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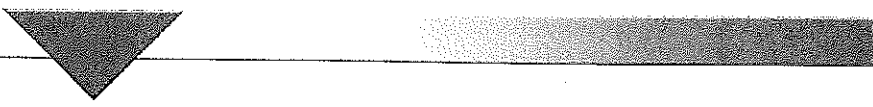
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Criminal Prosecution *And* Civil Remedies For Victims of Sexual Offenses: Amendment of The Rape Shield Law

By Carol E. Jordan, Elizabeth S. Hughes,
and Mary Jo Gleason

In 1999, a Governor's Task Force on Sexual Assault was appointed to study the Commonwealth's response to crimes of sexual violence. Data released in March of that year showed that one in nine, or 175,000, women in Kentucky will have the experience of forcible rape, a narrow definition for sexual offenses that does not include sexual harassment and other forms of sexual violence. After months of testimony from judges, prosecutors, defense attorneys, advocates, therapists, law enforcement, and survivors of sexual assault, the Task Force included among its final recommendations that the Governor's Office of Child Abuse and Domestic Violence Services propose to the Kentucky Supreme Court an amendment to the Kentucky Rules of Evidence expanding the Rape Shield Law to civil cases.

In 2003, the Kentucky Supreme Court adopted the amended KRE 412, effectively making the language of KRE 412 consistent with the analogous Federal Rule of Evidence 412. Now, as in federal court, the provisions of the Rape Shield Law apply in both criminal *and* civil cases to govern when and how evidence of a victim's alleged sexual behavior or sexual predisposition may be introduced. This article describes the intent of the original Rape Shield Law

and the implications of its amended version in both civil and criminal cases.

The Kentucky Rape Shield Law

The defense of a sex crime case frequently centers on the possibility of consent by the victim, as the *lack* of consent "is an element of every of-

Now, as in federal court, the provisions of the Rape Shield Law apply in both criminal *and* civil cases to govern when and how evidence of a victim's alleged sexual behavior or sexual predisposition may be introduced.

fense defined in [KRS Chapter 510]."²¹ Prior to the enactment in 1976 of KRS 510.145, commonly known as the Rape Shield Law, "evidence of the victim's prior sexual conduct was admissible to support the proposition that if she consented to have relations with one or more other persons then she consented to the

relations with the defendant."²² The Rape Shield Law was enacted in order "to prevent the victim in a sexually related crime from becoming the defendant at a trial."²³ With the adoption of the Kentucky Rules of Evidence in 1992, KRS 510.145 was repealed and KRE 412 adopted as the revised Rape Shield Law applicable in Kentucky.

Since the enactment of the Kentucky Rules of Evidence and through July 1, 2003, KRE 412 applied to exclude evidence only in criminal prosecutions and then only for sexual offenses under KRS Chapter 510, for attempt or conspiracy to commit such sexual offenses, or for incest under KRS 530.020. In such criminal cases, former KRE 412(a) rendered inadmissible "reputation or opinion evidence related to the sexual behavior of an alleged victim." This prohibition essentially meant no witness could take the stand in a rape case and, in an effort to establish that the victim consented to sexual intercourse with the defendant, testify that the victim had a reputation for morally loose conduct.

In contrast, evidence of *particular acts* of sexual behavior by the victim could be admissible in criminal cases if it fell within one of three (3) exceptions defined by former KRE 412(b):

- (1) Evidence of past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury;
- (2) Evidence of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to

which an offense is alleged; or

- (3) Any other evidence directly pertaining to the offense charged.

General Description of Amended KRE 412

Amended KRE 412 begins with the general proposition that certain evidence is not admissible in any type of court proceeding. Specifically, KRE 412(a) provides as follows:

- (a) **Evidence generally inadmissible.** The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other⁴ sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

There are, of course, exceptions to this general rule of exclusion. For criminal cases, the exceptions are similar to those which previously existed. Specifically, as in former KRE 412, the amended version defines a procedure for obtaining admission of evidence falling within the exceptions of KRE 412(b). These procedures are described in KRE 412(c), which provides:

- (c) **Procedure to determine admissibility.**

- (1) A party intending to offer evidence under subdivision (b) must:

- (A) File a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

- (B) Serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

- (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

While these procedures are identical to those of the comparable federal rule, they differ significantly from those of the former KRS 412(c). Important changes include:

- While the rule previously required simply a written motion accompanied by a "written offer of proof," amended KRE 412(c)(1)(A) requires a written motion "specifically describing the evidence *and stating the purpose* for which it is offered...."
- Amended KRE 412(c)(1)(A) allows a court broader discretion in permitting the late filing of KRE 412 motions. Under the amended version the court may permit late

filing in any circumstance where the offering party shows "good cause."

