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American Bar Association Criminal Justice Section Report to the House of Delegates

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AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

Recommendation

RESOLVED, that the American Bar Association opposes the substance of Rules 413, 414, and 415 of the Federal Rules of Evidence concerning the admission of evidence in sexual assault and child molestation cases, as enacted by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).*

* *Editor's Note: The American Bar Association House of Delegates adopted this resolution at its midyear meeting on February 13, 1995.*

Report**

On September 13, 1994, President Clinton signed the "Violent Crime Control and Enforcement Act of 1994,"[1] which contains new Rules 413, 414 and 415 of the Federal Rules of Evidence. These rules govern the admission of evidence in criminal cases in which the accused is charged with an offense of sexual assault or child molestation, and of civil cases in which a claim for damages or other relief is predicated on conduct constituting an offense of sexual assault or child molestation. Pursuant to the rules, evidence of the defendant's or party's commission of another offense or offenses is admissible, and may be considered for its bearing on any matter to which it is relevant.

The law provides for the effective date of the rules to be delayed, giving the Judicial Conference of the United States 150 days to review them and submit recommendations to Congress. If the Judicial Conference's recommendations are different from the rules, the effective date is delayed an additional 150 days, during which time Congress can reconsider the rules. If Congress does not act on the Judicial Conference's recommendations, the Rules included in the law become effective 150 days after the transmittal of the Judicial Conference's recommendations.

In October, 1994, the American Bar Association submitted comments to the Rules of Practice and Procedure Committee of the Judicial Conference concerning the issues posed by Rules 413, 414 and 415 of the Federal Rules of Evidence. Those comments were based on the Association's Rules Enabling Act policy related to the manner in which rules should be promulgated for the federal courts.[2]

The comments criticized the bypassing of the Rules Enabling Act process. By evading the longstanding process designed to promulgate rules only after extensive thoughtful review by the entire legal community, Congress challenged the entire rulemaking structure. In particular, the comments pointed out that the careful review inherent in the public comment process was designed to eliminate unwarranted changes or changes which have unintended

** This report was written by Professor Myrna S. Raeder, who is a Professor of Law at Southwestern University School of Law and the former chairperson of the Criminal Justice Section's Committee on Federal Rules of Evidence and Criminal Procedure. The Report was prepared in support of the attached American Bar Association House of Delegates resolution.

1. Pub. L. No. 103-322, 108 Stat. 1796.

2. *See* ABA HOUSE OF DELEGATES REPORT NO. 118B (January, 1982).

consequences. In light of the number of serious ambiguities in the rules, the abbreviated public comment period is particularly disturbing. In addition, requiring affirmative Congressional action to modify Rules 413-415 effectively precludes the likelihood of any revision, despite the real possibility that substantial and substantive comments would be generated when the rules were briefly distributed for public review. Ultimately, if the rulemaking structure is ignored any time that a rule is likely to generate controversy, the entire integrity of the Rules Enabling Act is subverted.

The comments also noted the absence of any ABA policy directed at the use of propensity evidence cases concerning sexual abuse due, no doubt, in part to the fact that these rules are in direct conflict with the existing federal rules. The only related ABA policy concerned the use of prior bad acts evidence pursuant to Rule 404(b). In *United States v. Huddleston*,[3] the Supreme Court viewed the preliminary fact question of whether a defendant had committed the prior bad act as a Rule 104(b) issue. This holding overturned the longstanding requirement of most courts that clear and convincing evidence was required for the admission of such acts due to their inherent prejudice. The ABA resolution urges that Rule 404(b) be amended to provide that the court shall determine the preliminary fact question by a clear and convincing evidence standard. Thus, the ABA had previously viewed with suspicion evidence which legitimately fit within Rule 404(b) in order to ensure that courts carefully exercise their gatekeeping responsibilities. The ABA policy report supporting the Rule 404(b) resolution assumed that propensity evidence was inadmissible and simply spoke to the prejudice which may occur by jurors who use the evidence incorrectly for its propensity purposes.

