REPORT

OF THE

ADVISORY COMMITTEE

ON

CRIMINAL RULES

TO THE

COMMITTEE

ON

RULES OF PRACTICE AND PROCEDURE

Asheville, North Carolina
December 17 - 19, 1992

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal Procedure and Rules of Evidence

DATE: November 15, 1992

I. INTRODUCTION

At its October 1992 meeting, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed amendments to Rules 32 and 40 and Federal Rule of Evidence 412. The Advisory Committee recommends that the Standing Committee approve the proposed amendments for circulation to the bench and bar for public comment. This report briefly addresses the proposed amendments and the recommendations to the Standing Committee. The minutes of the Committee's meeting and copies of the proposed amendments and the accompanying Committee Notes are attached.

II. RULES PENDING COMMENT BY THE BENCH AND BAR

At its June 1992 meeting, the Standing Committee approved amendments to two rules, Rule 16(a)(1)(A) governing disclosure of statements by organizational defendants, and Rule 29(b), concerning delayed rulings on judgment of acquittal motions. Publication of these rules was delayed pending the move of the Rules Committee Support Office into its new offices this Fall.

III. PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

The Advisory Committee recommends that the following amendments be approved by the Standing Committee. The proposed amendments are attached.

A. **Rule 32. Sentence and Judgment.** The Committee has proposed that Rule 32 be amended in its entirety. As noted in the introductory paragraph of the Committee's Note accompanying the proposed amendment, the Committee intended to accomplish two primary objectives. First, the amended rule incorporates elements of the "Model Local Rule for Guideline Sentencing" which was proposed in 1987 by the Judicial Conference's Committee on Probation Administration. That model local rule focuses on the preparation of the presentence report as a method of identifying and narrowing the sentencing issues. The second objective was to reorganize the rule, which over the years had become a hodge podge of provisions. As rewritten, the rule should more closely approximate the sequential order of sentencing procedures. Much of the current rule remains in the amended version.

B. **Rule 40. Committment to Another District.** The Committee perceived a potential gap in a magistrate's authority to set conditions of release for a probationer or supervised releasee arrested in a district other that the district having jurisdiction. After reviewing Rules 32.1 (Revocation or Modification of Probation or Supervised Release), Rule 46 (Release From Custody), and Rule 40 (Committment to Another District), the Committee adopted a suggested change to Rule 40. The proposed amendment to Rule 40(d) should now make it clear that a magistrate considering the case of a probationer or supervised releasee under Rule 40(d) should have the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1).

IV. PROPOSED AMENDMENTS TO THE RULES OF EVIDENCE

The Committee considered proposed amendments to Federal Rules of Evidence 412 and 804 and recommends that the Standing Committee approve Federal Rule of Evidence 412 and publish it for public comment on an expedited basis.

A. **Rule 412. Victim's Past Sexual Behavior or Predisposition.** The Advisory Committee, at the suggestion of Judge Keeton, considered proposed amendments to Federal Rule of Evidence 412. Given Congress' high interest in the topic of violence against women, the Committee believed that it would be appropriate to propose changes to Rule 412

through the Rules Enabling Act procedures and publish the proposed amendment for public comment. The proposed change would extend the rule to all civil and criminal cases. Although the amendment retains the general rule that evidence of a person's sexual past is not admissible, it also recognizes several exceptions which generally mirror the current rule. Copies of the proposed amendment have been sent to both the Appellate and Civil Rules Committees.

B. Rule 804. Hearsay Exceptions; Declarant Unavailable. At its July 1992 meeting the Standing Committee considered the Advisory Committee's proposed changes to Federal Rule of Evidence 804. The Standing Committee referred the rule back to the Advisory Committee for further consideration. At its October meeting, the Committee reviewed the proposed amendments and the Standing Committee's suggestions and decided that in view of the pending formation of an Evidence Advisory Committee to defer any further action on Rule 804.

Attach.

[Rule 32 is deleted and replaced with the following]

Rule 32. Sentence and Judgment

(a) IN GENERAL; TIME FOR SENTENCING. When a presentence investigation and report is ordered pursuant to subdivision (b), sentence must be imposed by the end of 70 days from the finding of guilt unless the court either advances or continues the sentencing hearing for good cause.

