The original version of Federal Rule of Evidence 412 was enacted in 1978.² The aim was to establish a federal rape shield law because many states had begun to pass these types of laws in the 1970's.³ The promulgators of the rule "intended [it to be] a model statute" that the states could use as a guide when

1. FED. R. EVID. 412.

2. Fed. R. Evid. 412, 28 U.S.C.A. Federal Rules of Evidence (1984).

3. See Deborah Stavile Bartel, *A Comparison of the Federal and New York State Rape Shield Statutes*, 11 TOURO L. REV. 73 (1994); Jacqueline H. Sloan, Comment, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines Meritor Savings Bank v. Vinson*, 25 SW. U. L. REV. 363 (1996) (referring to the first version of Federal Rule of Evidence 412 as "[t]he original rape shield statute"); see also MCCORMICK ON EVIDENCE § 193, at 350 (John William Strong ed., 4th ed. 1992) (stating that "[i]n the 1970's . . . nearly all jurisdictions enacted 'rape shield' laws"); 1A WIGMORE ON EVIDENCE § 62, at 1264-95 (Tillers rev. 1983) (stating that "[f]orty-seven jurisdictions have enacted rape victim shield laws, and two jurisdictions have adopted the equivalent of a rape victim shield law by judicial decision").

formulating their own rape shield laws.⁴ In 1994, Rule 412 was amended “to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct.”⁵

Under Rule 412, evidence of a victim’s past sexual conduct and alleged sexual predisposition is generally inadmissible in criminal cases.⁶ However, there are three exceptions, under subdivision (b), when this evidence may be admissible. The first exception allows evidence of the victim’s past sexual behavior with someone other than the accused to show that the accused was not the source of semen or injury.⁷ However, to be admissible, it this

4. See Bartel, *supra* note 3, at 77.

5. FED. R. EVID. 412 advisory committee’s note. This version of Rule 412 became effective on December 1, 1994, and extends the application of the rule from cases involving sexual assault to all criminal offenses and to civil cases. *Id.* In addition, the new rule applies even if the accused or alleged victim is not a party to the litigation, and covers “pattern” witnesses as well. *Id.* Moreover, evidence of the alleged victim’s “‘other’ . . . sexual behavior[,] . . . sexual predisposition[,] . . . [and evidence] relating to the alleged victim’s mode of dress, speech, or life-style will not be admissible.” *Id.* Furthermore, the new rule mandates the sealing of the motion made to admit the evidence and the record of any hearing in chambers, unless otherwise ordered. *Id.*

6. FED. R. EVID. 412(a). On July 9, 1995, three new rules were added to the Federal Rules of Evidence to allow the admission of a *defendant’s* past conduct in sexual misconduct cases. In criminal cases of sexual assault, Federal Rule 413 provides that “evidence of the defendant’s commission of another offense . . . of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.” FED. R. EVID. 413(a). Likewise, in criminal child molestation cases, Federal Rule 414 provides that “evidence of the defendant’s commission of another offense . . . of child molestation is admissible” where relevant. FED. R. EVID. 414(a). Federal Rule 415 extends the admission of evidence of a defendant’s similar acts of sexual assault or child molestation, under Rule 413 and Rule 414, to civil cases. FED. R. EVID. 415(a).

7. FED. R. EVID. 412(b)(1)(A). The advisory committee’s note states that “evidence of specific instances of sexual behavior” of the victim may be admissible for this purpose. FED. R. EVID. 412(b)(1)(A) advisory committee’s note. Specifically, the defendant must be allowed to attempt to prove that someone else was the source of the evidence. *Id.*

evidence must also not violate any other rule of evidence rules, including Rule 403.⁸

In *United States v. Azure*,⁹ the defendant was convicted of having carnal knowledge of a girl under sixteen years of age.¹⁰ The defendant attempted to present evidence that the victim had engaged in consensual sex with a young boy to prove that the boy was the source of the victim's vaginal injury, not himself.¹¹ The trial court excluded this evidence.¹² On appeal, the defendant argued that the district court had erred when it excluded the evidence of the victim's prior sexual behavior.¹³ The Eighth Circuit determined that the "laceration on [the victim's] vaginal wall [was] an 'injury' sufficient to trigger [Rule 412](b)(2)(A)'s exception."¹⁴ Despite this finding, the Eighth Circuit agreed with the district court that the evidence of the victim's prior sexual conduct was properly excluded on relevancy grounds.¹⁵

The second exception allows the admission of evidence of specific instances of sexual conduct between the victim and the accused when the evidence is offered to show that the victim consented, or if it is offered by the prosecution.¹⁶ The text of the rule nor the Advisory Committee's Note places any conditions on

8. FED R. EVID. 412 advisory committee's note; *see* FED R. EVID. 403. Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

9. 845 F.2d 1503 (8th Cir. 1988).

10. *Id.* at 1504.

11. *Id.* at 1505.

12. *Id.*

13. *Id.* at 1504.

14. *Id.* at 1505.

15. *Id.* During an in camera hearing held to evaluate the boy's testimony, he stated that he had never hurt the victim. *Id.* at 1505-06. In light of this testimony and the testimony of doctors, the Eighth Circuit held that the district court did not abuse its discretion when it excluded evidence of the victim's prior sexual activities. *Id.* at 1506.