Ensuing events have validated a number of the concerns expressed in the ABA comments. The Summary of Comments on New Evidence Rules 413-415 prepared by the Rules Committee Support Office of the Administrative Office of the United States Courts, indicates that 100 individuals and organizations opposed the rules, 10 supported them and 18 recommended modifications or were neutral. Opponents included 11 lawyers, 56 evidence professors, 19 judges, and 12 organizations, among others. The reasons for opposition to the rules were as follows:

3. 485 U.S. 681 (1988).

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In October, 1994, these rules were considered by two Advisory Committees of the Judicial Conference. The Advisory Committee on the Criminal Rules of Procedure sent a memorandum to the Evidence Advisory Committee noting its concern over the last minute addition of the rules without prior input from the Judicial Conference. The Committee specified its previous rejection of such rules by an 8 to 1 vote, and again voted 8 to 1 to oppose the adoption of rules permitting propensity evidence in sex cases and expressed its view that Rule of Evidence 404(b) was an "adequate vehicle" to introduce other crimes evidence. In addition the "Committee seriously questioned whether Rules 413-415 are worth the danger of convicting a defendant for his past, as opposed to charged behavior." Concerning the content of the rules, the Committee suggested several drafting changes, including combining the three rules into one and requiring that the prosecution be required to prove by clear and convincing evidence that the alleged act had occurred.[4]

In contrast, when the Evidence Advisory Committee met in November, 1994 to consider the Congressionally passed rules, while the Committee remained opposed to the content of the rules, it viewed the policy decision to permit propensity evidence as a Congressional fait accompli. As a result, the Evidence Advisory Committee is "urging Congress to reconsider its decision on the policy questions. If Congress does not do so, the committee is recommending that its alternative language be adopted."[5] In other words, the Committee limited its redrafting of the three rules to "correct ambiguities and possible constitutional infirmities identified in Rules 413-415 and remain consistent with Congressional in-

4. *See* Memo to Hon. D. Lowell Jensen, From Professor Dave Schlueter, Reporter, October 11, 1994, Re: Advisory Committee's Discussion of Federal Rules of Evidence 413-415.

5. Letter from Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Re: Proposed New Rules 413-415 of the Federal Rules of Evidence (Dec. 2, 1994).

tent."[6] Therefore, it did not attempt to dilute the content of the rules. In fact, both during and after the Committee meeting, input from the original drafters of the rules was incorporated. While it is fair to say that the end result of this process is a more coherent, better written version of the earlier rules, it is disturbing that the only support for propensity rules within either of the two Advisory Committees of the Judicial Conference came from the Department of Justice representative. Such support was not unexpected, since the rules were originally drafted by the Department of Justice during the administration of President Bush. In other words, none of the judges, academics or other lawyers on either Committee would have adopted these rules.

Rules 413-415 were included in the final version of the Violent Crime Control and Law Enforcement Act of 1994 in order to obtain a key vote in favor of the legislation. Even assuming that the Judicial Conference recommends to Congress that the Evidence Advisory Committee's redraft of the propensity rules should be substituted for the present rules, Rules 413-415 will go into effect as presently worded unless Congress takes affirmative action. If the rules become effective due to Congressional inaction, extensive litigation can be expected concerning their scope. Significant questions unanswered by the text of Rules 413-415 include whether the judge has any discretion to exclude prejudicial prior bad acts, whether expert testimony of sexual deviancy is permitted, and whether hearsay evidence of prior bad acts can be introduced. Moreover, while due process issues may be raised concerning any evidence introduced solely for propensity,[7] such questions would be magnified if Rules 413-415 were interpreted as completely prohibiting the exclusion of propensity evidence.

