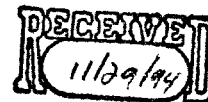


United States Court of Appeals

SECOND CIRCUIT



(203) 773-2353

CHAMBERS OF  
RALPH K. WINTER  
U.S. CIRCUIT JUDGE  
55 WHITNEY AVENUE  
NEW HAVEN, CT 06510

November 22, 1994

To: Honorable Alicemarie H. Stotler, Chair, and  
Members of the Standing Committee on Rules  
of Practice and Procedure

From: Honorable Ralph K. Winter, Chair  
Advisory Committee on Evidence Rules

The Advisory Committee on Evidence Rules submits the  
following items to the Standing Committee on Rules:

I. Proposals Concerning Amendments to Federal Rules of Evidence  
404 and 405 as Alternatives to Rules 413, 414, and 415 as  
Promulgated by the Congress.

The Advisory Committee adopted recommendations regarding  
amendments to Federal Rules of Evidence 404 and 405 pursuant to  
Section 320935 of the Violent Crime Control and Law Enforcement  
Act of 1994. The Advisory Committee requests that the Standing  
Committee recommend to the Judicial Conference that these  
proposals be submitted to the Congress pursuant to Section  
320935.

II. A Resolution Concerning Rules 413, 414, and 415.

The Advisory Committee adopted a resolution stating its  
views on Rules 413, 414, and 415. The Advisory Committee  
requests that this resolution be submitted to the Judicial  
Conference with Item I.

III. Proposed Amendments to the Rules of Evidence.

The Advisory Committee has proposed amendments to the  
Federal Rules of Evidence 103 and 407. The Advisory Committee  
requests the Standing Committee's approval of these amendments  
for publication and comment.

Hon. Alicemarie H. Stotler, Chair  
November 22, 1994  
Page Two

IV. Tentative Decision Not To Amend.

The Advisory Committee has tentatively decided not to propose amendments to the following Rules of Evidence and asks the Standing Committee to submit these tentative decisions for publication and comment:

Rule 406. Habit; Routine Practice

Rule 605. Competency of a Judge as Witness.

Rule 606. Competency of a Juror as Witness.

The Advisory Committee requests that the Standing Committee submit for publication and comment these tentative decisions, utilizing the same procedure followed at the last Standing Committee meeting.

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

L. RALPH MECHAM  
DIRECTOR

CLARENCE A. LEE, JR.  
ASSOCIATE DIRECTOR

WASHINGTON, D.C. 20544

JOHN K. RABIEJ  
CHIEF, RULES COMMITTEE  
SUPPORT OFFICE

December 2, 1994

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Materials on Item I Dealing with Evidence Rules 413-415*

Item I contains the following materials:

1. Proposed amendments to Evidence Rules 404 and 405 recommended by the Advisory Committee on Evidence Rules as an alternative to new Evidence Rules 413-415.
2. Correspondence from the committee's chair inviting public comment on new Evidence Rules 413-415, including a copy of the new rules. The invitation was sent to the courts, 900 professors of evidence law, publishers of legal periodicals, 40 women rights organizations, and 1,000 other interested individuals and organizations.
3. A chart summarizing the comments received from the public on Evidence Rules 413-415.
4. Correspondence from the Advisory Committees on Civil and Criminal Rules regarding Evidence Rules 413-415.

*John K. Rabiej*

John K. Rabiej

Attachments

[Add to Rule 404(a)]

1           (4) Character in sexual misconduct cases. If otherwise  
2 admissible under these rules, in a criminal case in which  
3 the accused is charged with sexual assault or child  
4 molestation, or in a civil case in which a claim is  
5 predicated on a party's alleged commission of sexual assault  
6 or child molestation, evidence of another act of sexual  
7 assault or child molestation, or evidence to rebut such  
8 proof or inference therefrom.

9           (A) In weighing the probative value of such  
10 evidence, the court, as part of its rule 403  
11 determination, may consider:

12                   (i) proximity in time to the charged or  
13 predicate misconduct;

14                   (ii) similarity to the charged or predicate  
15 misconduct;

16                   (iii) frequency of the other acts;

17                   (iv) surrounding circumstances;

18                   (v) relevant intervening events; and

19                   (vi) other relevant similarities or  
20 differences.