16. FED. R. EVID. 412(b)(1)(B).

the admissibility of such evidence when the prosecution is attempting to introduce it.¹⁷

In *United States v. Saunders*,¹⁸ the defendant in a rape prosecution sought to introduce evidence that he and the victim previously engaged in consensual sexual relations in order to show her consent on the particular occasion in question.¹⁹ Although the prior consensual sexual relations occurred three years before the alleged rape, the court determined that the evidence was admissible pursuant to the exception in Rule 412.²⁰ In determining that the probative value of the evidence outweighed the possibility of prejudice to the victim, the court stated that the “[d]efendant’s claim of a prior sexual relationship with the alleged victim is central to the consent defense.”²¹

The last exception to Rule 412 provides for admission of this type of evidence when its exclusion would infringe upon the

17. *Id.*; FED. R. EVID. 412(b)(1)(B) advisory committee’s note. The advisory committee’s note states:

Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expresses an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving that specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible . . . to show a pattern of behavior.

Id.

18. 736 F. Supp. 698 (E.D. Va. 1990), *aff’d*, 943 F.2d 388 (4th Cir. 1991), *cert. denied*, 502 U.S. 1105 (1992). *Saunders* was decided before the amendments to Rule 412 were implemented. *Id.* at 698. However, the previous version of Rule 412 also contained an exception which allowed evidence of a victim’s past sexual conduct with the defendant for the purpose of proving consent. *Id.* at 702. The old version of the rule allowed admission of this type of evidence when “past sexual behavior with the accused . . . is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior” *Id.*

19. *Id.* at 699-700.

20. *Id.* at 703. The court determined that the “[d]efendant’s offer of proof concerning his past sexual relations with the alleged victim falls squarely within one of the Rule’s exceptions.” *Id.* at 702.

21. *Id.* at 703.

defendant's constitutional rights.²² One reason for admitting this evidence might stem from a concern that a defendant's Sixth Amendment right of confrontation of witnesses or the right to have compulsory process to obtain witnesses in one's favor is being violated by excluding the evidence.²³

In order for evidence to be admitted pursuant to this exception, however, it must be relevant to the issue being determined.²⁴ In *United States v. Powers*,²⁵ the defendant was found guilty of sexually abusing his daughter.²⁶ On appeal, the defendant asserted that the exclusion of evidence of his daughter's past sexual conduct with her boyfriend infringed upon his Fifth Amendment Due Process right to introduce evidence that is relevant to his case and his right to cross-examine witnesses under the Sixth Amendment.²⁷ Thus, he maintained that the evidence should have been allowed pursuant to Rule 412(b)(1)(C).²⁸ The defendant contended that evidence of her

22. FED. R. EVID. 412(b)(1)(C).

23. See U.S. CONST. amend VI. The Sixth Amendment states in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor" *Id.* See also Bartel, *supra* note 3, at 79. Professor Bartel stated that "as an exclusionary rule, Federal Rule of Evidence 412 . . . may implicate the [defendant's] due process right to a fair trial." *Id.*; Olden v. Kentucky, 488 U.S. 227, 230-31 (1988) (stating that the court of appeals had "failed to accord proper weight to petitioner's Sixth Amendment right 'to be confronted with witnesses against him'" and concluding that a person defending rape charges should be allowed to show an alleged victim's bias and motive to lie by asking her if she lived with another man); FED. R. EVID. 412(b)(1)(C) advisory committee's note.

24. See FED. R. EVID. 412(b)(1) advisory committee's note.

25. 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996). In *Powers*, the defendant was charged with raping the victim continuously over a ten month period. *Id.* at 1463. At the time, the victim was only "nine and ten years old." *Id.* The defendant asserted that the "Government's evidence implied that, because of her young age, [the victim's] sexual activity could only be explained by [the defendant's] sexual assaults against her. Thus . . . evidence of [the victim's] sexual relations with her boyfriend should have been admitted to rebut this inference." *Id.* at 1470.

26. *Id.* at 1463.

27. *Id.* at 1469.

28. *Id.*

sexual relationship, which occurred at least one year after the alleged sexual abuse, was relevant because it would rebut the inference by the government that the victim's sexual activity at such a young age was due to the assaults by the defendant.²⁹ In determining that the evidence was irrelevant on the question of the defendant's guilt, and that its exclusion did not violate his constitutional rights, the court stated that

"[t]he Sixth Amendment right to confrontation and the Fifth Amendment right to due process of law require only that the accused be permitted to introduce all *relevant* and admissible evidence." A defendant's Sixth Amendment right to cross-examination is limited to issues that are relevant to his trial, and the district court has broad discretion to determine which issues are relevant.³⁰

Rule 412 has been amended to extend the scope of the rule to all criminal cases and to civil cases.³¹ Some of the reasons behind the extension of the rule include protecting the privacy of the victims, encouraging victims to come forward and report such acts, and diminishing the chances of embarrassment.³²

As a result, Rule 412 now provides that evidence of a victim's past sexual conduct and alleged sexual predisposition is generally inadmissible in civil cases.³³ There is, however, an exception to

29. *Id.* at 1469-70.

