PACIFIC JUDICIAL COUNCIL
2017 BIENNIAL CONFERENCE

Evidence Presentation by
Judge John C. Coughenour

September 26, 2017

2:45 pm–4:00 pm: Special Rules for Sex Offenses (Rules 412-415); Child and Other Special Witnesses

Special Rules for Sex Offenses

Four evidence rules apply to sex offenses: 412, 413, 414, and 415.

Rule 412: Sex-Offense Cases – The Victim's Sexual Behavior
This rule prohibits evidence of sexual conduct to show (1) that the victim engaged in other sexual behavior or (2) the victim's sexual predisposition. Fed. R. Evid. 412(a). The general policy behind the rule is victim protection and the desire to encourage victims to come forward. *See* Fed. R. Evid. 412, Advisory Committee Notes, 1994 Amendments.

Sexual conduct is defined broadly under this rule. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991) (use of contraceptives inadmissible because use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of illegitimate child inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. WRIGHT AND K. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, § 5384 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

However, there are exceptions. *See* Fed. R. Evid. 412(b). In civil cases, evidence of the victim's sexual behavior or sexual predisposition may be admitted if its probative value substantially outweighs the danger of harm to any victim or of unfair prejudice to any party. Fed. R. Evid. 412(b)(2). The burden is on the proponent of the evidence to make this showing. *See* Fed. R. Evid. 412, Advisory Committee Notes, 1994 Amendments. This is distinct from the Rule 403 balancing test, where the burden is on the party seeking exclusion to show that the prejudice substantially outweighs the probative value. In addition, under Rule 412, the court considers third-party prejudice, *i.e.*, the potential prejudice to the victim, not simply the parties. *See* Fed. R. Evid. 412(b)(2). Evidence of a victim's reputation may also be admitted if the victim first places it in controversy. *Id.*

In criminal cases, there are three categories of evidence that may be presented. First, specific instances of the victim's sexual behavior can be presented to show that someone other than the defendant was the source of physical evidence. Fed. R. Evid. 412(b)(1)(A). Particularly where the prosecution asserts that the physical evidence originated with the accused, he or she must be afforded the opportunity to prove that another person was responsible. *See United States v. Begay*, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for this purpose may still be excluded if it does not satisfy Rules 401 or 403. *See, e.g., United States v. Azure*, 845 F.2d 1503, 1505-06 (8th Cir. 1988) (where 10-year-old victim's injuries indicated recent use of force, court excluded evidence of consensual sexual activities with witness who testified outside the presence of the jury that he never hurt victim and failed to establish recent activities).

Second, specific instances of the victim's sexual history with the defendant may be admitted if offered by the defendant to show consent or if offered by the prosecutor. Fed. R. Evid.

412(b)(1)(B). This includes "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." Fed. R. Evid. 412, Advisory Committee Notes, 1994 Amendments. If there is a dispute whether the previous sexual activity occurred or was consensual, the court should determine its admissibility by performing a conditional relevance inquiry under Rule 104. *See* Fed. R. Evid. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.").

The third category of exceptions in criminal cases is a catchall provision stating that such evidence must be admitted where required by due process. Fed. R. Evid. 412(b)(1)(C); *see e.g.*, *Olden v. Kentucky*, 488 U.S. 227 (1988) (defendant in rape case had right to inquire into victim's cohabitation with another man to show bias).

These exceptions balance the victim's rights and the defendant's rights by permitting evidence of sexual conduct under only limited and well-reasoned circumstances. *See* Fed. R. Evid. 412, Advisory Committee Notes, 1994 Amendments.

Rules 413, 414, and 415: Similar Crimes in Sexual Assault and Child Molestation Cases
Rule 413 pertains to criminal cases involving sexual assault. The rule permits presentation of evidence that the defendant committed any other sexual assault, to be "considered on any matter to which it is relevant." Similarly, Rule 414, which pertains to criminal cases involving child molestation, permits presentation of evidence that the defendant committed any other child molestation, again to be "considered on any matter to which it is relevant." Rule 415 establishes that Rules 413 and 414 apply in civil cases. *See* Fed. R. Evid 415(a).

