



Litigating Rule 412 Motions

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Utah R. Evid 412

Title:

“Admissibility of Victim’s Sexual Behavior or Predisposition”

Should be “*Inadmissibility . . .*”

Rule 412 generally excludes sexual behavior or predisposition evidence

Sexual Behavior

Connotes all activities that involve actual physical conduct, such as:

- sexual intercourse and sexual contact

Or that imply sexual intercourse or sexual contact, such as:

- the birth of an illegitimate child
- evidence of a venereal disease
- the use of contraceptives
- and even mental activities, such as fantasies or dreams.



Sexual Predisposition

Refers to evidence such as the AV's:

- dress
- speech
- life-style

Purpose of Rule 412

- Utah adopted Utah Rule of Evidence 412 (patterned after the federal rape shield rule), to ensure that sexual assault victims are not “deterred ... from participating in prosecutions because of the fear of unwarranted inquiries into the victim's sexual behavior.”
- The rule “reflects the recognition that evidence of the victim's unchastity is ordinarily of no probative value on the issue of whether a rape or sexual assault occurred.”
- In adopting the rape shield rule in Utah, the adopters recognized and agreed with the general consensus among courts that an alleged victim's prior sexual conduct “is simply not relevant to any issue in the rape prosecution including consent.’ ”
- Even where such evidence bears some marginal relevance, “it has ‘an unusual propensity to unfairly prejudice, inflame, or mislead the jury’ and is ‘likely to distort the jury's deliberative process.’ ”

Rule 412(a)

(a) Prohibited Uses. The following evidence is not admissible in a 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.

Rule 412(b)

(b) Exceptions. The court **may admit** the following evidence **if the evidence is otherwise admissible under these rules:**

(1) 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;

(2) 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; or

(3) evidence whose exclusion would violate the defendant's constitutional rights.

Rule 412(c)

(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; and

(C) serve the motion on all parties.*

(2) Notice to the Victim. The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(3) 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 are classified as protected.



Rule 412(d)

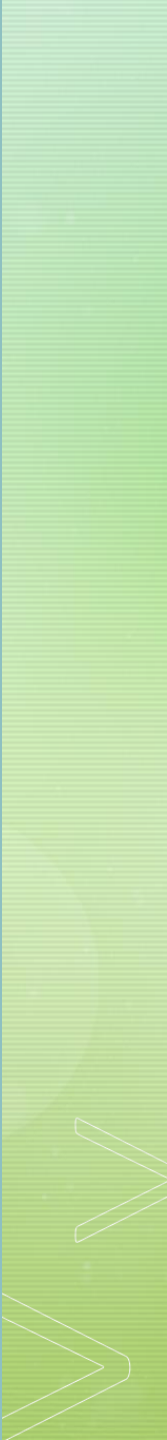
(d) Definition of “Victim.” In this rule, “victim” includes an alleged victim.

Again, generally applies to . . .

- “All activities that involve actual physical conduct ... or that imply sexual intercourse or sexual contact.”
- It also excludes all evidence that “may have a sexual connotation for the fact finder”
- This evidence has been “deemed” too sexually charged to be admitted under this rule.

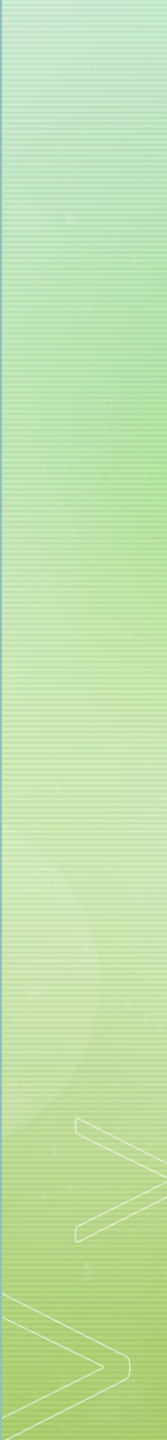


Know Your Purpose . . .





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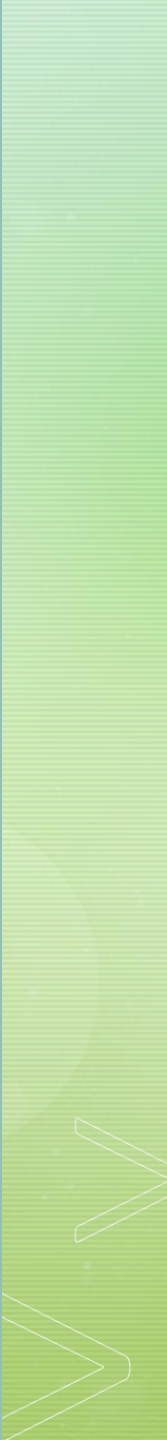


Did I mention ?

Know

Your

Purpose



Generally Rule 412 does not bar. . .