30. *Id.* at 1470 (citations omitted). The court determined that because the victim's "sexual relations with her boyfriend . . . occurred long after the acts for which [the defendant] was tried, . . . [the] evidence was irrelevant because it could not provide a reasonable alternative explanation to [the defendant's] guilt." *Id.* See *United States v. Bear Stops*, 997 F.2d 451, 454-55 (8th Cir. 1993) (holding that in a case based on alleged sexual abuse, evidence that the victim had been previously sexually abused by three people other than the defendant around the same time as the alleged incident with the defendant was required by the constitution to be admitted pursuant to Rule 412 because it was relevant in "establish[ing] an alternative explanation for why [the victim] exhibited the behavioral manifestations of a sexually abused child," which could potentially exculpate the defendant).

31. FED. R. EVID. 412(a) advisory committee's note.

32. *Id.*

33. FED. R. EVID. 412(b)(2).

this rule as well. Evidence of a victim's sexual predisposition or past sexual conduct will be admissible if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. . . . [and] reputation [evidence] is admissible only if it has been placed in controversy by the alleged victim."³⁴ The Advisory Committee specifically chose a balancing test for civil cases instead of express exceptions "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."³⁵

In *Burger v. Litton Industries, Inc.*,³⁶ the plaintiff filed a civil suit against the defendant based on sexual harassment and sex discrimination.³⁷ During the deposition of a witness, who was not a party to the action, questions were asked concerning whether she had prior sexual relations with any of the defendant's employees.³⁸ Plaintiff's counsel objected to the questions, and the witness did not answer.³⁹ The defense asserted that the questions were necessary to prove the witness was biased, as well

34. FED. R. EVID. 412(b)(2). The advisory committee's note to subdivision (b)(2) distinguishes the balancing test set forth in (b)(2) from the balancing test contained in Federal Rule 403 in that:

First, it [r]everses that usual procedure . . . 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.

FED. R. EVID. 412(b)(2) advisory committee's note (emphasis added).

35. *Id.*

36. 91 Civ. 0918 (WK) (AJP), 1995 WL 476712 (S.D.N.Y. Aug. 10, 1995).

37. *Id.* at *1.

38. *Id.* The court recognized the fact that Rule 412 was not directly applicable to discovery, but stated that "the Court must consider it [during discovery] 'in order not to undermine the rationale of Rule 412.'" *Id.* at *2.

39. *Id.* at *1.

as to impeach her testimony.⁴⁰ In applying the balancing test set forth in Rule 412(b)(2), the court determined that although the questions were relevant to the issues of bias and impeachment, in neither instance did they “‘substantially outweigh’ the invasion of [the witness’s] privacy.”⁴¹ Therefore, the court held that the questions were forbidden pursuant to Rule 412.⁴²

If the evidence is found to be admissible, certain procedural requirements must first be satisfied.⁴³ Specifically, counsel must file a motion in writing “describing the evidence and stating the purpose for which it is offered.”⁴⁴ In addition, this motion must be served on all parties, and the alleged victim must be notified.⁴⁵ Finally, the court “*must* conduct a hearing in camera and afford the victim and parties a right to . . . be heard[.]” and the motion papers and documentation of the proceedings will be sealed by the court.⁴⁶

40. *Id.* The defense argued that the evidence was necessary to show the witness was biased as a result of the defendant firing a co-worker with whom had a sexual relationship. *Id.* at *3. In addition, defense counsel asserted that the questions would impeach the witness’ testimony that her co-workers would always talk about sex by showing that she, too, frequently spoke about her sex life with her co-workers. *Id.* at *2.

41. *Id.* at *3.

42. *Id.* at *1. See *Alberts v. Wickes Lumber Co.*, No. 93 C 4397, 1995 WL 117886 *1, *2 (N.D. Ill. Mar. 15, 1995) (applying the balancing test set out in Federal Rule of Evidence 412(b)(2) to a deposition in a civil suit and stating that it is the job of the court to “establish the relevance of the information sought by the question being challenged so that the court may . . . weigh its probative value and to determine whether or not [it] will substantially outweigh the danger of harm or unfair prejudice to the victim”).

43. FED. R. EVID. 412(c).

44. FED. R. EVID. 412(c)(1)(A). The part of subdivision (c) which requires the motion be made before trial and allows the motion to be made late, provided good cause is shown, has not been amended. FED. R. EVID. 412(c) advisory committee’s note.

45. FED. R. EVID. 412(c)(1)(B).

46. FED. R. EVID. 412(c)(2) (emphasis added). The advisory committee’s note explains that language from the old rule, which provided that “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 . . . shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine

Several federal courts have interpreted the original version of Rule 412; however, due to the relative infrequency of such cases,⁴⁷ only a few cases have interpreted the amended rule.⁴⁸ In *Doe v. United States*,⁴⁹ a case interpreting the original rule, the

such issue," was deleted from the rule. FED. R. EVID. 412(c) advisory committee's note. The Committee determined that this change was based on constitutional concerns regarding "the right to a jury trial under the Sixth and Seventh Amendments." *Id.* Specifically, the Advisory Committee believed that this language granted a trial judge broad discretion to "exclude evidence of past sexual conduct between [the] 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." *Id.* See *United States v. Platero*, 72 F.3d 806, 813 (10th Cir. 1995) (discussing this change to Rule 412 and stating that "[t]he advisory committee obviously was aware of the constitutional implications of allowing the court to make the determination of the conditional fact, and therefore removed the requirement of former Rule 412(c)(2) that 'the court' accept such evidence on sexual conduct and 'determine such issue'").