As noted above, these rules allow the jury to consider evidence of similar acts on "any matter to which it is relevant." Fed. R. Evid 413(a); Fed. R. Evid 414(a); *see also* Fed. R. Evid 415(a) ("The evidence may be considered as provided in Rules 413 and 414."). This truly means <u>any</u> matter: the evidence can even be admitted to show propensity to commit these offenses. *See, e.g.*, *United States v. May*, 260 F.3d 1018, 1025-26 (9th Cir. 2001) ("[T]here is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414."). However, the evidence is still subject to the other Rules of Evidence, such as Rule 401 and 403. Fed. R. Evid. 413(c); Fed. R. Evid. 414(c); Fed. R. Evid. 415(c); *see also May*, 260 F.3d at 1025-26 ("As long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded."); *see, e.g.*, *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 156-57 (3d Cir. 2002) (unlike present act, prior act was not intentional and was thus unduly prejudicial).

The policies underlying these rules include the unusual disposition of such offenders, as well as problems with credibility and corroboration in these types of cases. *Cf.* Louis F. Meizlish, "Evidence," 59 WAYNE L. REV. 1033, 1098 (2014).

Rules 413(d) and 414(d) define what constitutes "sexual assault" and "child molestation." These definitions include the relevant state law in a particular case. Fed. R. Evid. 413(d); Fed. R. Evid. 414(d).

If evidence is to be presented under Rule 413, 414, or 415, it must be disclosed to the opposing party at least 15 days before trial. Fed. R. Evid. 413(b); Fed. R. Evid. 414(b); Fed. R. Evid. 415(b). Later disclosure will be permitted only if good cause is shown. *Id.*

Child and Other Special Witnesses

"Special witnesses"—such as the young, elderly, and impaired—present special challenges for parties and judges alike. There are two main issues that arise: (1) the determination of competency and (2) the use of leading questions.

Competency

Rule 601 addresses witness competency. It states: "Every person is competent to be a witness unless these rules provide otherwise."[1] In other words, age and mental capacity do not *per se* render a witness incompetent to testify. Rather, a capacity inquiry will be made on a case-by-case basis.

Federal courts have permitted attacks on many aspects of witness capacity. *See, e.g.*, *Ramseyer v. General Motors Corp.*, 417 F.2d 859, 863 (8th Cir. 1969) (mental illness); *United States v. Hoffman*, 415 F.2d 14, 20-21 (7th Cir. 1969) (lack of memory); *United States v. Pryce*, 938 F.2d 1343, 1346 (D.C. Cir. 1991) (physical deficiencies); *Washington v. Schriver*, 255 F.3d 45, 57 (2d Cir. 2001) (youth); *United States v. Odom*, 736 F.2d 104, 114 (4th Cir. 1984) (old age); *Alcala v. Woodford*, 334 F.3d 862, 877 (9th Cir. 2003) (exposure to hypnotism); *Roberts v. Hollocher*, 664 F.2d 200, 203 (8th Cir. 1981) (use of drugs); *Rheaume v. Patterson*, 289 F.2d 611, 614 (2d Cir. 1961) (use of alcohol). However, such capacity evidence remains subject to review under Rule 403 and will not be admissible if its potential for unfair prejudice substantially outweighs its probative value.

Lack of capacity may be shown by testimony, presentation of physical evidence, or an in-court demonstration testing the witness's ability. *See* 3A WIGMORE, EVIDENCE, Chadbourn rev. 1970, §§ 991, 993. Extrinsic evidence concerning witness capacity is generally considered non-collateral and admissible. *Sinclair v. Turner*, 447 F.2d 1158, 1162-63 (10th Cir. 1971); *Behler v. Hanlon*, 199 F.R.D. 553, 558 (D. Md. 2001). The court may admit capacity evidence regarding defects that existed at the time of testimony or at the time the witness perceived the facts underlying the testimony. *See, e.g., United States v. Banks*, 250 F.2d 627, 630-31 (7th Cir. 1975); *United States v. Fowler*, 465 F.2d 664, 665-68 (D.C. Cir. 1972).

Use of Leading Questions

Under Rule 611, leading questions are not allowed on direct examination "except as necessary to develop the witness's testimony." Special witnesses fall under this category: for example, leading questions may be used when questioning a young, elderly, or impaired witness who becomes confused or has difficulty with narrowly worded questions. *See, e.g.*, *United States v. Callahan*, 801 F.3d 606, 623 (6th Cir. 2015).

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[1] The rule continues: "But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision." This provision addresses the concern that so-called "Dead Man's Statutes" could otherwise become inapplicable in the federal courts. *See* Notes of Committee on the Judiciary, House Report No. 93-650.