

## Alabama Rules of Evidence

### Article IV. Relevancy and Its Limits

#### Rule 412.

#### **Admissibility of evidence relating to complaining witness in prosecution for criminal sexual conduct.**

(a) *Evidence Generally Inadmissible.* The following evidence is not admissible in any prosecution for criminal sexual conduct except as provided in sections (b) and (c):

(1) evidence offered to prove that any complaining witness engaged in other sexual behavior.

(2) evidence offered to prove any complaining witness's sexual predisposition.

(b) *Exceptions.* The following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of sexual behavior by the complaining witness offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the complaining witness with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(3) evidence the exclusion of which would violate the constitutional rights of the defendant.

(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 a reasonable time before trial unless the court, for good cause, sets a different time; and

(C) serve the motion on all parties.

(2) NOTICE. Regardless of who brings the motion, the prosecution shall notify the complaining witness, or, when appropriate, the complaining witness's guardian or representative, of the motion.

(3) HEARING. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the parties a right to attend and be heard. If at the conclusion of the hearing the court finds that any of the evidence introduced at the hearing is admissible under section (b) of this rule, the court shall by order state what evidence may be introduced and in what manner the evidence may be introduced. All in camera proceedings shall be included in their entirety in the transcript and record of the trial and case;

(4) The party may then introduce evidence pursuant to the order of the court.

(d) Definitions. As used in this rule, unless the context clearly indicates otherwise, the following words and phrases shall have the following respective meanings:

(1) COMPLAINING WITNESS. Any person alleged to be the victim of the crime charged, the prosecution of which is subject to the provisions of this rule.

(2) CRIMINAL SEXUAL CONDUCT. Sexual activity, including, but not limited to, rape; sodomy; sexual misconduct; sexual abuse; and assault with intent to commit, attempt to commit, solicitation to commit, or conspiracy to commit criminal sexual conduct.

[Amended 8-15-2013, eff 10-1-2013.]

### **Advisory Committee's Notes**

Of those states that have adopted rules of evidence, only Mississippi has adopted verbatim Federal Rule of Evidence 412. Each of the others has either drafted its own corresponding rule or simply adopted a preexisting "rape shield" statute as its Rule 412. See G. Joseph & S. Saltzburg, *Evidence in America* § 22.2 (1987). The drafters of Ala.R.Evid. 412 have chosen the latter course. Alabama's preexisting statute, applied in prosecutions for those crimes named in section (b), and providing for the general exclusion of evidence regarding the past sexual behavior of a victim of criminal sexual conduct, has been rewritten, with slight modifications, as Rule 412. Compare Ala. Code 1975, § 12-21-203 (superseded by this rule). This rule varies from the preexisting statute primarily in two regards. First, Rule 412(a)(3) expands the definition of "evidence relating to past sexual behavior" to include opinion evidence regarding the victim's character. This change makes Rule 412 consistent with Rule 405(a), which provides that opinion may be offered as an alternative to reputation when proving character. The second change made in converting the preexisting statute into a rule is to add language in Rule 412(d)(1) providing that the defense, in notifying the court that it intends to introduce evidence of past sexual behavior that directly involved the accused, may give the court the required notice at any time before the defense seeks to introduce it.

Rule 412 is intended to effect no change in that line of well developed judicial authority interpreting Alabama's preexisting "rape shield" statute. It continues the general exclusion of all evidence concerning the victim's past sexual behavior. Such evidence, in whatever form, will become admissible only if the court determines that it relates to behavior that directly involved the participation of the accused. See *McGilberry v. State*, 516 So.2d 907 (Ala.Crim.App.1987); *Smelcher v. State*, 520 So.2d 229 (Ala.Crim.App.1987); *Jackson v. State*, 375 So.2d 1271

(Ala.Crim.App.), cert. denied, 375 So.2d 1274 (Ala.1979) (holding that the prosecutrix could not be cross-examined as to whether she was taking birth control pills at the time of the assault). See also C. Gamble, *McElroy's Alabama Evidence* § 32.01 (4th ed. 1991) (sexual behavior of the victim).

While the term "in camera" is taken directly from Alabama's rape shield statute, and therefore is not specifically defined in Rule 412, the committee assumes the term will carry its common law meaning, and the committee intends that the trial judge will have the discretion to decide the method by which the defendant's offer of evidence is made. See Rule 412(d)(1).