47. See *Bartel*, *supra* note 3, at 77. A majority of prosecutions brought for sexual offenses are instituted in state court. This is because "there are not that many times when the federal courts have jurisdiction over the crime of rape. The rape would have to occur some place like an Indian reservation or in a federal courthouse or on Amtrack. It has to occur someplace where the federal authorities have jurisdiction." *Id.*; see generally *United States v. Yazzie*, 59 F.3d 807 (9th Cir. 1995) (federal prosecution for alleged sexual abuse occurring at an Indian hospital); *United States v. Torres*, 937 F.2d 1469 (9th Cir. 1991) (federal prosecution for sexual abuse under 18 U.S.C. § 2241(c)), *cert. denied*, 502 U.S. 1037 (1992); *United States v. Cardinal*, 782 F.2d 34 (6th Cir.) (federal prosecution for rape taking place on an Indian reservation), *cert. denied*, 476 U.S. 1161 (1986).

48. See *infra* notes 53-58 and accompanying text, *supra* notes 25-30, 36-42 and accompanying text.

49. 666 F.2d 43 (4th Cir. 1981). In *Doe*, the court held that the defendant's evidence of the victim's "'general reputation [at] the Army post . . . where [the defendant] resided;' [as well as] evidence of the victim's 'habit[s,] [which included] calling out to the barracks to speak to . . . soldiers; . . . coming to the post to meet people[,] [and] being at the barracks at the snack bar'" was inadmissible under Rule 412. *Id.* at 47. However, the court ruled that evidence of conversations between the defendant and victim were relevant, and the defendant's "knowledge, acquired before the alleged crime, of the victim's past sexual behavior [was] relevant" and admissible on the issue of intent. *Id.* at 48. Cf. *United States v. Saunders*, 943 F.2d 388, 391 (4th Cir. 1991) (questioning *Doe's* application of Rule 412 with

Fourth Circuit found that absent extraordinary circumstances, the type of evidence excluded by Rule 412 was generally considered insufficiently probative on the issues of credibility and consent, and could not outweigh its prejudicial effect.⁵⁰ In addressing the constitutional justifications for Rule 412, the court stated that “an accused is not constitutionally entitled to present irrelevant evidence.”⁵¹ In addition, the court explained that “reputation and opinion [evidence] concerning a victim’s past sexual behavior” is also irrelevant on the issue of consent to a particular sexual act.⁵²

In *United States v. Roman*,⁵³ the district court followed the reasoning of the Advisory Committee in its interpretation of the 1994 amendment to Rule 412 which excludes all evidence offered to prove an alleged victim’s sexual predisposition.⁵⁴ In *Roman*,

respect to the admission of reputation evidence when relevant to the state of mind of the accused), *cert. denied*, 502 U.S. 1105 (1992).

50. *Doe*, 666 F.2d at 47-48 (quoting *United States v. Kasto*, 584 F.2d 268, 271-72 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979)). *Cf.* *United States v. Duncan*, 855 F.2d 1528 (11th Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989). In *Duncan*, the court found that the probative value of evidence of the victim’s chastity outweighed its prejudicial effect concerning a kidnapping charge because the victim’s testimony showed that “her prior virginity explain[ed] her shock and inability to act aggressively to escape,” which explained “why she did not run away,” and therefore refuted the defendant’s allegation of acquiescence. *Id.* at 1534.

51. *Doe*, 666 F.2d at 47. *See also* *United States v. Torres*, 937 F.2d 1469 (9th Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992). In *Torres*, the court concluded that “the term ‘past sexual behavior’ as used in Fed. R. Evid. 412 includes all sexual behavior of the victim of an alleged sexual assault which precedes the date of the trial. This conclusion is in accord with the avowed purposes of the rule . . . and . . . prevent[s] wasting time on distractive collateral and irrelevant matters.” *Id.* at 1472 (citations omitted); *United States v. Duran*, 886 F.2d 167 (8th Cir. 1989). In *Duran*, the court stated that the evidence of the birth of the victim’s child, which took place six months prior to the charged sexual abuse, was “substantively unrelated to the charged event. . . . [and] exactly the type of evidence that Rule 412 was designed to preclude.” *Id.* at 169.

52. *Doe*, 666 F.2d at 47.

53. 884 F. Supp. 124 (S.D.N.Y. 1995).