Given this background, the American Bar Association House of Delegates resolution appended to this report opposes Federal Rules of Evidence 413-415. First, it should be clear what this resolution does not do. Evidence which is legitimately within F.R.E. Rule 404(b) is not affected by this resolution. Lawyers and judges recognize the difficulties associated with proving sexual abuse in cases involving adults as well as children. Problems in proof frequently stem from the absence of other witnesses or corroboration. When the defendant claims consent, the trial often becomes a cred-

6. *Id.*

7. *See, e.g.*, McKinney v. Rees, 993 F.2d 1378, 1385 (9th Cir.), *cert. denied*, 114 S. Ct. 622 (1993) (erroneous admission of propensity evidence rendered trial fundamentally unfair in violation of due process).

ibility contest. Where young children are involved, their discomfort about testifying or inability to communicate may intertwine with competency questions.

Society is currently struggling with ways to ensure that the guilty do not escape punishment without the wholesale abandonment of the evidentiary and constitutional protections of criminal defendants. The federal constitution has been interpreted to permit children to testify out of the presence of the defendant when an individualized showing can be made that the child would be traumatized by face to face confrontation.[8] Child hearsay is now admitted under traditional hearsay exceptions as well as by hearsay catchalls and in some states by specific child hearsay exceptions. Expert testimony is used extensively in all types of sexual abuse cases. The Rape Shield rule protects against the complainant being put on trial for her own consensual sexual conduct.

Moreover, existing caselaw in state and federal courts generously interprets Rule 404(b) to permit evidence of the defendant's prior bad acts in sex crimes cases so long as any nexus exists to a purpose other than propensity. Therefore, to the extent that the prior acts indicate motive, intent, opportunity, identity, or common scheme or plan, those acts are legitimately admitted under current law. Similarly, as Professor Imwinkelried has argued, the doctrine of chances may provide an alternative noncharacter route for the most egregious evidence of bad acts.[9] In other words, in determining whether an act was criminal, the doctrine of chances permits the use of reasoning which asks "[h]ow statistically likely is it that an innocent individual would be accused of the same type of crime on several different occasions[ ]". The inference is not that the person is bad, and therefore more likely to commit the current crime, but rather that the possibility of repeated unfounded accusals is remote, unless there is another explanation which could account for the previous complaints. The most obvious use of this reasoning is in cases of multiple unexplained deaths happening in a similar manner, when the evidence that any one death was a homicide. However, this rationale has been extended to sexual misconduct cases on the theory that it is unlikely that one individual would be falsely accused of several completely separate similar incidents.[10]

8. *See* Maryland v. Craig, 497 U.S. 836 (1990).

9. Edward J. Imwinkelried, *The Dispute Over the Doctrine of Chances*, 7 CRIM. JUST. 16 (1992).

10. *See* People v. VanderVliet, 80-81, 508 N.W.2d 114, 129 (1993), *amended on other grounds*, 520 N.W.2d 338 (1994); *see also* People v. Balcom, 867 P.2d 777, 785

Obviously, when the doctrine of chances is used, a proper foundation must be established and the evidence carefully evaluated to exclude acts that have no other purpose than propensity.

Undoubtedly, a few cases will always exist in which the only relevancy link for admission is propensity and exclusion may result in what some believe to be an unwarranted retrial or acquittal. However, to catch that relatively small number of cases, the proponents of Rules 413-415 would drastically alter one of the fundamental premises underlying the Federal Rules of Evidence. Currently, we do not round up the regular suspects and try them based on evidence of who they are rather than what they did in the particular case. Wigmore characterized the prejudice associated with character evidence as "the overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts [and] the tendency to condemn not because the accused is believed guilty of the present charge but because he escaped unpunished from other offenses."[11]

Prejudice can result from overestimating the probative value of character evidence, or punishing the accused for past conduct or other crimes the defendant may have committed or will commit. Obviously, the prejudice of such acts is great. Jurors may be overwhelmed by an emotional response to the evidence which interferes with their ability to hold the prosecution to its burden of proof beyond a reasonable doubt. They may not care if sufficient evidence of guilt exists because they feel less responsibility for convicting an individual who they know has committed previous bad acts. Ultimately, the jury may reach its verdict without deciding the defendant's guilt in the present case.

