**MEETING AGENDA**

# *UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE*

**Matheson Courthouse**
**450 South State Street**
**Council Room (N301)**

**Tuesday – May 17, 2016**
**5:15 p.m. to 6:45 p.m.**

**Mr. John Lund, Presiding**

***Light dinner will be served***

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1. Welcome & Approval of Minutes (February 16, 2016) ***(Attached)***.....*Mr. John Lund*

2. Rules of Evidence & Rules of Criminal Procedure Joint Subcommittee ***(Attached)***.....
.....*Mr. John Lund*

3. Rule 504 & Committee Note ***(Attached)***.....*Mr. Ed Havas*

4. Rule 511 ***(Attached)***.....*Mr. John Lund*

5. Rule 412 ***(Attached)***.....*Mr. Tim Shea*

6. Other Business.....*Mr. John Lund*

# AGENDA ITEM 1

**UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE**

**MEETING MINUTES**

**Tuesday– February 16, 2016**
**5:15 p.m.**
**Council Room**

***Mr. John Lund, Presiding***

**MEMBERS PRESENT**
Ms. Teneille Brown
Mr. Matthew D. Bates
Mr. Christopher R. Hogle
Ms. Linda M. Jones
Hon. Keith A. Kelly
Mr. John R. Lund
Mr. Terence Rooney
Hon. David Mortensen
Ms. Jacey Skinner
Ms. Teresa Welch
Mr. Ed Havas
Hon. Thomas Kay
Mr. Chad Platt
Ms. Deborah Bulkeley

**GUESTS PRESENT**
Senator Stephen Urquhart
Professor Cliff Rosky

**STAFF PRESENT**
Ms. Nancy Merrill
Mr. Richard Schwermer
Mr. Tim Shea

**MEMBERS EXCUSED**
Mr. Tom Seiler
Mr. Patrick Anderson

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## 1. WELCOME AND APPROVAL OF MINUTES: (Mr. John Lund)

Mr. Lund welcomed everyone to the meeting.

***Motion:* Judge Keith Kelly moved to approve the minutes from the November 17, 2015 Evidence Advisory meeting. Judge Thomas Kay seconded the motion. The motion carried unanimously.**

## 2. Hate Crimes Proposal *(Handout)* (Mr. Rick Schwermer)

Mr. Schwermer passed out two drafts, the proposed amendment to the rules of evidence and the Joint Resolution Amending Rules of Evidence. Senator Urquhart is sponsoring Hate Crimes legislation and he attended the meeting to inform the Committee about the intent of the Hate

Crimes Legislation. He noted that Senator Urquhart is seeking drafting guidance on a standard of when evidence can be considered being sensitive to first amendment concerns about speech and association. The Committee, Senator Urquhart, and Professor Rosky discussed various scenarios regarding hate crimes and if adopted where the proposed rule would fit into the rules of evidence. Senator Urquhart will draft a substitute for Mr. Schwermer to pass onto the Committee for comment.

**3. Rule 504 Report and Discussion *(attached)* (Mr. Ed Havas)**

Mr. Havas updated the Committee on the current status of Rule 504, extending the attorney client privilege beyond the client. The subcommittee agreed to work on Rule 504 and consider the following questions:

- What have other jurisdictions done on this issue?
- What goals are being accomplished with the changes and what are possible unintended consequences that could come from the proposed changes?
- What language is used to confirm authorization by the client to talk to the attorney?
- The Committee suggested possible language in (a) (4) of the Committee Note: "representative of the client means a person or entities; (a) having the authority to obtain legal services, (b) having the authority to act on advice, and (c) specifically authorized to communicate."

Mr. Havas agreed to consider the comments that were discussed and prepare a revision to be reviewed at the next Evidence Advisory Committee meeting.

