

the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. *Cf. Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962-63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

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

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

[The Supreme Court withheld that portion of the proposed amendment to Rule 412 transmitted to the Court by the Judicial Conference of the United States which would apply that Rule to civil cases. This Note was not revised to account for the Court's action, because the Note is the commentary of the advisory committee. The proposed amendment to Rule 412 was subsequently amended by section 40141(b) of Pub. L. 103-322. See below.]

COMMITTEE NOTES ON RULES—2011 AMENDMENT

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

CONGRESSIONAL MODIFICATION OF PROPOSED 1994 AMENDMENT

Section 40141(a) of Pub. L. 103-322 [set out as a note under section 2074 of this title] provided that the amendment proposed by the Supreme Court in its order of Apr. 29, 1994, affecting Rule 412 of the Federal Rules of Evidence would take effect on Dec. 1, 1994, as otherwise provided by law, and as amended by section 40141(b) of Pub. L. 103-322. See 1994 Amendment note below.

AMENDMENT BY PUBLIC LAW

1994—Pub. L. 103-322 amended rule generally. Prior to amendment, rule contained provisions relating to the relevance and admissibility of a victim's past sexual behavior in criminal sex offense cases under chapter 109A of Title 18, Crimes and Criminal Procedure.

1988—Pub. L. 100-690, §7046(a)(1), substituted "Sex Offense" for "Rape" in catchline.

Subd. (a). Pub. L. 100-690, §7046(a)(2), (3), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or of assault with intent to commit rape" and "such offense" for "such rape or assault".

Subd. (b). Pub. L. 100-690, §7046(a)(2), (5), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or of assault with intent to commit rape" in introductory provisions and "such offense" for "rape or assault" in subd. (b)(2)(B).

Subds. (c)(1), (d). Pub. L. 100-690, §7046(a)(4), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or assault with intent to commit rape".

EFFECTIVE DATE

Section 3 of Pub. L. 95-540 provided that: "The amendments made by this Act [enacting this rule] shall apply to trials which begin more than thirty days after the date of the enactment of this Act [Oct. 28, 1978]."

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) PERMITTED USES. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) DISCLOSURE TO THE DEFENDANT. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) EFFECT ON OTHER RULES. This rule does not limit the admission or consideration of evidence under any other rule.

(d) DEFINITION OF "SEXUAL ASSAULT." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. §513) involving:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;
- (2) contact, without consent, between any part of the defendant's body—or an object—and another person's genitals or anus;
- (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

(Added Pub. L. 103-322, title XXXII, §320935(a), Sept. 13, 1994, 108 Stat. 2135; amended Apr. 26, 2011, eff. Dec. 1, 2011.)

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 413 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

EFFECTIVE DATE

Section 320935(b)–(e) of Pub. L. 103-322, as amended by Pub. L. 104-208, div. A, title I, §101(a), [title I, §120], Sept. 30, 1996, 110 Stat. 3009, 3009-25, provided that:

"(b) IMPLEMENTATION.—The amendments made by subsection (a) [enacting this rule and rules 414 and 415 of these rules] shall become effective pursuant to subsection (d).

"(c) RECOMMENDATIONS BY JUDICIAL CONFERENCE.—Not later than 150 days after the date of enactment of this Act [Sept. 13, 1994], the Judicial Conference of the

United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act [28 U.S.C. 2072] shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

“(d) CONGRESSIONAL ACTION.—

“(1) If the recommendations described in subsection (c) are the same as the amendment made by subsection (a), then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

“(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

“(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

“(e) APPLICATION.—The amendments made by subsection (a) shall apply to proceedings commenced on or after the effective date of such amendments [July 9, 1995], including all trials commenced on or after the effective date of such amendments.”

[The Judicial Conference transmitted to Congress on Feb. 9, 1995, a report containing recommendations described in subsec. (c) that were different than the amendments made by subsec. (a). The amendments made by subsec. (a) became effective July 9, 1995.]

Rule 414. Similar Crimes in Child-Molestation Cases

(a) **PERMITTED USES.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) **DISCLOSURE TO THE DEFENDANT.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) **EFFECT ON OTHER RULES.** This rule does not limit the admission or consideration of evidence under any other rule.

(d) **DEFINITION OF “CHILD” AND “CHILD MOLESTATION.”** In this rule and Rule 415:

(1) “child” means a person below the age of 14; and

(2) “child molestation” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. §513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body—or an object—and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

(Added Pub. L. 103-322, title XXXII, §320935(a), Sept. 13, 1994, 108 Stat. 2136; amended Apr. 26, 2011, eff. Dec. 1, 2011.)

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 414 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

EFFECTIVE DATE

Rule effective July 9, 1995, see section 320935(b)–(e) of Pub. L. 103-322, set out as a note under rule 413 of these rules.

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) **PERMITTED USES.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) **DISCLOSURE TO THE OPPONENT.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) **EFFECT ON OTHER RULES.** This rule does not limit the admission or consideration of evidence under any other rule.

(Added Pub. L. 103-322, title XXXII, §320935(a), Sept. 13, 1994, 108 Stat. 2137; amended Apr. 26, 2011, eff. Dec. 1, 2011.)

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 415 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

EFFECTIVE DATE

Rule effective July 9, 1995, see section 320935(b)–(e) of Pub. L. 103-322, set out as a note under rule 413 of these rules.

ARTICLE V. PRIVILEGES

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1933; amended Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific non-