(b) PRESENTENCE INVESTIGATION.

(1) *When Made*. Unless the court finds that there is sufficient information in the record to enable the meaningful exercise of sentencing authority under 18 U.S.C. 3553, and the court explains this finding on the record, the court shall direct the probation officer to make a presentence investigation and report to the court before the imposition of sentence.

(2) Presence of Counsel. Upon request, the defendant's counsel is entitled to be present at any interview of the defendant by the probation officer in the course of the presentence investigation.

(3) *Submission to the Court*. Except with the written consent of the defendant, the report must not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(4) *Report.* The report of the presentence investigation must contain--

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. 994(a), that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. 994(a)(2);

(D) information containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) any other information required by the court.

(5) *Disclosure and Objections*.

(A) Not less than 35 days before the sentencing hearing, unless this minimum period is waived by the defendant, the probation officer shall provide the defendant, the defendant's counsel and the attorney for the Government, with a copy of the report of the presentence investigation, including the information required by subdivision (b)(4) and any report and recommendation resulting from a study ordered by the court under 18 U.S.C. 3552(b), but not including any diagnostic opinions which, if

disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. In addition, the court may, by local rule or in individual cases, direct the probation officer, in making disclosure of the presentence report, to withhold the probation officer's recommendation, if any, as to sentence.

(B) Within 14 days after receiving the report of the presentence investigation, the parties shall communicate in writing to the probation officer and to each other, any objections either may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report of the presentence investigation. After receiving any such objections the probation officer may require the defendant, the defendant's counsel, and the attorney for the Government to meet with the probation officer to discuss unresolved factual and legal issues and may conduct a further

investigation and make appropriate revisions to the presentence report.

(C) Not later than 7 days before the sentencing hearing the probation officer shall submit the presentence report to the court together with an addendum setting forth any unresolved objections, the grounds for such objections, and the probation officer's comments concerning such objections. Any revisions made to the presentence report, and the addendum, shall be furnished by the probation officer at the same time to the defendant, the defendant's counsel and the attorney for the Government.

(D) Except for any objection made under subdivision (b)(5)(B) that has not been resolved, the report of the presentence investigation may be accepted by the court at the sentencing hearing as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before the imposition of sentence.

(c) SENTENCE

(1) *Sentencing Hearing*. At the sentencing hearing the court shall afford counsel for the defendant and the attorney for the Government an opportunity to comment on the probation officer's determination and on

other matters relating to the appropriate sentence; shall determine the unresolved objections to the presentence report, if any, and may, in the discretion of the court, permit the parties to introduce testimony or other evidence concerning such objections. The court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations must be appended to any copy of the presentence investigation report made available to the Bureau of Prisons.

(2) *Production of Statements at Sentencing Hearing*. Rule 26.2(a)-(d), (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of Sentence*. Before imposing sentence, the court shall --

(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation

report made available under subdivision (b)(5)(A) but if the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (b)(5)(A), the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon;

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(4) *In Camera Proceeding*. The court's summary, if any, made under subdivision (c)(3)(A) may be made to the parties in camera. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera the statements by the defendant, counsel for the defendant, or the

attorney for the Government under subdivision (c)(3)(B), (C) and (D).

(5) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. The courts has no duty to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file immediately a notice of appeal on behalf of the defendant.

(d) JUDGMENT.

(1) *In General.* A judgment of conviction must set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture must authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(e) PLEA WITHDRAWAL. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. 2255.

COMMITTEE NOTE

The amendments to Rule 32 are intended to accomplish two primary objectives. First, the amendments incorporate elements of a "Model Local Rule for Guideline Sentencing" which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule, and the accompanying report, were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of 1984. See Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T. Hutchinson & D. Yellen, Federal Sentencing Law and Practice, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. See U.S.S.G. § 6A1.2. Accordingly, the model rule focused on preparation of the presentence report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, in the process of effecting those amendments, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the reorganization represents an attempt to reflect an appropriate sequential order in the sentencing procedures.