**4. Eyewitness Subcommittee: (Mr. John Lund)**

Mr. Schwermer passed out a draft of the Eyewitness Subcommittee description. He noted that the Supreme Court would like to find three or four people from the Evidence Advisory Committee to serve on the subcommittee. The appointed members would consist of half Criminal Procedure and half Evidence Advisory Committee members. Mr. Lund asked the Committee to review the handout and contact Mr. Schwermer or John Lund if they have interest in being on the Eyewitness Subcommittee.

**5. Other Business: (Mr. John Lund)**

Judge Kay expressed concern with the Hate Crimes Legislative proposal. Mr. Schwermer noted that the agenda for the next Evidence Advisory Committee meeting will include Rule 504 and the Eyewitness Subcommittee. John Lund noted that in the summer of 2016 some members of the Evidence Advisory Committee terms will be expired.

**Next Meeting:** 5:15 p.m., April 19, 2016
AOC, Council Room

# AGENDA ITEM 2

**JOINT SUBCOMMITTEE OF THE ADVISORY COMMITTEES ON THE UTAH RULES OF EVIDENCE AND UTAH RULES OF CRIMINAL PROCEDURE**

March 1, 2016

For a number of years Utah courts have issued jury instructions aimed at guiding a jury's assessment of the reliability and credibility of certain categories of witnesses (such as eyewitnesses, *see State v. Clopten*, 2015 UT 82, and incarcerated informants), and certain types of evidence (such as the "flight" of a suspect in a criminal case, *see State v. LoPrinzi*, 2014 UT App 256 (Voros, J., concurring)).

The Utah Supreme Court is interested in assessing the wisdom and legal propriety of such instructions. On one hand, such instructions may be helpful in providing social science background for the jury on matters that may not otherwise be apparent to lay people. This may be especially significant in a case in which the defendant cannot afford to retain an expert witness to provide the relevant background to the jury.

On the other hand, the social science of relevance to these considerations may evolve. *See State v. Clopten*, 2015 UT 82. So a stock jury instruction like that endorsed in *State v. Long*, 721 P.2d 483 (Utah 1986), may become obsolete over time. And this court may not have an opportunity to make ready adjustments to an instruction, as we must await a case on appeal that presents the issue before we can reconsider a prior opinion. So a rule of evidence or procedure may be preferable to a jury instruction, since we have greater control over our rules and can amend them when they have become obsolete.

Some jurisdictions have concluded that jury instructions in this field present legal concerns. First, there may conceivably be a conflict with the provision in the criminal rules prohibiting courts from "comment[ing] on the evidence" in a case and requiring them to "instruct the jury that they are the exclusive judges of all questions of fact." UTAH R. CRIM. P. 19(f). Second, if judges are assessing social science literature in deciding how to weigh certain testimony or evidence, instead of letting the jury consider expert testimony and argument, they may possibly be treading into the domain of "investigat[ing] facts in a matter independently." UTAH R. J. ADMIN. CODE Canon 2, Rule 2.9(c). Finally, some courts have suggested that jury instructions in this field may tread into the domain of the jury under the state constitution.

We would like to take a fresh look at the important legal and policy considerations at stake in this field. The subcommittee's charge is to present a report advising us on its views as to (a) the propriety and policy implications of a court issuing jury instructions aimed at advising a jury on how to assess the reliability or credibility of certain kinds of

witnesses or categories of evidence, particularly in cases in which the defendant may not be able to afford an expert witness; and (b) the possibility of addressing the matters currently dealt with in jury instructions through a rule of evidence or procedure (e.g., a rule deeming certain categories of evidence inadmissible if deemed insufficiently reliable under prescribed considerations, or directing the factfinder to assess reliability of certain evidence in light of specified factors). We would ask that in considering these issues and generating a report, the subcommittee keep in mind the legal arguments that have been leveled at such jury instructions.

The subcommittee should include members with experience and background in criminal prosecution and criminal defense. It should also include trial judges. Representation from a member of the Model Uniform Jury Instructions committee may also be advisable.

If the subcommittee elects to propose a rule, it should present a draft rule for the court's consideration.

