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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of

ARIZONA RULE OF EVIDENCE 412

Arizona Supreme Court No. R-24-\_\_\_\_\_

PETITION TO AMEND ARIZONA  
RULE OF EVIDENCE 412

**PETITION TO AMEND ARIZONA RULE OF EVIDENCE 412**

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Advisory Committee on Rules of Evidence (the “Committee”), by and through its Co-Chairs, the Honorable Sara Agne and the Honorable Maria Elena Cruz, petitions the Court

to adopt Arizona Rule of Evidence 412, as reflected in the Attachment to this Petition, effective January 1, 2025.

## **I. INTRODUCTION AND BACKGROUND**

This Court first adopted the Arizona Rules of Evidence in September 1977. They are based on the Federal Rules of Evidence, adopted in 1975. In the decades since, the Federal Rules of Evidence have been amended on several occasions, and many—but not all—of these amendments have become part of the Arizona Rules of Evidence. This Committee evaluates proposed federal changes consistent with its June 2012 chartering administrative order:

The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

Congress originally enacted Federal Rule of Evidence 412—colloquially known as the “rape-shield rule”—as part of the Privacy Protection for Rape Victims Act of 1978. The original rule applied in criminal cases only. Twenty years later, in 1998, the Arizona legislature passed a similar rape-shield statute, A.R.S. § 13-1421, governing criminal cases.

In 2012, this Committee did not adopt a rape-shield *rule* because Arizona already had a rape-shield *statute*. Arizona Rule of Evidence 412 contains the following comment from 2012: “Federal Rule of Evidence 412 has not been adopted. See A.R.S. § 13-1421 (Evidence relating to victim’s chastity; pretrial hearing).”

By 2012, Federal Rule of Evidence 412 included more than criminal rape-shield protections. In 1994, Congress amended Federal Rule 412 to apply in all *civil* and criminal cases involving alleged sexual misconduct. In civil cases, Federal Rule 412(b)(2) allows admission of “evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and unfair prejudice to any party. The court may admit evidence of a victim’s reputation only if the victim has placed it in controversy.” FED. R. EVID. 412(b)(2).

As noted above, the Committee did not adopt civil rape-shield protections in 2012. Instead, the Committee believed that Arizona’s criminal statute sufficiently covered the field. A review of records and discussions with former Committee members suggests that not considering a *civil* rape-shield rule at the time was simply an oversight.

The Committee would like to rectify this oversight, and therefore as Petitioner unanimously recommends that Arizona adopt a non-criminal rape-shield rule in Rule 412 that substantially mirrors the federal civil rape-shield rule.

## II. SPECIFICS OF FEDERAL RULE OF EVIDENCE 412(b)(2)

Federal Rule of Evidence 412 (titled “Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition”) prohibits evidence of an alleged victim’s past “sexual behavior” and “sexual predisposition” “in a civil or criminal proceeding involving alleged sexual misconduct.” FED. R. EVID. 412(a). In civil cases, Federal Rule 412(b)(2) permits introduction of “evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.” FED. R. EVID. 412(b)(2). This implements a reverse-Rule 403 balancing test because the probative value of the evidence must be substantially greater than its harm and prejudice. *Compare* FED. R. EVID. 403 (exclusion permitted when the probative value of the evidence is substantially outweighed by its unfair prejudice, among other reasons).

This reverse standard in Federal Rule of Evidence 412 is intentionally a difficult standard to meet. In addition, the federal rule also requires the danger of harm to any victim (such as humiliation) to be weighed on the prejudicial side of the equation, making it more likely that the evidence remains inadmissible. The final sentence of Federal Rule 412(b)(2) provides that “evidence of a victim’s reputation” is admissible “only if the victim has placed it in controversy.” *Id.*

The federal civil rape-shield rule has been effective for nearly thirty years, and the Committee is not aware of any difficulties or problems with the rule in

federal court practice. To the contrary, the rule helps ensure that embarrassing and distracting information is kept from the factfinder.

### **III. SPECIFICS OF PROPOSED CHANGES TO ARIZ. R. EVID. 412**

Roughly eleven states have laws that largely mirror the federal civil rape-shield rule. *See, e.g.*, CONN. R. EVID. 4-12; IND. R. EVID. 412; KY. REV. STAT. § 412; ME. R. EVID. 412; NEB. REV. STAT. ANN. § 27-412; N.D. R. EVID. 412; OR. REV. STAT. ANN. § 40.211; S.D. CODIFIED LAWS § 19-19-412; WA. R. REV. ER 412; W. VA. R. EVID 412. Eight additional states have other varieties of civil rape-shield protections. *See, e.g.*, CAL. EVID. CODE § 1106; COLO. REV. STAT. § 13-25-138; HAW. REV. STAT. 412; 735 ILL. COMP. STAT. ANN. 5/8-2801; LA. CODE EVID. ANN. art. 412; Ma. R. Evid. § 412; N.C. GEN. STAT. ANN. 8C-1, 412 & *In re K.W.*, 666 S.E.2d 490, 493 (N.C. Ct. App. 2008) (“[T]his Court has found the rule to be applicable in civil cases.”); WIS. STAT. ANN. § 901.08; *cf. Bumpus v. New York City Transit Auth.*, No. 3512/07, 2009 WL 1141401, at \*3 (N.Y. Supr. Ct. Apr. 28, 2009) (adopting civil rape-shield protections in a protective order ruling).