**Acts of sexual conduct which are
“intrinsic” to the alleged sexual
misconduct at issue in the case.**

See Utah R. Evid. 412, adv. com. note (citing *United States v. Williams*, 900 F.2d 823, 825 (5th Cir.1990) for proposition that “Under Rule 404(b), evidence is ‘intrinsic’ when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged”).

▶ **Generally Rule 412 does not bar. . .**

Evidence when it “contextualizes” the relationship and explains the factual background and context of the case.

Cf. State v. Richardson, 2013 UT 50, ¶ 25. In *Richardson*, the excluded evidence made consent more probable because it contextualized the AV’s sexual relationship with Richardson.

Examples of where the sexual evidence is “inextricably entwined” or needed to “contextualize” the relationship?

??????

▶ **Generally Rule 412 does not bar. . .**

Allegedly False Allegations

Notwithstanding the rule's careful circumscription of all evidence of sexual behavior, evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412.

State v. Tarrats, 2005 UT 50; *State v. Clark*, 2009 UT App 252



For allegedly false allegations:

- Must prove false by preponderance
- You get an evidentiary hearing to prove prior allegation by accuser was false “if there is evidence of a prior allegation and a legitimate reason to question its veracity.”
- Truthful prior allegation not admissible*

State v. Tarrats, 2005 UT 50; *State v. Clark*, 2009 UT App 252; *State v. Jordan*, 2018 UT App 187



For allegedly false allegations:

Allowed to conduct discovery on the issue of prior false claims and to discovery evidence.

***State v. Martin*, 1999 UT 72, 984 P.2d 975 (Martin I)**

The defendant appealed his rape conviction on the grounds that he was not able to conduct adequate discovery of an issue that may have been central to his case: the identity of a man the victim had alleged had raped her on a previous occasion. We agreed with Martin and remanded the case back to the trial court for further discovery on the matter.

The defendant was entitled to discover the information he sought, which carried ‘strong’ impeachment value and could significantly impact ‘the central issue of the case—whom to believe about the circumstances of the sexual contact.’ ”

▶ **Even if not “barred” by Rule 412. . .**

The evidence will only be admitted if it survives the tests of the other rules of evidence.

(especially 401, 402, 403).

State v. Tarrats, 2005 UT 50

So . . .

**Is the following considered “412 evidence”
where you need to / should file a motion?**




Scenario:


The alleged victim is accusing your client of a brutal rape in the bathroom of a bar. SANE documents “injuries” to her vaginal area and bruises on her knees and the back of her legs. She tells SANE that injuries are from brutal rape and that she hasn’t had sex with anyone else in the past week.


Is the following considered

“Rule 412” evidence?



- 
- DNA showing two male contributors with your client as the major male contributor.

- 
- Evidence that AV went camping and hiking with her boyfriend in the prior two days in the woods and had sex with her boyfriend in the woods.

- 
- Evidence that AV has a reputation (as stated by her friends and family) that she often gets drunk and is promiscuous with strangers, but then tells her friends and family she was raped.



If in doubt—

File a Motion



Know your purpose. . .

Intuitively (other than showing AV is promiscuous), what's your purpose for seeking admission of:

- DNA showing two male contributors with your client as the major male contributor?
- Evidence that AV went camping and hiking with her boyfriend in the prior two days in the woods?
- Evidence that AV had sex with her boyfriend in the woods?
- Evidence that AV has a reputation (as stated by her friends and family) that she often gets drunk and is promiscuous with strangers, but then tells her friends and family she was raped?



Once you know your purpose . . .

then you can find a path to admissibility



The Exceptions Under 412(b)

Paragraph (b) delineates the exceptions to Rule 412's general exclusion and sets forth those specific circumstances in which the court may admit evidence otherwise generally inadmissible under Rule 412.

(b)(1)

Under (b)(1), “evidence of specific instances of sexual behavior with persons other than the accused may be admissible if offered to prove that another person was the source of semen, injury or other physical evidence.”

Utah R. Evid. 412, and adv. com. note

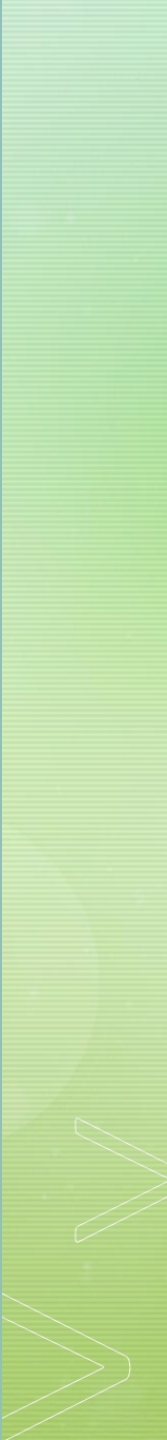
“Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible.”

Id. (citing *United States v. Begay*, 937 F.2d 515 (10th Cir.1991)).



(b)(1) Examples:

??????



(b)(2)

Under (b)(2), “evidence of specific instances of sexual behavior involving the alleged victim and the accused may be admissible if offered to prove consent, or if offered by the prosecution.”