### **Advisory Committee's Notes to Amendment to Rule 412 Effective October 1, 2013**

Sections (a) and (b) of amended Rule 412 are taken directly from sections (a) and (b) of Federal Rule of Evidence 412 -- omitting only language that references the application of the federal rule to civil cases. Unlike its federal counterpart, Alabama's Rule 412 applies only in criminal prosecutions for crimes involving "sexual conduct," and it affords protection to only the "complaining witness." Accordingly, some changes in wording were required to recognize the more limited scope of the Alabama rule. For example, in Alabama's Rule 412 the phrase "complaining witness" has been substituted for the phrase "alleged victim" in the federal rule, and the phrase "prosecution for criminal sexual conduct" has been substituted for the phrase "civil or criminal proceeding involving alleged sexual misconduct."

Section (a). Evidence Generally Inadmissible. As amended, Rule 412(a) bars evidence offered to prove the complaining witness engaged in "other sexual behavior" or to prove the complaining witness's "sexual predisposition." These terms are taken verbatim from Federal Rule 412(a)(1) and (2) and include evidence the former Alabama rule defined as "Evidence Relating to Past Sexual Behavior." See 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 32.01 (6th ed. 2009) (Rule 412 prohibits evidence of "sexual acts, marital history, mode of dress, general reputation for a pertinent trait, and opinion of the victim's character for a pertinent trait."). Like the former rule, amended Rule 412 continues the general exclusion of all such evidence, in whatever form, unless the requirements for a section (b) exception are satisfied. This amendment is not intended to effect a change in the well-developed line of judicial authority admitting evidence that a victim made prior false allegations of sexual misconduct. See *Ex parte Loyd*, 580 So. 2d 1374, 1375 (Ala. 1991) (evidence that complaining witness made prior false allegations of sexual misconduct, or threatened to make such allegations, falls outside scope of Alabama's rape-shield statute).

Under the amended rule, "other sexual behavior" connotes all activities that involve actual physical conduct, i.e., sexual intercourse or sexual contact, or that imply sexual intercourse or sexual contact. See, e.g., *Jackson v. State*, 375 So. 2d 1271, 1273 (Ala. Crim. App. 1979) (evidence that complaining witness was taking birth-control pills at the time of the alleged assault inadmissible); *United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991) (evidence of use of contraceptives inadmissible because such use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (evidence of birth of an illegitimate child inadmissible); and *State v. Carmichael*, 240 Kan. 149, 156-57, 727 P.2d 918, 925 (1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. See 23 C. Wright & K.

Graham, Jr., *Federal Practice and Procedure* § 5384 at p. 548 (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."). The word "other" is used to suggest flexibility in admitting evidence "intrinsic" to the alleged criminal sexual misconduct.

Amended Rule 412 also excludes evidence relating to a complaining witness that is offered to prove a "sexual predisposition." This is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the fact-finder. For example, evidence relating to the complaining witness's mode of dress, speech, or lifestyle will not be admissible unless constitutionally required pursuant to subsection (b)(3). The exclusion of evidence of sexual predisposition is not new to Alabama. Compare Ala. Code 1975, § 12-21-203(a)(3) (superseded by the adoption of Rule 412) (excluding evidence of marital history and mode of dress). See *McGilberry v. State*, 516 So. 2d 907, 913 (Ala. Crim. App. 1987) (affirming trial court's exclusion of evidence concerning victim's "interest in and propensity for seeking affection from older men" under Alabama's statutory rape- shield law).

Section (b). Exceptions. Section (b) sets forth three exceptions to the general rule of exclusion. These exceptions are identical to the three exceptions found in subsections (A), (B), and (C) of Federal Rule 412(b)(1). Evidence may be admitted pursuant to one of the three exceptions provided the evidence also satisfies other requirements for admissibility specified in the Alabama Rules of Evidence, including Rule 403. It should be noted that the exceptions contained in subsections (b)(1) and (b)(2) require proof relating to specific instances of sexual behavior. This requirement is in recognition of the limited probative value and dubious reliability of evidence of the complaining witness's reputation or of evidence in the form of an opinion.

Under subsection (b)(1), evidence of specific instances of the complaining witness's sexual behavior with persons other than the accused may be admissible if it is offered to prove that another person was the source of semen, injury, or other physical evidence. When 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. This exception is a codification of the so-called "Scottsboro exception" and the Alabama Supreme Court's decision in *Ex parte Dennis*, 730 So. 2d 138, 142 (Ala. 1999) ("[T]he 'Scottsboro exception' is not only wise, but is constitutionally required in some cases in which the prosecution offers evidence to show that a physical injury or condition of the victim indicates that the defendant committed the offense of rape.").