Subdivision (a) includes several changes. First, instead of the general requirement that the sentence be imposed "without unnecessary delay," the rule now contains a 70-day provision. The purpose of the 70-day time period is to provide a sufficient overall window of time for the probation officer to complete and disclose to the parties the presentence report, for the submission of objections by the parties, for resolution of those objections, if possible, by the probation officer before the sentencing hearing, and for a report to the court concerning unresolved objections so that the court can prepare for the hearing in an orderly way. Under the rule, however, the sentencing judge may either shorten or extend that time for good cause.

The second change to subdivision (a) is that the remainder of the provision, which addressed the sentencing hearing, is now located in subdivision (c).

Subdivision (b) (formerly subdivision (c)) which addresses the presentence investigation, has been modified in several respects. First, subdivision (b)(2) is a new provision which provides that, on request, defense counsel is entitled to be present at any interview of the defendant conducted by the probation officer. Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. *See, e.g., United States v. Herrera-Figureroa*, 918 F.2d 1430, 1437 (9th Cir. 1990)(court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992)(court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant.

Subdivision (b)(5), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's

presentence report. Subdivision (b)(5)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(5)(A). Under that new provision (formerly subdivision (c)(3)(A)), the court now has the discretion (in an individual case or in accordance with a local rule) to decide whether to direct the probation officer to disclose any final recommendation concerning the sentence. But the prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5)(A).

New subdivisions (b)(5)(B), (C), and (D) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with a written list of objections to the report within 14 days of receiving the report; (2) permitting the probation officer to schedule compulsory conferences, conduct an additional investigation, and to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 7 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as its findings of fact, except for the parties' unresolved objections.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, *supra*, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free at the sentencing hearing to comment on the presentence report, and in the discretion of the court, to introduce evidence concerning their objections to the report.

Subdivision (c) addresses the imposition of sentence and makes no changes in current practice. The provision consists largely of material formerly located in subdivision (a). Language formerly in (a)(1) referring to the court's disclosure to the parties of the probation officer's

determination of the sentencing classifications and sentencing guideline range is now located in subdivisions (b)(5) and (c)(1). Likewise, the brief reference in former (a)(1) to the ability of the parties to comment on the probation officer's determination of sentencing classifications and sentencing guideline range is now located in (c)(1) and (c)(3). The provision for disclosure of a witness' statements, which was recently proposed as an amendment to Rule 32 as new subdivision (e), is now located in subdivision (c)(2).

Subdivision (d), dealing with entry of the court's judgment, is former subdivision (b). Subdivision (e), which addresses the topic of withdrawing pleas, was formerly subdivision (d). Both provisions remain the same except for minor stylistic changes.

The Committee considered, but rejected, a provision which would have permitted victim allocution at sentencing. Although the Committee was sensitive to the interest of some victims in the sentence to be imposed, it also recognized a number of difficulties which the Committee ultimately concluded outweighed any value to the victim in personally addressing the court. First, under guideline sentencing (which takes victim impact into account), the court has very limited sentencing discretion once the applicable guideline range has been determined, and the guideline range is usually below the maximum sentence allowed by statute. In most cases, therefore, the views of the victim would have little or no impact upon the sentence thereby producing a likelihood of victim frustration rather than victim satisfaction. Additionally, if the victim's allocution persuaded the court to consider a possible departure from the guideline sentencing range, due process might require notice and an opportunity to contest that result under *Burns v. United States*, ____ U.S. ____, 111 S.Ct. 2182 (1991). This could substantially complicate and delay the sentencing hearing. There is also a problem in the federal system in identifying victims who would have the right to allocution. While a single victim of a violent crime is easily identified, federal criminal law covers a broad range of violent as well as non-violent conduct which often results in numerous victims. In such cases, it simply would not be feasible to extend the right of allocution to all of the victims. Finally, the Committee also took into account existing law and procedure which keeps victims informed of the progress of the case, *see, e.g.*, 42 U.S.C. § 10601, et seq. (enumerated "victims' rights include, inter alia, the right to be notified of court proceedings, the right to be present at all public court proceedings, and the right to confer with the attorney for the Government) court

proceedings permits the victim to be present at all stages of the judicial proceeding including sentencing, and provides an opportunity for direct input in the preparation of the presentence report. See subdivision (b)(4)(D).

Rule 40. Committment to Another District

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(d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

* * * * *

COMMITTEE NOTE

The amendment to subdivision (d) is intended to clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction. As written, there appeared to be a gap in Rule 40, especially under (d)(1) where the alleged violation occurs in a jurisdiction other than the district having jurisdiction.