54. *Id.* at 125-26. *See* FED. R. EVID. 412(a)(2) advisory committee’s note. The advisory committee’s note states that:

the defendant, who was also the victim's husband, wanted the court to compel the victim's infant to undergo a blood test to prove that he was not the child's biological father.⁵⁵ The court denied the defendant's motion to compel the infant to undergo the blood test because the paternity test, if negative, could damage the victim's credibility.⁵⁶ The court held that the results of a paternity test, which could connote that the victim "has a history not only of promiscuity but of untruthfulness in matters of a sexual nature," would be inadmissible under Rule 412.⁵⁷ In addition, the court stated that "Rule 412 does not permit this type of impeachment evidence."⁵⁸

Rule 412 finds a fairly close relative in New York's rape shield law, which is codified in section 60.42 of the Criminal Procedure Law⁵⁹ [hereinafter C.P.L.]. Section 60.42 does not permit the

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove 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. . . . Consequently, unless the [balancing test in] (b)(2) . . . is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

Id.

55. *Roman*, 884 F. Supp. at 125.

56. *Id.* at 125-26.

57. *Id.* at 126.

58. *Id.*

59. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992). Section 60.42 states:

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law [sex offenses] unless such evidence:

1. proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or
2. proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the penal law [prostitution] within three years prior to the sex offense which is the subject of the prosecution; or

3. rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, deviate sexual intercourse or sexual contact during a given period of time; or
4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or
5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

Id. See N.Y. CRIM. PROC. LAW § 60.43 (McKinney 1992). Section 60.43 states:

Evidence of the victim's sexual conduct, including the past sexual conduct of a deceased victim, may not be admitted in a prosecution for any offense, attempt to commit an offense or conspiracy to commit an offense defined in the penal law unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

Id. See also *People v. Childs*, 161 Misc. 2d 749, 615 N.Y.S.2d 232 (N.Y. Sup. Ct. 1994). The *Childs* case involved a murder prosecution of a defendant who allegedly was at a motel, the scene of the crime, with the victim. *Id.* at 750, 615 N.Y.S.2d at 233. The defendant claimed that the victim repeatedly made unwarranted homosexual advances towards him. *Id.* The defendant sought to introduce evidence of the victim's past homosexual behavior, specifically, that the victim was recently at the same motel having "homosexual liaisons with young men." *Id.* at 753, 615 N.Y.S.2d at 234. The court held that the evidence was "relevant in several respects" and admitted the evidence under C.P.L. § 60.43. *Id.* at 752-53, 615 N.Y.S.2d at 234. Moreover, the court stated that "[b]arring the evidence of the deceased's prior sexual conduct in this case would abridge the defendant's constitutional right to adduce evidence in his own defense." *Id.* at 753, 615 N.Y.S.2d at 234. In its analysis, the court noted the difference between C.P.L. § 60.42 and § 60.43. *Id.* at 751-52, 615 N.Y.S.2d at 233-34. The court explained that "[t]here are no enumerated exceptions to C.P.L. § 60.43 [as there are in § 60.42] and, in fact, a 'presumption of irrelevance' of such evidence has been established" *Id.* at 751, 615 N.Y.S.2d at 233; see also *People v. McGrath*, 195 A.D.2d 831, 833, 601 N.Y.S.2d 200, 202 (3d Dep't 1993) (holding that evidence of the victim's past sexual behavior was irrelevant in a prosecution for reckless endangerment and criminal mischief pursuant to C.P.L. § 60.43); *People v. Culver*, 192 A.D.2d 10, 16, 598 N.Y.S.2d 832.

admission of evidence of the sexual conduct of a victim during the prosecution of a defendant for the commission of any sexual offense or attempt to perpetrate any sexual offense under article 130 of the penal law, including rape, sodomy, and sex abuse.⁶⁰ However, there are five exceptions to the general rule.⁶¹ This type of evidence is admissible if: (1) it tends to prove or does prove particular instances of previous sexual conduct between the victim and the accused;⁶² (2) it tends to prove or does prove that the victim has been found guilty of prostitution within three years of the offense in the present prosecution;⁶³ (3) it will rebut evidence offered by the prosecution that the victim has not engaged in sexual intercourse, sexual contact, or deviate sexual intercourse within a certain time period;⁶⁴ or (4) it will rebut evidence that the accused is the source of disease, pregnancy, or

836 (3d Dep't 1993) (refusing to admit evidence of victim's guilty plea to sexual abuse, entered 13 years before the present murder prosecution, on the basis of remoteness and irrelevance).

60. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

61. *Id.* See *Carroll v. Hoke*, 695 F. Supp. 1435, 1439 (E.D.N.Y. 1988) (stating that each of the "several" exceptions of the rape shield statute is "designed to ensure the fairness of the proceedings"), *aff'd*, 880 F.2d 1318 (2d Cir. 1989).

62. N.Y. CRIM. PROC. LAW § 60.42(1) (McKinney 1992). See also *People v. Souvenir*, 83 Misc. 2d 1038, 1041, 373 N.Y.S.2d 824, 827 (N.Y. Crim. Ct. 1975) (stating that in a case based on sexual misconduct, "[t]he fact that . . . the complainant and the defendant knew each other and may have engaged in sexual relations in the past would be admissible as evidence at trial. . . . Section 60.42 . . . only disallows the introduction of proof as to a victim's sexual conduct with someone other than the accused himself").