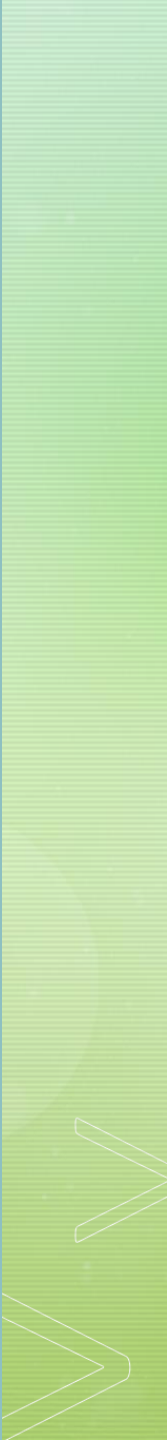
This exception justifies the admission of “evidence of specific sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused.”

Utah R. Evid. 412 and adv. com. note.



(b)(2) Examples:

??????




(b)(3)

Under (b)(3) evidence whose exclusion would violate the defendant's constitutional rights is admissible.


(b)(3) “states a truism.” A “court may not exclude evidence of an alleged victim's sexual behavior or predisposition if to do so would deny the accused Constitutional protections.”

Utah R. Evid. 412 and adv. com. note.



The United States Supreme Court recognizes “that in various circumstances a defendant may have a right under the Confrontation Clause to introduce evidence otherwise precluded by an evidence rule” and in this context, sexual behavior evidence has been admitted to allow the defendant an opportunity to specifically **challenge the alleged victim’s credibility.**

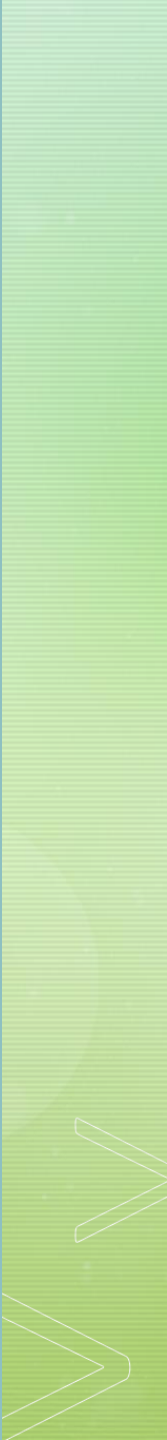
Utah R. Evid. 412 adv. com. note. (citing Olden v. Kentucky, 488 U.S. 227 (1988) for proposition that “defendant in rape cases had right to inquire into alleged victim’s cohabitation with another man to challenge credibility”).






A defendant also has the constitutional
right to present a complete defense.



State v. Nunez-Vasquez, 2020 UT App 98, ¶ 31, cert. denied, 474 P.3d 945 (Utah 2020) (noting that the Sixth Amendment’s multiple provisions – due process right to fair trial, cross-examination, right to impeach, right to confront -- “encompass some form of ‘right to present [a] defense.’”) (citing *State v. Thornton*, 2017 UT 9, ¶ 74; *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987))






As part of constitutional right to present a complete defense, accused has right to **introduce evidence tending to disprove his or her specific intent to commit a crime.**

E.g., State v. Lindgren, 910 P.2d 1268, 1271 (Utah App.1996) (citing *State v. Sessions*, 645 P.2d 643 (Utah 1982); *State v. Olsen*, 869 P.2d 1004 (Utah App. 1994); *United States v. Cortes*, 600 F.2d 1054, 1056-57 (5th Cir. 1979)).





“The precise scope of the accused's constitutional right[s] turns on the case's specific facts.”

Utah R. Evid. 412, adv. com. note (citing authority).

At a minimum, the defendant must show the evidence in question **is essential to the presentation of a defense.**

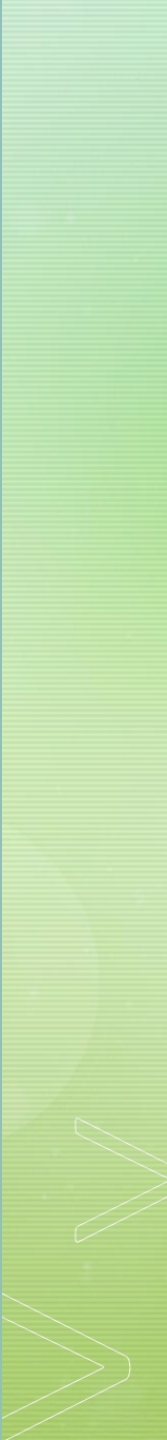
Nunez-Vasquez, 2020 UT App 98; *Thornton*, 2017 UT 9





(b)(3) Examples:

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Thinking Outside the Box. . .





Prior allegations of abuse to show AGDI (“another guy did it”)

- where you can prove it . . .
- where you can’t “prove” it . . .



Prior allegations of rape

- Where you can't "prove" they are false . . .





Other thoughts and questions?

The End