A number of rules contain references to pretrial, trial, and post-trial release or detention of defendants, probationers and supervised releasees. Rule 46, for example, addresses the topic of release from custody. Although Rule 46(c) addresses custody pending sentencing and notice of appeal, the rule makes no explicit provision for detaining or releasing probationers or supervised releasees who are later arrested for violating terms of their probation or release. Rule 32.1 provides guidance on proceedings involving revocation of probation or supervised release. In particular, Rule 32.1(1) recognizes that when a person is held in custody on the ground that the person violated a condition of probation or supervised release, the judge or United States magistrate judge may release the person under Rule 46(c), pending the revocation proceeding. But no other explicit reference is made in Rule 32.1 to the authority of a judge or magistrate judge to determine conditions of release for a probationer or supervised releasee who is arrested in a district other than the district having jurisdiction.

The amendment recognizes that a judge or magistrate judge considering the case of a probationer or supervised releasee under Rule 40(d) has the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1). Thus, regardless of the ultimate disposition of an arrested probationer or supervised releasee under Rule 40(d), a judge or magistrate judge acting under that rule may rely upon Rule 46(c) in determining whether custody should be continued and if not, what conditions, if any, should be placed upon the person.

FEDERAL RULES OF EVIDENCE

Rule 412 is deleted and replaced with the following:]

Rule 412. Victim's Past Sexual Behavior or Predisposition

(a) Evidence of past sexual behavior or predisposition of an alleged victim of sexual misconduct is not admissible in any civil or criminal proceeding except as provided in subdivision (b).

(b) Evidence of the past sexual behavior or predisposition of an alleged victim of sexual misconduct may be admitted under the following circumstances:

(1) evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged if offered to prove that another person was the source of semen or injury;

(2) evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged if offered to prove consent;

(3) evidence of specific instances of sexual behavior if offered under circumstances in which exclusion would violate the constitutional rights of a defendant in a criminal case or in a civil case would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense; or

(4) evidence of reputation or opinion evidence in a civil case in which exclusion would deprive the trier

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of fact of evidence which is essential to a fair and accurate determination of a claim or defense.

(c) Evidence covered by this rule may not be admitted unless the party offering it files a motion under seal, not less than 15 days prior to trial or at such other time as the court may direct, seeking leave to offer the evidence at trial. The motion must describe with particularity the evidence and the purposes for which it is offered. The court shall permit any other party as well as the victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. The court may permit a motion to be made under seal during trial for good cause shown. The motion and the record of any in camera proceeding must remain under seal during the course of all further proceedings both in the trial and appellate courts.

COMMITTEE NOTE

The changes to Rule 412 are intended to diminish some of the confusion engendered by the rule in its current form and expand the protection afforded to all persons who claim to be victims of sexual misconduct. The expanded rule would exclude evidence of an alleged victim's sexual history in civil as well as criminal cases except in circumstances in which the probative value of the evidence is sufficiently great to outweigh the invasion of privacy and potential embarrassment which always is associated with public exposure of intimate details of sexual history.

FEDERAL RULES OF EVIDENCE

The amendment eliminates three parts of existing subdivision (a): the confusing introductory phrase, "[n]otwithstanding any other provision of law;" the limitation on the rule to "a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code;" and the absolute statement that "reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible." The Committee believes that these eliminations will promote clarity without reducing unnecessarily the protection afforded to alleged victims.

The introductory phrase in subdivision (a) was unclear and has been deleted because it contained no explicit reference to the other provisions of law that were intended to be overridden. The legislative history of the provision provided little guidance as to the purpose of the phrase. In eliminating it, the Advisory Committee intends that Rule 412 will apply and govern in any case, civil or criminal, in which it is alleged that a person was the victim of sexual misconduct and a litigant offers evidence concerning the past sexual behavior or predisposition of the alleged victim. Rule 412 applies irrespective of whether the evidence concerning the alleged victim is ostensibly offered as substantive evidence or for impeachment purposes. Thus, evidence, which might otherwise be admissible under Rules 402, 404 (b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires.