- Amended KRE 412(c)(1)(B) contains a requirement, wholly new under Kentucky law, that not only must the parties to the action be served with a copy of the motion, but the *victim* of sexual misconduct (or the victim's guardian) must also be notified.
- Amended KRE 412(c)(2) provides that hearings on a KRE 412 motion will be "in camera" and that motions, related papers and the record of the hearing itself "*must*" be sealed.
- Former KRS 412 appeared to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused based upon the judge's belief that such past acts did not occur. Amended KRE 412 eliminates the language relating to evidence which depends upon the fulfillment of a condition of fact.

Application of Amended KRE 412 in Criminal Cases

For the most part, the substantive application of KRE 412 in criminal cases remains the same. There continue to be three (3) exceptions to the general rule of inadmissibility, but certain changes are worth noting. First, the exception allowing evidence of past sexual behavior for purposes of proving that a person other than the defendant was the source of semen or injury has been expanded to include proving that another person was the source of any other physical evidence, thus ending the debate over whether particular facts constitute an "injury." Second, evidence of past sexual behavior with the defendant is no longer admissible only upon the motion of the defendant; KRE

412(b)(1)(B) now explicitly permits the Commonwealth to introduce such evidence. Thus, in a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the victim offered by the prosecution may be admissible pursuant to KRE 404(b) to show a pattern of behavior.

A third change is to the formula in criminal cases for balancing the probative value against the danger of undue prejudice. While the former KRE 412(c) required the trial court to find that "the probative value of such evidence outweighs the danger of unfair prejudice," the amended rule requires that the evidence, if it falls within one of the defined exceptions of amended KRE 412(b)(1), only be "otherwise admissible under these rules." In other words, the court falls back upon the balancing test of KRE 403, which requires exclusion only "if the probative value is substantially outweighed by the danger of undue prejudice...." Although the Governor's Office of Child Abuse and Domestic Violence Services recommended that the amended version of KRE 412 retain the previous balancing test, the Court opted for uniformity and elected to utilize the same language as in the federal counterpart, thus eliminating the more exclusionary balancing test of former KRE 412(c)(3).

Finally, KRE 412 is no longer limited to prosecutions for sex offenses under KRS Chapter 510 or KRS 530.020 and applies to any criminal prosecution "involving alleged sexual misconduct."

Application of Amended KRE 412 in Civil Cases

It was the belief of the Governor's Office of Child Abuse and Domestic Violence that Kentucky should protect the privacy of victims subjected to sexual misconduct in both criminal and civil arenas, thus encouraging

victims to participate in all types of legal proceedings against offenders as appropriate to the facts of the case. Whether in criminal or civil cases, the purpose of the amended rule is as follows:

The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

FRE 412, Advisory Committee Notes.

Thus, the Kentucky Supreme Court has now added subsection (b)(2) to KRE 412:

In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any al-

leged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

KRE 412(b)(2) does not itemize any particular category of evidence or purpose for which evidence of sexual behavior or predisposition may be introduced in a civil proceeding. The court is simply required to employ a two-part test. First, the evidence must be "otherwise admissible"; second, the court must balance the interests by finding that the probative value of the evidence "substantially outweighs the harm to any victim and of unfair prejudice to any party." This balancing test is dramatically different from that contained in KRE 403 in three ways:

- (1) The burden lies with the proponent of the evidence to establish its admissibility, as op-

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posed to requiring the opponent to prove its inadmissibility.

- (2) The standard for admission is far more stringent, requiring the proponent to prove that the probative value *substantially outweighs* the specific dangers, effectively rendering the evidence "presumptively inadmissible."⁵
- (3) A specific danger – "harm to the victim" – is equal in importance to unfair prejudice to a party.