21           (B) In a criminal case in which the prosecution  
22 intends to offer evidence pursuant to this subdivision,  
23 it must disclose the evidence, including statements of  
24 witnesses or a summary of the substance of any

1 testimony, at a reasonable time in advance of trial, or  
2 during trial if the court excuses pretrial notice on  
3 good cause shown.

4 (C) For purposes of this subdivision,

5 (i) "sexual assault" means conduct of the  
6 type proscribed by chapter 109A of title 18,  
7 United States Code, or conduct that involved  
8 deriving sexual pleasure or gratification  
9 from the infliction of death, bodily injury,  
10 or physical pain on another person  
11 irrespective of the age of the victim, or an  
12 attempt or conspiracy to engage in either  
13 type of conduct, regardless of whether that  
14 conduct would have subjected the actor to  
15 federal jurisdiction.

16 (ii) "child molestation" means conduct of the  
17 type proscribed by Chapter 110 of Title 18,  
18 United States Code, or conduct, committed in  
19 relation to a child below the age of 14  
20 years, either of the type proscribed by  
21 chapter 109A of title 18, United States Code,  
22 or that involved deriving sexual pleasure or  
23 gratification from the infliction of death,  
24 bodily injury, or physical pain on another  
25 person or an attempt or conspiracy to engage  
26 in any of these types of conduct, regardless

1                   of whether that conduct would have subjected  
2                   the actor to federal jurisdiction.

3           (b) Other crimes, wrongs, or acts. - Evidence of other  
4 crimes, wrongs, or acts is not admissible to prove the character  
5 of a person in order to show action in conformity therewith  
6 except as provided in subdivision (a). . . .

Note to Rule 404(a)(4)

The Committee has redrafted Rules 413, 414 and 415 which the Violent Crime Control and Law Enforcement Act of 1994 conditionally added to the Federal Rules of Evidence.\* These modifications do not change the substance of the congressional enactment. The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

The Committee placed the new provisions in Rule 404 because this rule governs the admissibility of character evidence. The congressional enactment constitutes a new exception to the general rule stated in subdivision (a). The Committee also combined the three separate rules proposed by Congress into one subdivision (a)(4) in accordance with the rules' customary practice of treating criminal and civil issues jointly. An amendment to Rule 405 has been added because the authorization of a new form of character evidence in this rule has an impact on methods of proving character that were not explicitly addressed by Congress. The stylistic changes are self-evident. They are particularly noticeable in the definition section in subdivision

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\* Congress provided that the rules would take effect unless within a specified time period the Judicial Conference made recommendations to amend the rules that Congress enacted.

(a)(4)(C) in which the Committee eliminated, without any change in meaning, graphic details of sexual acts.

The Committee added language that explicitly provides that evidence under this subdivision must satisfy other rules of evidence such as the hearsay rules in Article VIII and the expert testimony rules in Article VII. Although principal sponsors of the legislation had stated that they intended other evidentiary rules to apply, the Committee believes that the opening phrase of the new subdivision "if otherwise admissible under these rules" is needed to clarify the relationship between subdivision(a)(4) and other evidentiary provisions.

The Committee also expressly made subdivision (a)(4) subject to Rule 403 balancing in accordance with the repeatedly stated objectives of the legislation's sponsors with which representatives of the Justice Department expressed agreement. Many commentators on Rules 413-415 had objected that Rule 403's applicability was obscured by the actual language employed.

In addition to clarifying the drafters' intent, an explicit reference to Rule 403 may be essential to insulate the rule against constitutional challenge. Constitutional concerns also led the Committee to acknowledge specifically the opposing party's right to offer in rebuttal character evidence that the rules would otherwise bar, including evidence of a third person's prior acts of sexual misconduct offered to prove that the third person rather than the party committed the acts in issue.