# AGENDA ITEM 3

**Rule 504. Lawyer - Client.**

**(a) Definitions.**

(1) "Client" means a person, public officer, corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer or who consults a lawyer with a view to obtaining professional legal services.

(2) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) "Representative of the lawyer" means a person or entity employed to assist the lawyer in a rendition of professional legal services.

(4) "Representative of the client" means a person or entity ~~having authority~~:

(A) having authority to obtain professional legal services;

(B) having authority to act on advice rendered pursuant to legal services on behalf of the client; or

(C) ~~person or entity~~ specifically authorized to communicate with the lawyer concerning a legal matter.

(5) "Communication" includes:

(A) advice given by the lawyer in the course of representing the client; and

(B) disclosures of the client and the client's representatives to the lawyer or the lawyer's representatives incidental to the professional relationship.

(6) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is

in furtherance of rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

**(b) Statement of the Privilege.** A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

(1) made for the purpose of facilitating the rendition of professional legal services to the client; and

(2) the communications were between:

(A) the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest; or

(B) among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest.

**(c) Who May Claim the Privilege.** The privilege may be claimed by:

(1) the client;

(2) the client's guardian or conservator;

(3) the personal representative of a client who is deceased;

(4) the successor, trustee, or similar representative of a client that was a corporation, association, or other organization, whether or not in existence; and

(5) the lawyer on behalf of the client.

**(d) Exceptions to the Privilege**. Privilege does not apply in the following circumstances:

(1) Furtherance of the Crime or Fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction;

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client;

(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a document to which the lawyer was an attesting witness; or

(5) Joint Clients. As to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

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**Commented [EH1]:** In earlier version we deleted "professional" from current rule language. Take out or leave in?

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(1) made for the purpose of facilitating the rendition of professional legal services to the client; and

(2) the communications were between:

(A) the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest; or

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(2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction;

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(5) Joint Clients. As to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

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**2016 Advisory Committee Note. –** The definition of "Representative of the client" has been revised to be more grammatically correct, and to clarify the application of the term "specifically authorized" in sub-paragraph (a)(4). The 2011 Advisory Committee Note made clear that a "representative of the client" includes "employees who are specifically authorized to communicate to the lawyer concerning a legal matter". An individual client might in a similar vein specifically authorize a spouse or other close family member or companion to communicate with the lawyer on a specific matter, with the same assurance of confidentiality under the privilege.

The 2011 Advisory Committee Note recognized that a representative of the client may be an independent contractor (such as a consultant or advisor). So, too, might a spouse or other individual specifically authorized to communicate with the lawyer, as described above.

Minor typographical errors were also corrected.

# AGENDA ITEM 4

**Rule 511. Insurance Regulators.**

(a) *Definitions.*

(1) "Commissioner" has the same meaning as set forth in Utah Code section 31A-1-301.

(2) "Department" has the same meaning as set forth in Utah Code section 31-A-1-301.

(3) "NAIC" means the National Association of Insurance Commissioners.

(4) "Confidential Information" means information, documents, and copies of these that are obtained by or disclosed to the Commissioner or any other person in the course of an examination or investigation made under Utah Code section 31A-16-107.5, and all information reported under Utah Code section 31A-16-105.

(b) *Statement of the privilege for Confidential Information.*

(1) The Commissioner and the Department have a privilege to refuse to disclose in a private civil action Confidential Information that is within the possession or control of the Commissioner and the Department, unless the Commissioner has determined that the Confidential Information may be released pursuant to Utah Code section 31A-16-109.

(2) The NAIC has a privilege to refuse to disclose in a private civil action Confidential Information that is within the possession or control of the NAIC.

(c) *Who may claim.* The privilege may be claimed solely by the Commissioner, representatives of the Department, or representatives of the NAIC.

(d) *Circumstances not constituting waiver.* No waiver of any applicable privilege shall occur as a result of disclosure of documents, materials, or information to the Commissioner under Utah Code section 31A-16-109 or as a result of the sharing of documents, materials, or information under Utah Code section 31A-16-109(3).