63. N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 1992). See also *People v. McNab*, 144 Misc. 2d 612, 614-16, 544 N.Y.S.2d 930, 932-33 (N.Y. Sup. Ct. 1989) (holding that in a rape prosecution, evidence that the victim had been observed trying to flag down and solicit drivers for prostitution was inadmissible).

64. N.Y. CRIM. PROC. LAW § 60.42(3) (McKinney 1992). See also *People v. Kellar*, 174 A.D.2d 848, 849, 571 N.Y.S.2d 144, 145 (3d Dep't 1991) (holding that C.P.L. § 60.42(3) did not apply to admit evidence of the prior sexual conduct of a rape victim where "the victim did not testify that she was a virgin; rather, she testified that she told defendant during the attack that she was a virgin").

semen discovered in the victim.⁶⁵ In addition, the court can admit the evidence if it is “relevant and admissible in the interests of justice.”⁶⁶ This phrase is intended to allow the courts to admit evidence not falling within one of the four listed exceptions.⁶⁷

In *People v. Mandel*,⁶⁸ the New York Court of Appeals, in applying C.P.L. section 60.42(5) to a prosecution for sexual abuse, held that evidence of a victim’s past sexual conduct was not relevant to the crime being alleged.⁶⁹ In addition, the court

65. N.Y. CRIM. PROC. LAW § 60.42(4) (McKinney 1992). *See also* *People v. Labenski*, 134 A.D.2d 907, 908, 521 N.Y.S.2d 608, 609 (4th Dep’t 1987) (holding that C.P.L. § 60.42(4) did not apply to allow defense counsel to cross-examine a rape victim concerning an allegation that she had sexual relations three hours before the alleged rape, even though evidence of semen found on her panties was admitted, because the semen was not found “within the victim”); *People v. Mountain*, 105 A.D.2d 494, 496, 481 N.Y.S.2d 449, 451 (3d Dep’t 1984) (stating that “[t]he purpose of [C.P.L. § 60.42(4)] is obvious. If the victim had sexual intercourse with an individual other than defendant just prior to or after the alleged rape, evidence of such sexual conduct would be probative and relevant on the issue of whether defendant is the source of semen found in the victim”), *aff’d*, 66 N.Y.2d 197, 486 N.E.2d 802, 495 N.Y.S.2d 944 (1985).

66. N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney 1992). In order for this type of evidence to be admissible pursuant to C.P.L. § 60.42(5), there must either be a hearing or offer of proof made outside the presence of the jury by the defendant in order for the court to determine the relevance of the evidence. *Id.* *See also* *People v. Labenski*, 134 A.D.2d 907, 908, 521 N.Y.S.2d 608, 609 (4th Dep’t 1987) (stating that “C.P.L. 60.42(5) permits a trial judge to allow questioning about prior sexual conduct when necessary in the interest of justice even if a specific exception does not apply” when it held that the lower court should have allowed a rape victim to be questioned about alleged sexual activity three hours before the rape, after allowing evidence that semen had been discovered on her panties).

67. N.Y. CRIM. PROC. LAW § 60.42 practice commentaries.

68. 48 N.Y.2d 952, 401 N.E.2d 185, 425 N.Y.S.2d 63 (1979), *cert. denied*, 446 U.S. 949 (1980).

69. *Id.* at 953, 401 N.E.2d at 186, 425 N.Y.S.2d at 64. The appellate division stated that “[i]n simple justice, the trial court should have permitted the proposed witnesses to testify that in sexual situations with complainant . . . she refused to allow them to touch her breasts. . . . [but] [a]ny testimony concerning the exact nature of the sexual encounters . . . or the complainant’s . . . reputation was properly excluded as immaterial and

found that there was no crucial probative correlation between the evidence of the victim's prior false allegations of rape and the current charges.⁷⁰ Similarly, in *People v. Williams*,⁷¹ the court of appeals stated that New York's rape shield statute, and similar statutes in other states, "put to rest the now-discredited rationale that a victim's past 'unchastity' is probative of present consent and recognize[] that such evidence is typically of little or no relevance and may seriously prejudice the prosecution of sex crimes."⁷²

prejudicial." *People v. Mandel*, 61 A.D.2d 563, 574-75, 403 N.Y.S.2d 63, 71 (2d Dep't 1978), *rev'd on other grounds*, 48 N.Y.2d 952, 401 N.E.2d 185, 425 N.Y.S.2d 63 (1979), *cert. denied*, 446 U.S. 949 (1980). The defendants alleged that the victim brought the rape charges after becoming "humiliated and embarrassed when . . . water balloons fell out of her bra and burst upon the floor" during consensual group sex. *Id.* at 574, 403 N.Y.S.2d at 71. The court of appeals, although it reversed the appellate division's order and reinstated the convictions of the defendants, agreed with the appellate division that "it cannot be concluded as a matter of law [that defendants were entitled] to the introduction of such evidence under C.P.L. § 60.42 (subd. 5)." *Mandel*, 48 N.Y.2d at 953, 401 N.E.2d at 186, 425 N.Y.S.2d at 64.