In order to minimize the need for extensive and time-



consuming judicial interpretation, the Committee listed factors that a court may consider in discharging Rule 403 balancing. Proximity in time is taken into account in a related rule. See Rule 609(b). Similarity, frequency and surrounding circumstances have long been considered by courts in handling other crimes evidence pursuant to Rule 404(b). Relevant intervening events, such as extensive medical treatment of the accused between the time of the prior proffered act and the charged act, may affect the strength of the propensity inference for which the evidence is offered. The final factor -- "other relevant similarities or differences" -- is added in recognition of the endless variety of circumstances that confront a trial court in rulings on admissibility. Although subdivision (4)(A) explicitly refers to factors that bear on probative value, this enumeration does not eliminate a judge's responsibility to take into account the other factors mentioned in Rule 403 itself -- "the danger of unfair prejudice, confusion of the issues, . . . misleading the jury, . . . undue delay, waste of time, or needless presentation of cumulative evidence." In addition, the Advisory Committee Note to Rule 403 reminds judges that "The availability of other means of proof may also be an appropriate factor."

The Committee altered slightly the notice provision in criminal cases. Providing the trial court with some discretion to excuse pretrial notice was thought preferable to the inflexible 15-day rule provided in Rules 414 and 415. Furthermore, the formulation is identical to that contained in the 1991 amendment

to Rule 404(b) so that no confusion will result from having two somewhat different notice provisions in the same rule. The Committee eliminated the notice provision for civil cases stated in Rule 415 because it did not believe that Congress intended to alter the usual time table for disclosure and discovery provided by the Federal Rules of Civil Procedure.

The definition section was simplified with no change in meaning. The reference to "the law of a State" was eliminated as unnecessarily confusing and restrictive. Conduct committed outside the United States ought equally to be eligible for admission. Evidence offered pursuant to subdivision (a)(4) must relate to a form of conduct proscribed by either chapter 109A or 110 of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction.

Rule 405

[Add to first sentence in Rule 405(a)]

1 except as provided in subdivision (c) of this rule.

[Add]

1 (c) Proof in sexual misconduct cases. In a case in which  
2 evidence is offered pursuant to rule 404(a)(4), proof may be made  
3 by specific instances of conduct, testimony as to reputation or  
4 testimony in the form of an opinion, except that the prosecution  
5 or claimant may offer reputation or opinion testimony only after  
6 the opposing party has offered such testimony.

Note to Rule 405(c)

The addition of a new subdivision (a)(4) to Rule 404 necessitates adding a new subdivision (c) to Rule 405 to govern methods of proof. Congress clearly intended no change in the preexisting law that precludes the prosecution or a claimant from offering reputation or opinion testimony in its case in chief to prove that the opposing party acted in conformity with character. When evidence is admissible pursuant to Rule 404(a)(4), the proponents proof must consist of specific instances of conduct. The opposing party, however, is free to respond with reputation or opinion testimony (including expert testimony if otherwise admissible) as well as evidence of specific instances. In a criminal case, the admissibility of reputation or opinion testimony would, in any event, be authorized by Rule 404(a)(1). The extension to civil cases is essential in order to provide the opponent with an adequate opportunity to refute allegations about a character for sexual misconduct. Once the opposing party offers reputation or opinion testimony, however, the prosecution or claimant may counter using such methods of proof.

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

**ALICEMARIE H. STOTLER**  
CHAIR

**PETER G. McCABE**  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

**JAMES K. LOGAN**  
APPELLATE RULES

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CIVIL RULES

**D. LOWELL JENSEN**  
CRIMINAL RULES

**RALPH K. WINTER, JR.**  
EVIDENCE RULES

September 9, 1994

**TO THE BENCH, BAR, AND PUBLIC**

The House of Representatives and the Senate have passed H.R.3355, the Violent Crime Control and Law Enforcement Act of 1994. The President is expected to sign the bill soon. Section 320935 of the Act adds three new Evidence Rules 413-415, which would make evidence of a defendant's past similar acts admissible in a civil and a criminal case involving sexual assault or child molestation offense. A copy of the rules is attached.

Under the Act, the three new evidence rules take effect 180 days after the President signs the bill, unless the Judicial Conference makes alternative recommendations to Congress within 150 days. The review procedures under the Rules Enabling Act explicitly do not apply to these rules.