Under the exception in subsection (b)(2), evidence of specific instances of sexual behavior involving the complaining witness and the accused is admissible if offered by the accused to prove consent or if offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of 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 accused. When such evidence is offered by the accused, this exception is consistent with the sole exception contained in the former rule and the Alabama statute the former rule superseded. See Ala. Code 1975, § 12-21-203 (superseded by the adoption of Rule 412). However, subsection (b)(2) also incorporates language from the federal rule, which provides that such evidence may also be offered "by the prosecution." For example, in a prosecution for

child sexual abuse, evidence of uncharged sexual activity between the accused and the complaining witness offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. If the prosecution seeks to offer evidence under this exception, it must comply with all procedural requirements set forth in section (c). Evidence relating to the complaining witness's alleged sexual predisposition is not admissible pursuant to this exception.

The third exception, set out in subsection (b)(3), recognizes that evidence of a complaining witness's other sexual activity or sexual predisposition may not be excluded when such exclusion would be in violation of the accused's constitutional rights. See *Ex parte Dennis*, 730 So. 2d 138, 141 (Ala. 1999) ("[W]hen Rule 412 is applied to preclude the admission of particular exculpatory evidence, the constitutionality of its application is to be determined on a case-by-case basis."); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 32.01 (6th ed. 2009) ("Nothing ... prevents the courts from concluding that the apparent absolutism of the rape shield principle gives way to constitutionally mandated rights."). The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by a rule of evidence under the Confrontation Clause. See, e.g., *Olden v. Kentucky*, 487 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias). Cf. *Ex parte D.H.L.*, 806 So. 2d 1190, 1193-94 (Ala. 2001) (prosecution may open the door to otherwise inadmissible evidence of the complaining witness's sexual activity with others to rebut and impeach testimony to the contrary). Arguably, it is not necessary to include such an exception because Rule 412 is of course subordinate to the Constitution.

Section (c). Procedure to Determine Admissibility. Section (c) sets forth the procedures that must be followed in determining whether evidence may be introduced pursuant to one of the section (b) exceptions. Although the procedures track those contained in the former Alabama rule, some differences should be noted.

First, subsection (c)(1)(A) requires that a motion be filed that "specifically describes the evidence and states the purpose for which it is to be offered." This language is more specific than subsection (d)(1) of the former rule, which stated only that the "defense shall notify the court of [its] intent" to introduce evidence under rule.

Second, unlike subsection (d)(1) of the former Alabama rule, which stated that the court could be notified "[a]t any time before the defense shall seek to introduce evidence," subsection (c)(1)(B) requires the motion to be filed "a reasonable time before trial" but permits the motion to be filed later upon a showing of "good cause." The requirement that the motion be filed pretrial is intended to provide for a more orderly review of the issues presented. Nonetheless, the rule also recognizes that in some instances circumstances justifying an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

Third, subsection (c)(1)(D) requires the prosecution to notify the complaining witness that a motion to present evidence pursuant to the rule has been filed. This requirement is new to Alabama law. Although, in a technical sense, the complaining witness would not be considered a party to criminal proceedings, providing such notice represents sound policy in light of the purposes underlying Rule 412. It should be noted that the amended rule, unlike its federal counterpart, requires the prosecution — not the defense — to provide notice that a

motion has been filed. Cf. Fed. R. Evid. 412(c)(1)(B) (providing that the party filing the motion and intending to offer evidence under a Rule 412 exception must notify the alleged victim).

Finally, subsection (c)(2) does not change the requirement in the former rule that the court conduct an in camera hearing on the motion. This requirement is intended to ensure that the privacy of the complaining witness is preserved. It should be noted that the amended rule does not provide that the complaining witness has a right to attend and be heard at the in camera admissibility hearing. Cf. Fed. R. Evid. 412(c)(2) (affording "victim and parties" a right to attend and be heard).

Section (d). Definitions. The definition for "complaining witness" in subsection (d)(1) is unchanged from the definition in the former rule. The definition for "criminal sexual conduct" in subsection (d)(2) is lengthier than the definition provided in the former rule; however, there is no difference in substance. The definition for "criminal sexual conduct" in subsection (d)(2) simply updates and combines language set out in two different subsections of the former rule. The definition for "evidence relating to past sexual behavior" found in the former rule has been deleted as unnecessary because conduct associated with the phrase "past sexual behavior" is included within the terms "other sexual behavior" and "sexual predisposition" set out in subsections (a)(1) and (a)(2) of the amended rule.

**Note from reporter of decisions:** The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_ So. 3d.