Arizona should join the federal courts and these numerous states and adopt a civil rape-shield rule. Without these protections, victims may have to answer intrusive questions about their sexual lives and orientations, fantasies, and even their clothing choices. *See* Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1926 (enacting the federal criminal rape-shield rule) (effective July 1, 1975); *see also Meritor Sav. Bank, FSB*

*v. Vinson*, 477 U.S. 57, 69 (1986) (“[I]t does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.”). There is no reason for the Arizona Rules of Evidence to remain out of step with the Federal Rules of Evidence in this area.

Thus, the Committee unanimously proposes that Arizona adopt a civil rape-shield rule in Rule 412, which currently contains no rule text and instead refers to A.R.S. § 13-1421 in a comment to the 2012 amendments.

We propose the following:

**Rule 412. The Victim’s Sexual Behavior or Predisposition in Non-Criminal Cases**

- (a) Prohibited Uses.** In proceedings involving alleged sexual misconduct where A.R.S. § 13-1421 does not apply, the following evidence is not admissible:
  - (1)** evidence offered to prove that a victim engaged in other sexual behavior; or
  - (2)** evidence offered to prove a victim’s sexual predisposition.
- (b) Exceptions.** The court may admit evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim’s reputation only if the victim has placed it in controversy.

The proposed rule follows the substantive provisions of the Federal Rule of Evidence 412, but includes a couple of differences that are worth highlighting:

- Arizona’s title and scope differs from the Federal Rule because Arizona has a criminal rape-shield statute, so the Arizona Rule need not, and should not, cover criminal proceedings.
- More specifically, the Arizona Rule is designed to apply in cases where the criminal statute, A.R.S. § 13-1421, does not apply. That certainly means civil cases. But there may be other proceedings, such as non-delinquency juvenile proceedings, where the criminal statute does not apply and, thus, the Arizona rule should fill in the gap. Thus, we do not use the more restrictive “civil proceedings” language from the Federal Rule and instead remind the reader that A.R.S. § 13-1421 will apply in criminal cases, and Arizona Rule 412 applies in the remainder.
- Arizona’s subsection lettering and numbering differ in minor ways from the Federal Rules, largely because proposed Arizona Rule 412 does not cover criminal cases.
- Finally, Arizona’s rule does not include the procedures to determine admissibility. *See* Fed. R. Evid. 412(c) (subtitled, “Procedure to Determine Admissibility”). These sorts of timing and notification issues may be set by individual judges in consultation with parties, and this Committee tends to consistently recommend that procedural rules not be melded into the evidentiary rules absent compelling reason.

Unanimously, the Committee also recommends the following brief comment to the 2025 amendment: “Rule 412 was adopted effective January 1, 2025, to conform to Federal Rule of Evidence 412 in cases where A.R.S. § 13-1421 (Evidence relating to victim’s chastity; pretrial hearing) does not apply.”

### CONCLUSION

The federal rules have had a civil rape-shield rule for thirty years. It is time for Arizona to adopt those protections, too. The Committee respectfully requests that the Court consider this Petition and its proposed rule changes at its earliest convenience. The Committee additionally requests that the Petition be circulated for public comment until May 1, 2024, and that the Court adopt the proposed rule as presented, or as modified in light of comments received from the public and any replies, with an effective date of January 1, 2025.

DATED this 9th day of January, 2024.

*/s/ Sara J. Agne* \_\_\_\_\_  
Sara J. Agne, Co-Chair

*/s/ Maria Elena Cruz w/ permission* \_\_\_\_\_  
Maria Elena Cruz  
Co-Chair, Advisory Committee on Rules of Evidence

## ATTACHMENT

### Proposed Arizona Rule of Evidence 412

#### ~~Rule 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition~~

<Not adopted.>

#### **Rule 412. The Victim's Sexual Behavior or Predisposition in Non-Criminal Cases**

**(a) Prohibited Uses.** In proceedings involving alleged sexual misconduct where A.R.S. § 13-1421 does not apply, the following evidence is not admissible:

- (1) evidence offered to prove that a victim engaged in other sexual behavior; or
- (2) evidence offered to prove a victim's sexual predisposition.

**(b) Exceptions.** The court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

#### **COMMENT TO 2025 AMENDMENT**

Rule 412 was adopted effective January 1, 2025, to conform to Federal Rule of Evidence 412 in cases where A.R.S. § 13-1421 (Evidence relating to victim's chastity; pretrial hearing) does not apply.