Application of Amended KRE 412 in Sexual Harassment Cases

KRE 412(b)(2) is designed to apply to victims seeking civil redress for sexual assault or misconduct, but its application is also dramatic in the area of employment law. That KRE 412 applies to sexual harassment actions is indisputable, in that sexual harassment clearly comes within the concept of "sexual misconduct."⁶ Moreover, the federal advisory committee makes express reference to sexual harassment cases in discussing the

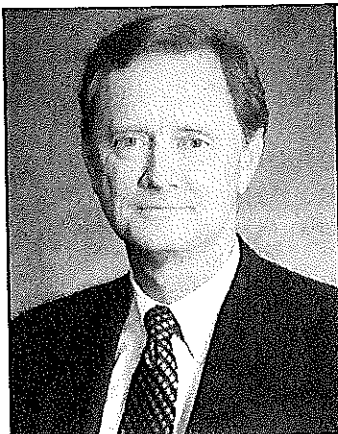
identical language of FRE 412(b)(2). Since the Kentucky Civil Rights Act is patterned after Title VII and the Kentucky Supreme Court has consistently interpreted KRS Chapter 344 in consonance with Title VII,⁷ those federal cases analyzing the application of FRE 412 to Title VII cases are helpful in predicting how Kentucky courts will now treat evidence of sexual behavior or predisposition in sexual harassment cases, which evidence is frequently offered by a defendant to establish that the harasser's sexual conduct was welcomed by the plaintiff and, therefore, not actionable.

In general, the evidence considered by federal courts falls within four (4) categories. First, there is sexual conduct which does not occur at the workplace or involve co-workers and does not involve the harasser. Clearly, this evidence is not admissible under KRE 412.⁸ Second, there is evidence of a plaintiff's behavior with co-workers but about which the harasser had no knowledge. Most courts that have considered this type of evidence have rejected it, finding that if the harasser did not know of the conduct, it could not affect his perception of whether his own conduct would be welcomed by the plaintiff.⁹ The third category involves sexual behavior with a co-worker at the workplace and about which the harasser did have knowledge. This

evidence has generally been found to be inadmissible on the theory that it has probative value only if one concludes that knowledge of a victim engaging in a consensual relationship with a co-worker makes reasonable the perception that the victim welcomed other sexual advances at her place of employment.¹⁰ Some courts, however, have decided the issue based upon the plaintiff's expectation of privacy.¹¹ Finally, there is a fourth category of evidence of the victim's sexual conduct: on-duty, at the workplace, and with the harasser. If it is the defendant's position that the plaintiff welcomed or consented to the harasser's conduct, this evidence will be admissible.¹² There does not appear to be authority for admission of this type of evidence if the employer is contending the conduct did not occur at all.

A different situation arises, however, where the purpose of the evidence is not to establish consent or welcomeness, but is to establish causation. In *Delaney v. City of Hampton*,¹³ the plaintiff claimed that she suffered post traumatic stress disorder as a result of sexual harassment. The employer moved to admit evidence contained in the plaintiff's psychiatric records that the plaintiff had suffered prior sexual abuse to establish that the plaintiff's damage was caused by those other events, and the court found the evidence to be admissible.¹⁴

Because a plaintiff must show that he or she was subjectively offended by the sexual conduct of the harasser, defendants also attempt to introduce the victim's "other sexual behavior" to show that the harassment did not offend him or her. In *Wolak v. Spucci*,¹⁵ the Second Circuit held that the district court improperly allowed the defendant to introduce evidence that the plaintiff had viewed pornography as a means of establishing that she was not subjectively offended by



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the pornography in the workplace and as relating to damages. The court specifically held this was error, stating that "[w]hether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication."¹⁶

Application of Amended KRE 412(c) to Civil Discovery

The procedures set forth in KRE 412(c), requiring a written motion 14 days prior to trial, plainly do not apply to discovery. A party scheduled to take a witness' discovery deposition need not seek a ruling two weeks prior to the deposition, and what may be discoverable under CR 26 is far broader in scope than what may ultimately be admissible at trial. The limitations of subsection (b)(2) of amended KRE 412, however, will

serve to define what is "reasonably calculated to lead to the discovery of admissible evidence" under CR 26.02(1). For example, in *Barta v. City and County of Honolulu*,¹⁷ the court compared the more lenient standards under FRCP 26 with those of FRE 412 in determining what types of sexual behavior may lead to the discovery of admissible evidence. Such an analysis was also recommended by the federal advisory committee, and thus, the provisions of KRE 412 should go a long way in protecting victims during the discovery process as well.¹⁸