Rules permitting propensity evidence are particularly inadvisable in light of developing scientific evidence which has consistently demonstrated the high percentage of mistaken identifications in cases where the assailant's identity is at issue. Approximately 30% of cases submitted to the FBI laboratory for DNA analysis result in the known suspect's DNA *not* matching the specimen taken from the scene.[12] If police work and identifications are mistaken in so

(1994), Arabian, J. (concurring) (if two people claim rape and their stories are sufficiently similar, the chances that both are lying or one truthful and the other invented a false story that just happens to be similar, is greatly diminished).

11. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2 (Peter Tillers ed., 1983).

12. *See, e.g.*, NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 88 (1992); Begley, *et. al.*, *Blood, Hair and Heredity*, NEWSWEEK, July 11, 1994, at 24.

many cases involving violent crimes, one must wonder why the judicial system would want to encourage convictions in such cases based on propensity evidence. In other words, the admission of character evidence allows the jury to convict the defendant by inferring that if he has committed a previous sexual crime, he committed the current one. However, the reason that many sex offenders are originally identified is because of their inclusion in mug books of sexual offenders. Thus, it is predictable that in many cases where a victim has been raped by a stranger, the defendant will have been charged with prior sexual crimes. If the prior conviction has a relevance other than propensity, it will be admitted without the need for any change in the rules.

The driving force behind the proposed rules appear to be directed at two types of cases: 1) those in which the defense to rape is consent, and 2) those in which a pedophile preys on numerous young children. However, the rules are not so limited. One would assume that such a dramatic change in the philosophy underlying the rules would have called for some empirical justification. Had the rules gone through the Rules Enabling Act process, such proof would likely have been demanded. It is unclear that such evidence does exist. The early belief was that sexual offenders had very low recidivism rates. Recent recidivism rates for sexual offenders also appear to be lower than for most other categories.[13] Exhibitionists appear to have the highest recidivism rates of other sex offenders.[14] But even these are described as less than the national average of all recidivists.[15] Other commentators question the methodology of studies of recidivism of sexual offenders.[16] Yet none of the commentators appear to posit that recidivism in sexual offenses is higher than rates for other types of crime.

Indeed, the relevant question is not simply whether sexual offenders have high recidivism rates, but is character evidence of sexual crimes more predictive than character evidence of other crimes? Unfortunately, recidivism rates are unacceptably high for all crimes. Therefore, if propensity is allowed for sex crimes, how is this to be distinguished from using propensity in other cases, ex-

13. David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529 (1994); ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 6 (1989).

14. Thomas J. Reed, *Reading Goal Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 154 (1992).

15. *Id.* at 149, 155.

16. Lita Furbey et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 4 (1989).

cept for the outrage which is understandably directed at the commission of sexual crimes?[17]3 While sexual offenses are often hard to prove, so are drug conspiracies and other categories of crimes.

To the extent that some will argue that sexual propensity evidence has previously been permitted under the guise of evidence showing a "lustful disposition," several points should be made. First, when this exception first became popular, deviant sexual offenders were assumed to be highly recidivistic and rare.[18] Second, the predominant use of such evidence was limited to child abuse cases.[19] Third, the pure propensity use of such evidence was often masked because of instructions which focused on whether the prior acts showed a sexual deviation of the same nature as revealed by the present crime. In other words, prosecutors were not permitted to argue that the defendant should be convicted because he is a sexual offender. While Rules 413-415 may prompt this type of closing argument, convictions based on status are constitutionally prohibited.[20] Fourth, propensity evidence has been rejected by the Federal Rules and states adopting Rule 404. Fifth, while one commentator argued that a number of states still permit such evidence in sexual abuse cases,[21] some of those decisions predate the adoption of Federal and State versions of Rule 404. Newer opinions often stretch to permit sexual crimes evidence, but they do so by enlarging the concepts of common plan or scheme, or modus operandi, not by relying on character evidence.[22]

If Rules 413-415 are promulgated, they may become the first volley in a larger attempt to reject the ban against character evidence. For example, Ms. Davies, a commentator widely quoted as favoring a more generous approach to the admissibility of relevant character evidence, makes no distinction between sexual crimes

17. *See* Bryden & Park, *supra* n.13, at 572.