70. *Mandel*, 48 N.Y.2d at 953, 401 N.E.2d at 187, 425 N.Y.S.2d at 64. In addition, the court stated that a "'Swinger' photograph of the victim[,] . . . proof as to the victim's prior vaginal condition and evidence of alleged prior beatings of the victim by her father" were also not admissible even though they did not fall "within the proscriptive scope of CPL 60.42." *Id.* at 954, 401 N.E.2d at 187, 425 N.Y.S.2d at 64. *See also* *Latzer v. Abrams*, 602 F. Supp. 1314, 1321 (E.D.N.Y. 1985) (granting a writ of habeas corpus to a defendant who claimed "mistaken identity" because the trial court barred any inquiry into specific sexual activities of two alleged sodomy victims when, under C.P.L. § 60.42(5), the court had the opportunity to conduct a hearing to determine whether or not the evidence was relevant and failed to do so).

71. 81 N.Y.2d 303, 614 N.E.2d 730, 598 N.Y.S.2d 167 (1993).

72. *Id.* at 312, 614 N.E.2d at 733, 598 N.Y.S.2d at 170. In *Williams*, the defendants were convicted of raping a 17 year old New Jersey woman whom they met outside of a dance club in Manhattan. *Id.* at 309, 614 N.E.2d at 732, 598 N.Y.S.2d at 169. The defense attempted to introduce evidence that the victim's motive for testifying was that she had engaged in prior consensual group sex with other black men. *Id.* at 315, 614 N.E.2d at 735, 598 N.Y.S.2d at 172. In applying C.P.L. § 60.42, the court stated that "counsel made no effort to explain how prior sexual conduct with other males would be probative of the complainant's motive to testify -- a connection neither apparent nor

On its face, C.P.L. section 60.42 does not apply to civil actions to exclude evidence of a victim's past sexual conduct.⁷³ However, it seems as though this type of evidence will not automatically be admissible in a civil action. It has been held that a trial judge has the discretion to exclude evidence of prior sexual behavior of a party in a civil action, even though it may be relevant, if it "is so prejudicial that its probative value is outweighed"⁷⁴ It has also been asserted that even though C.P.L. section 60.42 is not applicable in civil cases, the rationale behind the rule should be applied to exclude this type of evidence. One court has stated that "a civil litigant . . . is entitled, at the very least, to the same protection of privacy as is a complainant in a criminal case which involves a sexual offense."⁷⁵ In addition, it has been held that even though section

logical on its face. Nor did counsel suggest that the evidence might be relevant to the question of consent" *Id.* Moreover, in holding that the lower court acted reasonably in not admitting the evidence of the victim's alleged prior consensual group sex, the court reasoned that "the Constitution does not compel a court to proceed to a fuller consideration of the evidence until the proponent demonstrates some basis for its admission." *Id.* See also *People v. Garcia*, 194 A.D.2d 554, 555, 598 N.Y.S.2d 572, 573 (2d Dep't 1993) (holding that the sexual history of an 11 year old sodomy victim was "irrelevant to the issues at hand and had no bearing on the issue of the defendant's guilt or innocence").

73. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

74. *Bodensteiner v. Vannais*, 167 A.D.2d 954, 954, 561 N.Y.S.2d 1017, 1018 (4th Dep't 1990). The appellate division determined that the trial court had not abused its discretion in excluding the evidence. *Id.*

75. *Greene v. Aberle*, 150 Misc. 2d 306, 309, 568 N.Y.S.2d 300, 303 (N.Y. Sup. Ct. 1991). In *Greene*, the defendant, who was a student at the same college as the plaintiff, alleged that the plaintiff raped her. *Id.* at 307, 568 N.Y.S.2d at 301. After being absolved of the charge by the hearing board of the college, the plaintiff sued the defendant for intentional infliction of emotional distress, defamation and negligence based on the rape allegation. *Id.* Through interrogatories, the plaintiff sought information concerning the defendant's past sexual conduct, virginity, medical treatment and whether she had gotten an abortion. *Id.* at 307-08, 568 N.Y.S.2d at 302. The court determined that the rationale behind C.P.L. § 60.42 of preventing victim harassment and jury confusion by the presentation of irrelevant evidence was applicable in this case. *Id.* at 309-10, 568 N.Y.S.2d at 303. In deciding that

60.42 “is not applicable to civil suits, . . . the rationale and policy considerations which led to its enactment [may be] relevant and persuasive” in a civil case.⁷⁶ Thus, although the rule does not directly apply to civil cases, New York courts may be willing to apply its rationale to civil cases in order to exclude evidence of a party’s prior sexual conduct.

There are some similarities between Federal Rule of Evidence 412 and C.P.L. section 60.42. One obvious similarity is the strong social policy on which both rules rest. The advisory committee’s note to the Federal Rule states that

[t]he 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 infusion of sexual innuendo into the fact finding process. . . . [T]he rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.⁷⁷

Likewise, the practice commentaries to C.P.L. section 60.42 state that this section was

enacted to bar harassment of victims and confusion of issues through raising matters relating to the victims’ sexual conduct that have no proper bearing upon the defendant’s guilt or innocence. . . . [and] serves an important public interest by

the interrogatories did not have to be answered, the court stated that “[t]he right of the individual to privacy must be respected and, in this case . . . [the defendant’s activities] do not relate to the claims now before the court.” *Id.* at 310, 568 N.Y.S.2d at 303.

