

FRE 412. Prof. Notes. German rule – only uses listed are permitted, otherwise inadmissible in civil or criminal proceedings “alleging sexual misconduct.” 412(a).

Prohibited Uses

(a)(1) evidence the “victim” engaged in “other sexual behavior” is not permitted.

- Victim includes an “alleged” victim.
- Prohibition applies to civil and criminal cases involving alleged “sexual misconduct.”
 - For example: The shield can protect a witness (who is not the present victim) in a civil sexual harassment case if that witness is testifying about the civil defendant’s sexual misconduct. See, note 4, pg. 89 RB and *Wilson v. City of Des Moines*, 442 F.3d 367 (8th Cir. 2006).

(a)(2) evidence to prove “victim’s sexual predisposition” is prohibited.

Note: both categories of evidence above (victim’s sexual predisposition and evidence of other sexual behavior) are prohibited unless an exception applies. In other words, the evidence is barred for any purpose – substantively and as use for impeachment. See no 5, pg. 89 RB.

- The prohibited categories of evidence are interpreted broadly to include to include statements of a sexual nature, fantasies and dreams, use of contraception, living with a partner, clothing, etc.
- NOTE: evidence of filing false rape or sexual abuse reports is not “sexual behavior” and is not barred.
 - *State v. Smith* (La. 1999), pp. 333-337. Step grand-daughter’s previous false reports are not “sexual behavior” and 412, therefore, does not prohibit their introduction. This is circumstantial evidence of state of mind (not necessarily character evidence) if you are able to get more specific as to motive – needing attention, etc. (more likely if expert testimony supports). If motive, then extrinsic evidence if allowed, if not motive, just probative of truthfulness. (Study this case).
 - See *Redmon v. Kingston* (7th Cir. 2001) prior false accusation to get mother’s attention. Violation of defendant’s due process

rights if refuse admission. See RB, N. 6, p. 91. Note that if calling alleged victim a liar, rather than proving she is lying, the evidence is character evidence and the specific instance may only be inquired into on cross and extrinsic evidence is not allowed.

- Problem 5.4, p. 337 (Ms. Meier). Defendant wants to introduce extrinsic evidence victim had consensual sex with another and then falsely claimed rape. This is clearly “sexual behavior”, courts are split on this but most will likely find a way to let it in as to not violate due process. Likely allow the “false report” and if victim opens door with explanation allow the consensual nature. This still, however, limits the impact of the evidence if defendant claims consent was granted.

(b) exceptions.

(1) Criminal cases –

(A) prove someone other than defendant source of physical evidence;

(B) sexual conduct between victim and defendant if to prove consent or offered by prosecutor;

- **See problem 5.2** (Brianna Johnson), p. 332 of Text. This exception is literally only available to prove “**consent**” regarding the alleged offense. In 5.2, however, the defendant wanted to introduce a prior consensual sex act with the alleged victim in order to explain why his fingerprint was in the bedroom. He does not claim she consented on the present occasion, but rather states it didn’t happen. He, therefore, is not introducing the prior act to prove consent on this occasion. Although this does not fit within the technical reading of the rule, the court will likely allow the evidence, especially in a criminal case. To not do so, might actually violate the defendant’s right to put on his defense (***see 412(b)(1)(C)***).

and

(C) exclusion violate D’s constitutional rights.

- **(Bias)(Olden v. KY, US-1988, Note (d), pg. 90 RB;** refusal to allow D to introduce evidence alleged victim previously made false claim to get

mother's attention violates confrontation clause (Redmond v. Kingston (7th Cir. 2001); and US v. Bear Stops (8th Cir. 1993)(Defense should have been allowed to introduce prior assault by three perps to rebut prosecution evidence that victim's regressive behavior due to D's sexual assault of victim.

- **Question:** does defendant have a 6th Amendment right (confrontation clause) that overrides the rape shield statute to cross on past lies? (Olden says yes to bias). 6th, 7th and 4th Circuits say no. 9th Circuit yes. First Circuit circumvented by saying bias even though evidence was in nature of character evidence.

(2) Civil cases. Court may if reverse 403. May only admit victim's reputation if placed in controversy by victim.

(C) procedure for admissibility and (D) definition of victim includes alleged victim.

NOTES:

This is an exception disallowing 404(a)(2)(B) evidence from being introduced by a criminal defendant.

Scope: all cases alleging sexual misconduct. For example, can apply in a kidnapping case in which motive for kidnapping was sexual assault. In civil case where a person claims to be a victim of sexual misconduct.

Inadmissible: all activities implying sexual activity, including fantasies and dreams and all opinion and reputation evidence.

Sexual behavior intrinsic to alleged sexual conduct is not "other" sexual behavior. Sexual predisposition includes mode of dress, speech, life-style. Prior false claims are not sexual behavior but must be tested under 404, 405 and 608.

Applicability of 412(b)(1) exceptions are a 104(b) question. Note 6, pg. 91 RB.

Problem 5.5 Koby Bryant's Accuser, pp. 344-45.

Defense wants to introduce evidence that two prosecution witnesses had sex with the alleged victim to show their bias in testifying. If probative of bias, Olden v. Kentucky requires the opportunity to introduce the evidence and also provide extrinsic evidence if necessary. Yet, is having a sexual relationship probative of

bias? As compared to close friendship? How might you balance 412 and confrontation rights? Perhaps allow inquiry into close relationship and not use term "sexual."

Defense seeks to introduce defendant's sex with others to show method, modus operandi. Not allowed. 412 does not have a 404(b) other uses. 412 is not a French rule, it is a German rule.

Defense wants to introduce the victim's sexual conduct after the alleged rape to rebut prosecution's claim she was suffering from PTSS. Is sex afterwards probative of whether victim is suffering PTSS? This is an issue of conditional relevancy and would depend on proffers by experts.