18. *See generally* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT § 4.14.

19. *See, e.g.*, Bryden & Park, *supra* n. 14, at 558.

20. *See* Robinson v. California 370 U.S. 660 (1992); Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions* (forthcoming CORNELL L. REV. 1995) (arguing that even if Rules 413-415 are enacted, the defendant would be entitled to an instruction limiting the use of character evidence).

21. *See* Thomas J. Reed, *supra* n.13, at 159.

22. *See, e.g.*, People v. Balcom, 7 Cal. 4th 414, 867 P.2d 777 (1994) (uncharged rapes not admissible to prove intent, but admissible to prove manifestations of common design or plan); *see also* PAUL F. ROTHSTEIN, EVIDENCE IN A NUT SHELL 355-56 (1981) (arguing that on occasion a specific propensity may rise to the level of a common plan).

and other crimes.[23] However, unlike the balance struck by the drafters of Rules 413-415, she is quite concerned about prejudice and suggests a balancing approach which favors the exclusion of character evidence unless the proponent demonstrates that its probative value outweighs the danger of unfair prejudice.[24] Moreover, she would require a foundation of clear and convincing evidence for admission of prior acts.[25]

Even if one were comfortable with a policy shift allowing propensity evidence in sexual cases, and empirical evidence appeared to support a propensity rule for certain types of sexual offenders, Rules 413-415 cast their net much more widely, treating all sexual offenses and offenders as fungible. As previously mentioned, the scientific evidence concerning stranger rapes indicate that these are the very types of crimes which are often subject to mistaken identifications. Nor are all child abusers pedophiles.

In addition, it is clear that Rules 413-415 only apply to a small number of cases, those which are within federal jurisdiction. Ironically, even the proponents of the rules recognize this fact and view their enactment as a symbolic victory which will serve as a model for state rules. As a practical matter, in federal criminal cases, the effect will be felt in Indian territory where what would otherwise be state crimes are prosecuted in federal court. Other questions of fairness aside, should such a significant and controversial rule change be adopted which will primarily impact Native Americans? To the extent that the Military Rules of Evidence are required to follow the federal rules, a built-in delay of 180 days exists from the effective date of any new federal rule, during which time Rules 413-415 can be reviewed and modifications suggested which can be enacted by Presidential order.

Given the numerous troubling features of Rules 413-415, it is disquieting that an unintended result of their enactment may be to produce a backlash against the strict interpretation of the federal Rape Shield Rule 412. For example, judges may be more likely to admit evidence of the complainant's sexual history when the defendant's prior sexual acts are offered for propensity and credibility is key. There are obvious distinctions between the prior consensual acts of a complainant and prior unconsented acts of the

23. *See* Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 534 (1991); *see also* Reed, *supra* n.14, at 145.

24. *Id.*

25. *Id.* at 536.

defendant. However, when judges are faced with the admission of character evidence, some may feel constrained to admit otherwise excluded evidence of the complainant's sexual history on the theory that it is constitutionally required. The only way to challenge such results would be by the unsatisfactory route of petitioning for mandamus. It would be unfortunate if complainants hesitated to bring sexual charges because Rules 413-415 resulted in less predictability about whether their own backgrounds would become ammunition for impeachment at trial.

Moreover, to date no one has focused on how these rules might work in civil cases. The rape shield has recently been extended to cover sexual harassment. However, given the broader discretion of the judge in civil cases, Rule 412's protection may be illusory if judges routinely admit the complainant's sexual history when they admit propensity acts of the defendant. Similarly, defendants may claim prior touching by the plaintiff to open the question of the complainant's sexual activity. Conversely, defendants accused of sexual harassment will face the likelihood of their entire sexual history being admitted without any direct link to the case. Where an employer is also sued, and the evidence is not work-related, additional questions of prejudice may arise.

While the public sentiment against sexual offenders is shared by everyone, Rules 413-415 are ill designed and raise troubling policy issues. The legal community should not sit silent while Congress imposes these rules in an effort to appear tough on crime, but without a full consideration of the numerous issues raised by their enactment.