The reason for extending the rule to all criminal cases is obvious. If a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as a background, that the defendant sexually assaulted the victim, the rule in its current form is inapplicable. The need for protection of the victim is as great in the kidnapping case as it would be in a prosecution for sexual assault. There is a strong social policy in protecting the victim's privacy and to encourage victims to come forward to report criminal acts, and that policy is not confined to cases that involve a charge of sexual assault. Although a court might well exclude sexual history evidence under Rule 403 in a kidnapping or similar case, the Advisory Committee believes that Rule 412 should be extended so that it explicitly covers all criminal cases in which a claim is made that a person is the victim of sexual misconduct.

The reason for extending Rule 412 to civil cases is equally obvious. A person's privacy interest does not

disappear simply because litigation involves a claim of damages or injunctive relief rather than a criminal prosecution.. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, in any civil case in which a person claims to be the victim of sexual misconduct, evidence of the person's past sexual behavior or predisposition will be excluded except in circumstances in which the evidence has high probative value as recognized by amended Rule 412.

As it currently stands, subdivision (b) excludes evidence of a victim's past sexual behavior in the limited category of criminal cases to which the rule applies unless the Constitution requires admission, the evidence relates to sexual behavior with persons other than the accused and is offered to show the source of semen or injury, or the evidence relates to sexual behavior with the accused and is offered to show consent. As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. The amended rule provides for the first time protection in civil cases and sets forth two categories of evidence that are admissible in civil but not criminal cases.

It should be noted that the amended rule provides that certain categories of evidence may be admitted, but does not require admission. In some cases, evidence offered under one of the subdivisions may be irrelevant and therefore excluded under Rule 402.

Under subdivision (b)(1) the exception for evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged is admissible if it is offered to prove that another person was the source of semen or injury. Although the language of the amended rule is slightly different from the language found in existing (b)(2)(A), the difference is explicable by the extension of the rule to civil cases. Evidence offered for the specific purpose identified in this subdivision is likely to have high probative value, and the probative value is likely to be the same in civil and criminal cases where the evidence is relevant.

The exception in subdivision (b)(2) for evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged is admissible if offered to

prove consent. Although the language of the amended rule is slightly different from the language found in existing (b)(2)(B), the difference is explicable by the extension of the rule to civil cases. Evidence offered for the specific purpose identified in the subdivision is likely to have high probative value, and the probative value is likely to be the same in civil and criminal cases where the evidence is relevant.

Under (b)(3) evidence may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. Recognition of this basic principle is found in existing subdivision (b)(1), and is carried forward in subdivision (b)(3) of the amended rule. The treatment of criminal defendants remains unchanged. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (defendant in rape case had right to inquire into alleged victim's cohabitation with another man to show bias).

It is not nearly as clear in civil cases as it is in criminal cases to what extent the Constitution provides protection to civil litigants against exclusion of evidence that arguably has sufficient probative value that exclusion would undermine confidence in the accuracy of a judgment against the person whose evidence is excluded. The Committee concluded that exclusion of evidence that is essential to a fair determination of a claim or defense is undesirable and thus provided in subdivision (b)(3) of the amended rule that evidence otherwise excluded by the rule would be admissible when exclusion "would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense." This amendment provides a civil litigant with protection akin to that provided to a criminal defendant, but recognizes that some specific constitutional provisions may require admission of evidence in a criminal case that would not be admitted under the amended Rule 412.

Subdivision (b)(4) recognizes a limited class of civil cases in which exclusion of evidence of reputation or opinion would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense. An example is a diversity case in which a plaintiff alleges that a news story was defamatory and seeks damages for injury to reputation. It would be difficult in

such a case to deny the defendant the opportunity to show that the plaintiff suffered no reputational injury.

Amended subdivision (c) is more concise and understandable than the existing subdivision. The requirement of a motion 15 days before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. The amended rule requires that any motion be filed under seal and that it must remain under seal during the course of trial and appellate proceedings. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible.

The amended rule provides that the alleged victim and any party may be heard with respect to any motion, and that the court will rule on admissibility and the form in which any evidence will be received. Unlike the current subdivision (c)(3), the amended rule does not set forth a balancing test. The Advisory Committee intends that the court will proceed to make rulings under Rule 412 as it does under other evidence rules.

The single 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 schedules 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.