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

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

Date: May 18, 1994

I hereby transmit by separate attachment proposed amendments to Rules 412 and 1102 of the Federal Rules of Evidence. Both have been published and subject to public comment. The proposed amendment to Rule 412 has been considered by the Supreme Court, which has withheld approval of it. The Advisory Committee respectfully recommends that it be resubmitted to the Judicial Conference.

I am also transmitting tentative decisions by the Advisory Committee not to amend certain of the Rules of Evidence. The work of the Committee has proceeded apace since its reconstitution. However, we have had very little input from the bench, bar and public. This is unfortunate because the Committee is undertaking a comprehensive review of all of the Rules. In these circumstances, a decision not to amend a particular rule may be as important as a decision to amend, and there is the danger that some arguments for amendments have not been presented to or considered by the Advisory Committee. The Committee believes that a tentative decision on its part not to amend certain rules during this comprehensive review should be subject to the same procedures for public comment as its tentative decisions to propose amendments. The Advisory Committee

therefore requests that the Standing Committee publish for public comment a list of those Rules that the Advisory Committee has tentatively decided not to amend. This procedure appears to be outside the literal language of the governing procedures of the Standing Committee. However, we believe that the unique circumstances faced by the Advisory Committee justify the Standing Committee's giving public notice of the Advisory Committee's tentative decisions not to amend certain rules.

Attachment

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PROPOSED AMENDMENTS

Rule 412

The Supreme Court has withheld approval of the proposed amendments to Rule 412(b)(2). In a letter to the Chair of the Executive Committee of the Judicial Conference of the United States, the Chief Justice stated a concern on the part of some members of the Court that the proposed rule might violate the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The Chief Justice's letter suggested that the proposed rule might encroach on the rights of defendants in sexual harassment cases because it may be inconsistent with Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Finally, the Chief Justice's letter suggested that the Conference or Standing Committee might revisit the proposed rule in light of the concerns expressed in his letter.

The Advisory Committee on the Federal Rules of Evidence was asked by the Chair of the Standing Committee to state its views on the Supreme Court's withholding of approval of proposed Rule 412(b)(2) and concerns expressed in the Chief Justice's letter. Respectfully, the Advisory Committee recommends that proposed Rule 412(b)(2) be resubmitted to the Judicial Conference. The Advisory Committee sees no inconsistency with

the Rules Enabling Act and continues to view Rule 412(b)(2) as desirable as a prudential matter. Its views in these regards are set forth in the Advisory Committee Note. The Note is new and relates only to the resubmission. The original Note was not changed by the Supreme Court.

The Committee is resubmitting subdivision (b)(2) as originally transmitted by the Judicial Conference to the Supreme Court. The Committee's resubmission does not take into account the Court's redesignation of certain subdivisions and subparagraphs. Nor does the Committee's resubmission account for the Court's deletion of "civil" proceedings in subdivision (a).

Rule 1102

The Committee received no comments from the public on the proposed amendments to Rule 1102. The words "Technical and Conforming" were deleted from the caption of the Rule, because they applied only to subdivision (b) and not to subdivision (a).

The Committee recommends adoption of Rule 1102(b), which authorizes the Judicial Conference to make technical or conforming amendments to the Rules of Evidence.

PROPOSED AMENDMENTS TO RULES OF EVIDENCE*

Rule 412.

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(b) Exceptions.

* * *

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged 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.

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*New matter is underlined.

Committee Note

The Committee believes that proposed Rule 412(b)(2) is within the rulemaking power delegated to the Supreme Court by the Rules Enabling Act. Although commentators questioned the applicability of rulemaking authority established in the original 1934 Act to rules of evidence (see Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U.Pa.L. Rev. 1015 (1982); John Hart Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693 (1974)), Congress' delegation of power to promulgate Federal Rules of Evidence is now explicit. In 1988, the Act was amended to add: "The Supreme Court shall have the power to prescribe . . . rules of evidence . . ." (Pub. L. No. 100-702, § 401(a), 102 Stat. 4648 (1988), codified at 28 U.S.C. § 2072(a) (emphasis added). Cf. 28 U.S.C. § 2074(b) requiring Congressional approval for any rule "creating, abolishing or modifying an evidentiary privilege").

In 1988, Congress also reenacted the requirement in the second sentence of the original Rules Enabling Act of 1934 that a

Federal Rule must not "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072. This has been interpreted by the Supreme Court to uphold the validity of rules adopted pursuant to the rulemaking process if they may reasonably be classified as procedural. See Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (upholding the authorization of physical examinations in Fed. R. Civ. P. 35 despite claims that the rule abridged the examined party's right to privacy). See also Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) ("The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules."); Hanna v. Plumer, 380 U.S. 472 (1965) (finding within the proper scope of rulemaking authority rules regulating matters "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either").