76. *Mason v. Cohn*, 108 Misc. 2d 674, 676, 438 N.Y.S.2d 462, 464 (N.Y. Sup. Ct. 1981). In *Mason*, the plaintiff was raped in her apartment. *Id.* at 674, 438 N.Y.S.2d at 463. As a result, she sued her landlord for negligence based on his failure to provide satisfactory protection. *Id.* During the deposition of the plaintiff, the defendant sought information concerning the plaintiff’s prior sexual conduct in order to prove that she had consented to the sexual encounter. *Id.* at 674-75, 438 N.Y.S.2d at 463. In determining that this type of questioning should not be allowed in this case, the court stated that “such pretrial examinations as to sexual conduct . . . should only be granted in the exercise of discretion upon the strongest showing of special circumstances.” *Id.* at 676, 438 N.Y.S.2d at 464.

77. FED. R. EVID. 412 advisory committee’s note.

removing one of the impediments that caused many victims of sex offenses not to report them.⁷⁸

The second similarity is that both rules contain notice and hearing requirements. Rule 412 explicitly requires notice to be given to the parties and the victim,⁷⁹ and mandates that a hearing be held before the evidence is admitted.⁸⁰ C.P.L. section 60.42, on the other hand, provides for a hearing or offer of proof outside the presence of the jury in its catch-all exception only, in order to determine the relevance of the evidence.⁸¹

Rule 412 and C.P.L. section 60.42 differ in several important respects. First, Rule 412 prohibits the admission of evidence in all criminal as well as in civil proceedings in which an allegation of sexual misconduct is made, while section 60.42 bars the evidence only in criminal prosecutions for sex offenses.⁸² There seems to be a distinct possibility, however, that New York courts may be inclined to apply the underlying rationale of the rule to civil cases in order to prevent the admission of this type of evidence.⁸³ Additionally, C.P.L. section 60.43 provides for the admission of evidence a victim's past sexual conduct in a prosecution for any criminal offense only if it is "determined by the court to be relevant and admissible in the interests of justice"⁸⁴

Second, while Rule 412 applies to protect witnesses who are not parties to the litigation, the New York rule only protects a victim in a criminal prosecution for a sex offense.⁸⁵ Third, Rule 412 bars evidence of the victim's prior sexual behavior as well as

78. N.Y. CRIM. PROC. LAW § 60.42 practice commentaries.

79. FED. R. EVID. 412(c)(1)(B).

80. FED. R. EVID. 412(c)(2).

81. *See supra* note 66.

82. *Compare* FED. R. EVID. 412(a), *supra* notes 6 and 33 and accompanying text with N.Y. CRIM. PROC. LAW § 60.42, *supra* note 60 and accompanying text.

83. *See supra* notes 283-86 and accompanying text.

84. *See supra* note 268.

85. *Compare* FED. R. EVID. 412 advisory committee's note with N.Y. CRIM. PROC. LAW § 60.42.

evidence purporting to show the sexual predisposition of the victim.⁸⁶ The New York rule only excludes evidence of sexual conduct of a victim.⁸⁷

Fourth, both rules allow evidence to be admitted concerning previous instances of sexual conduct between the victim and the accused.⁸⁸ The New York rule allows the evidence to be admitted for any reason.⁸⁹ The federal rule, however, allows it only to show consent, or if offered by the prosecution.⁹⁰

Fifth, while C.P.L. section 60.42 provides explicit exceptions which allow the admission of evidence to show that the victim has been previously convicted of prostitution or to rebut evidence by the prosecution that the victim did not engage in sexual intercourse,⁹¹ the federal rule does not. However, the evidence may be admissible under Rule 412 if the exclusion would infringe upon the defendant's constitutional rights.⁹²

Finally, the federal rule allows introduction of this type of evidence in criminal cases to show that someone besides the defendant was the cause of the injury, semen or other physical evidence.⁹³ The New York rule, however, only allows admission of evidence to show that the defendant was the source of semen found *inside* the victim, but specifically allows evidence which shows that the defendant was not the source of the victim's disease or pregnancy.⁹⁴ Thus, Federal Rule of Evidence 412 affords a victim more protection than the New York rule from the introduction of evidence at trial concerning past sexual conduct or alleged sexual predisposition.

86. FED. R. EVID. 412(a)(1), (2).

87. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

88. FED. R. EVID. 412(b)(1)(B); N.Y. CRIM. PROC. LAW § 60.42(1) (McKinney 1992).

89. N.Y. CRIM. PROC. LAW § 60.42(1) (McKinney 1992).

90. FED. R. EVID. 412(b)(1)(B).

91. N.Y. CRIM. PROC. LAW § 60.42(2), (3) (McKinney 1992); *see supra* notes 63-64 and accompanying text.

92. *See* FED. R. EVID. 412(b)(1)(C).

93. FED. R. EVID. 412(b)(1)(A).

94. N.Y. CRIM. PROC. LAW § 60.42(4) (McKinney 1992).