The Judicial Conference's Advisory Committee on Evidence Rules will meet on October 17-18, 1994, in Washington, D.C., and it will consider Rules 413-415. In making its recommendations, the committee will benefit from public comment. To accommodate the deadlines imposed under the Act, the committee requests that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and in any event, no later than **October 11, 1994.**

All communications on these rules should be addressed to:

Secretary of the Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, D.C. 20544.

Ralph K. Winter, Jr.  
Chair, Advisory Committee on  
Evidence Rules

SEC. 320935 ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEX OFFENSE CASES.

(a) The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

**"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraph (1)–(4).

**"Rule 414. Evidence of Similar Crimes in Child Molestation Cases**

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

"(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

**"Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation**

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule."

(b) IMPLEMENTATION.—The amendments made by subsection (a) shall become effective pursuant to subsection (d).

(c) RECOMMENDATIONS BY JUDICIAL CONFERENCE.—Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

(d) CONGRESSIONAL ACTION.—

(1) If the recommendations described in subsection (c) are the same as the amendments made by subsection (a) then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

(e) APPLICATION.—The amendments made by subsection (a) shall apply to proceedings commenced on or after the effective date of such amendments.

**SUMMARY OF COMMENTS ON NEW EVIDENCE RULES 413-415**

	OPPOSE	SUPPORT	NEUTRAL/ RECOMMEND MODIFICATIONS
LAWYERS*	- 11 -	- 0 -	- 1 -
PROFESSORS OF EVIDENCE LAW*	- 56 -	- 3 -	- 7 -
JUDGES*	- 19 -	- 1 -	- 9 -
OTHERS	- 2 -	- 3 -	- 0 -
<i>SUBTOTALS</i>	- 88 -	- 7 -	- 17 -
<hr/>			
ORGANIZATIONS:			
NATIONAL	- 7 -	- 1 -	- 0 -
LOCAL	- 5 -	- 2 -	- 1 -
<i>SUBTOTALS</i>	- 12 -	- 3 -	- 1 -
<hr/>			
<b>TOTALS</b>	<b>- 100 -</b>	<b>- 10 -</b>	<b>- 18 -</b>

\*Includes all individual signatories.

(Prepared by Rules Committee Support Office,  
Administrative Office of the United States Courts)



## REASONS FOR OPPOSITION TO EVIDENCE RULES 413-415

	LAWYERS	PROFESSORS	JUDGES	ORGANIZATIONS	TOTALS
Circumvents Rules Enabling Act	- 1 -	- 0 -	- 2 -	- 4 -	- 7 -
Constitutional Concerns	- 2 -	- 15 -	- 1 -	- 1 -	- 19 -
Insufficient Data on Propensity	- 0 -	- 31 -	- 0 -	- 2 -	- 33 -
Unfair	- 9 -	- 40 -	- 4 -	- 5 -	- 58 -
Unnecessary	- 2 -	- 5 -	- 6 -	- 3 -	- 16 -
Impact on Native Americans	- 3 -	- 0 -	- 0 -	- 1 -	- 4 -
Drafting Problems	- 2 -	- 35 -	- 7 -	- 3 -	- 47 -

**ITEM II**

**RESOLUTION ON RULES 413-415**

Suggested Language for Transmittal Statement for Rule 404  
(Broun Draft #2)

The attached suggested rule represents the Committee's attempt to draft a rule that would more effectively carry out the policies embodied in Rules 413-415, as expressed by supporters of those rules, while at the same time providing essential integration with the existing Federal Rules of Evidence.

This Committee had earlier expressed the opinion that the changes now encompassed in these rules were not warranted. Our initial response was reinforced by comments from the overwhelming majority of the large number of lawyers, judges and law professors responding to Rules 413-415. We believe, with these commentators, that the existing Rules of Evidence are adequate to deal with the concerns expressed by members of Congress. Furthermore, we are concerned that the enacted rules may work to diminish significantly the policies established by long standing rules and case law guarding against undue prejudice to persons accused in criminal cases and parties in civil cases.

We do not believe that it is our role to prepare alternative rules that dilute the policies articulated by Congress. Instead, we have attempted to draft a rule that would both correct ambiguities and possible constitutional infirmities identified by the commentators in Rules 413-415 and remain consistent with Congressional intent.

We urge Congress to reconsider its decision on the policy questions. If it does not do so, we recommend that our alternative be adopted.