Conclusion

The Kentucky Supreme Court is to be commended for its adoption of

amended KRE 412, which serves to expand the rights and privacy protections afforded victims of sexual crimes in criminal cases and also extends those protections to apply in civil cases alleging sexual misconduct. In doing so, the Court furthers the goal of ensuring the fair administration of justice in cases involving alleged sexual offenses. Of equal import, adoption of the amended rule affords victims of these most intimate and damaging crimes more effective legal remedies designed equally to adhere to the principles of fairness while accommodating the needs they bring to these cases. ■

Endnotes appear on page 16

Endnotes

1. KRS 510.020.
2. *Smith v. Commonwealth*, Ky.App., 566 S.W.2d 181, 183 (1978).
3. *Id.*
4. "Other" clearly denotes sexual behavior *other than* the sexual misconduct which is the subject of the criminal or civil proceeding and of which the defendant is accused.
5. *Socks-Brunot v. Hirschvogel, Inc.*, 184 F.R.D. 113 (S.D. Ohio 1999).
6. *Warren v. Prejean*, 301 F.3d 893, 906 (8th Cir. 2002); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1104 (9th Cir. 2002); *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000).
7. *E.g., American General Life & Accident Insurance Company v. Hall*, Ky., 74 S.W.3d 688 (2002).
8. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1105 (9th Cir. 2002); *Wolak v. Spucci*, 217 F.3d 157, 160-1 (2d Cir. 2000); *Excel Corp. v. Bosley*, 165 F.3d 635, 641 (8th Cir. 1999); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 856 (1st Cir. 1998); *Owens v. Ragland*, 2004 WL 954808 (W.D. Wisc. 2004), *Chambler v. Harris & Harris, Inc.*, 154 F.Supp. 2d 670 (S.D. N.Y. 2001).
9. *Howard v. Historic Tours of America*, 177 F.R.D. 48 (D.C. 1997). *See also Jaros v. Lodgenet Entertainment Corp.*, 294 F.3d 960, 965 (8th Cir. 2002); *EEOC v. Wal-Mart Stores, Inc.*, 198 F.3d 257 (table); 1999 WL 1032963 (10th Cir. 1999); *But see Beard v. Flying J, Inc.*, 266 F.3d 792, 801-2 (8th Cir. 2001); *Myer-Dupuis v. Thompson Newspapers, Inc.*, 134 F.3d 371 (table); 1997 WL 809955 (6th Cir. 1997) (making distinction based upon expectation of privacy); *Browne v. Signal Mountain Nursery*, 286 F.Supp. 2d 904, 923 (E.D. Tenn. 2003).
10. *Howard v. Historic Tours of America*, 177 F.R.D. 48 (D.C. 1997).
11. *Myer-Dupuis v. Thompson Newspapers, Inc.*, 134 F.3d 371 (table); 1997 WL 809955 (6th Cir. 1997); *Browne v. Signal Mountain Nursery*, 286 F.Supp. 2d 904, 923 (E.D. Tenn. 2003).
12. *Warren v. Prejean*, 301 F.3d 893, 906 (8th Cir. 2002) (holding that sexual behavior with the alleged harasser is not "other" sexual behavior); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 856 (1st Cir. 1998).
13. *Delaney v. City of Hampton*, 999 F.Supp. 794 (E.D. Va. 1997).
14. *See also Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (in suit for wrongful transmission of genital herpes, court allowed evidence of plaintiff's prior sexual history because defendant denied plaintiff contracted the disease from him); *Spina v. Forest Preserve of Cook County*, 2001 WL 1491524 (N.D. Ill. 2001).
15. *Wolak v. Spucci*, 217 F.3d 157 (2nd Cir. 2000).
16. *Id.* at 160-161.
17. *Barta v. City and County of Honolulu*, 169 F.R.D. 132 (D. Hawaii 1996).
18. *See also A.W. v. I.B. Corp.*, 224 F.R.D. 20 (D. Maine 2004).

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