By analogy, a rule that may reasonably be classified as a rule of evidence is within the scope of the authority delegated by the Rules Enabling Act. Proposed Rule 412(b)(2) is such a rule. It provides a balancing test governing the admission of evidence concerning an alleged victim's sexual behavior and/or predisposition. Such evidence is admissible "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." This test takes into account the potential prejudicial effect on triers of fact, and chilling effect on victims of sexual misconduct, of evidence concerning a victim's sexual behavior or predisposition.

The test proposed by the Committee is thus a variation on the general balancing test embodied in Rule 403. For example, it recognizes that in cases like Meritor Savings Bank v. Vinson, 477 U.S. 67, 68-69 (1986), evidence of the claimant's sexual behavior in the workplace may be sufficiently probative as to require admission. Evidence of the claimant's sexual conduct outside working hours may not be relevant, depending upon the facts of the particular case. See Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962-63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances in the workplace).

The formulation of a balancing test for particular kinds of evidence is clearly within the scope of the rulemaking

authority. Cf. 1990 amendments to Rule 609(a)(1) (in criminal cases amendment removed protection of special balancing test previously accorded defense witnesses as well as the defendant, and extended protection of a Rule 403 balancing test to prosecution witnesses; in civil cases amendment rejected holding of Supreme Court in Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989), and extended Rule 403 balancing to witnesses against whom all felony convictions had previously been admissible).

Rule 1102. Amendments

(a) Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

(b) The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

Subdivision (b) is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

TENTATIVE DECISIONS NOT TO AMEND

The Advisory Committee on the Federal Rules of Evidence has reached tentative decisions not to amend certain of the

Rules. Its philosophy has been that an amendment to a Rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies a policy decision believed by the Committee to be erroneous. Any amendment will create uncertainties as to interpretation and sometimes unexpected problems in practical application. The trial bar and bench are familiar with the Rules as they presently exist and extensive changes might affect trials adversely for some time to come. Finally, amendments that seek to provide guidance for every conceivable situation that may arise would entail complexities that might make the rules difficult to apply in practice.

However, the Advisory Committee is keenly aware that the bar, the bench, and the public do not follow its deliberations with care. As a result, the Committee has not had much input from outside even though it is engaged in a comprehensive review of each Rule. The Advisory Committee has therefore asked the Committee on Rules of Practice and Procedure to take the unusual step of publishing for public comment the Advisory Committee's tentative decisions not to amend certain rules. The Advisory Committee hopes that this step will cause those who believe that certain rules should be amended to communicate their concerns to the Committee.

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A list of Rules that the Advisory Committee has tentatively decided not to amend follows. The list is partial and will be added to as the Committee continues its work. The absence of a Rule from the list does not mean, therefore, that amendments to that Rule will be proposed.

The Advisory Committee has tentatively decided not to amend the following rules:

Fed. R. Evid. 101.	Scope
Fed. R. Evid. 102.	Purpose and Construction
Fed. R. Evid. 105.	Limited Admissibility
Fed. R. Evid. 106.	Remainder of or Related Writings on Recorded Statements
Fed. R. Evid. 201.	Judicial Notice of Adjudicative Facts
Fed. R. Evid. 301.	Presumptions in General Civil Actions and Proceedings
Fed. R. Evid. 302.	Applicability of State Law in Civil Actions and Proceedings
Fed. R. Evid. 401.	Definition of "Relevant Evidence"
Fed. R. Evid. 402.	Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
Fed. R. Evid. 403.	Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
Fed. R. Evid. 404.	Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
Fed. R. Evid. 409.	Payment of Medical and Similar Expenses
Fed. R. Evid. 601.	General Rule of Competency

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Fed. R. Evid. 602.	Lack of Personal Knowledge
Fed. R. Evid. 603.	Oath or Affirmation
Fed. R. Evid. 604.	Interpreters
Fed. R. Evid. 607.	Who May Impeach
Fed. R. Evid. 608.	Evidence of Character and Conduct of Witness
Fed. R. Evid. 609.	Impeachment by Evidence of Conviction of Crime
Fed. R. Evid. 610.	Religious Beliefs or Opinions
Fed. R. Evid. 611.	Mode and Order of Interrogation and Presentation
Fed. R. Evid. 612.	Writing Used to Refresh Memory
Fed. R. Evid. 613.	Prior Statements of Witnesses
Fed. R. Evid. 614.	Calling and Interrogation of Witnesses by Court
Fed. R. Evid. 615.	Exclusion of Witnesses