**Bruce Pritchett**
**January 11, 2016 at 7:05 pm**

I oppose the proposed amendment to Utah Rule of Evidence 511. Evidentiary privileges have historically been granted only to the beneficiaries of important, confidential relationships such as:
1. Attorney-client (client holds privilege);
2. Doctor-patient (patient holds privilege);
3. Priest-penitent (penitent holds privilege).
This is the first instance, really, where a privilege is created for a routine business (mere insurance). It would make secret the very regulatory oversight of the insurance industry that is funded by taxpayer dollars, and intended to protect the public itself. Public oversight of an industry should remain public.
Moreover, the insurance-funded secrecy would allow the insurance industry to be the holder of the privilege, rather than the clients/patients/penitents who have been the recipients of important services in the past.
In essence, this allows the foxes to guard the henhouse–and in secret, as well.

**Jake Hinkins**
**January 12, 2016 at 1:45 pm**

I agree with Bruce's comment and oppose the amendment. This Rule appears to give unnecessary safeguards to insurance companies and would create additional difficulties in bad-faith insurance litigation.

**Troy Jensen**
**January 30, 2016 at 12:52 pm**

Attorney-Client privilege exists to encourage disclosure without retaliation and grant access to justice for individuals thus promoting due process. Spousal privilege protects and promotes marriage and helps keep family together. Clergy-Penitent encourages wrongdoers to come forward and access help and services to their benefit. So what will privilege for insurance regulators do… let's be frank and honest – it will replace much needed transparency with corruption. I'm curious to know who is promoting this rule and why?

# AGENDA ITEM 5

Rick,

I've attached a proposed amendment to Rule 412. This came up last Friday during the CLE on appellate e-filing. It apparently occurs frequently enough for a few lawyers to have mentioned it.

If a document is sealed, no one has access to it, not even the court, except by an order unsealing the document. In appellate e-filing, the reference to the trial court record in a brief will link to the document referred to. But if the document is sealed, that cannot happen. A classification of "protected" will keep the documents described in Rule 412 from public view, but still allow the parties and judges access to them. I've proposed a corresponding edit on the last page to the committee note.

Thanks,
Tim

**Rule 412. Admissibility of Victim's Sexual Behavior or Predisposition**

**(a) Prohibited Uses.** The following evidence is not admissible in a criminal proceeding involving alleged sexual misconduct:

(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 the following evidence if the evidence is otherwise admissible under these rules:

(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or

(3) evidence whose exclusion would violate the defendant's constitutional rights.

**(c) Procedure to Determine Admissibility.**

**(1) Motion.** If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and

(C) serve the motion on all parties.

**(2) Notice to the Victim.** The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

**(3) Hearing.** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing ~~must be and remain sealed~~ are classified as protected.

**(d) Definition of "Victim."** In this rule, "victim" includes an alleged victim.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE

The Utah Supreme Court has recognized that evidence of an alleged victim's prior sexual conduct gives rise to unique evidentiary problems. In many cases, "such evidence, either of general reputation or specific prior acts, is simply not relevant to any issue in the rape prosecution including consent..." State v. Johns, 615 P.2d 1260, 1264 (Utah 1980). Moreover, even where such evidence has some slight relevance, it has "an unusual propensity to unfairly prejudice, inflame, or mislead the jury" and is "likely to

distort the jury's deliberative process." State v. Dibello, 780 P.2d 1221, 1229 (Utah 1989). Because of this propensity, the Utah Supreme Court has held that the proponent of evidence of sexual conduct with someone other than the accused has the burden of showing that the probative value of the sexual conduct evidence outweighs the evidence's propensity to unfairly prejudice. State v. Dibello, supra.

In assessing whether a specific evidence rule should be adopted, the Committee has received comments from various interested groups and individuals, including the Governor's Council on Victims. Concerns have been raised that, notwithstanding the Utah case law limiting the evidence's admissibility, the absence of a specific rule has deterred victims from participating in prosecutions because of the fear of unwarranted inquiries into the victims' sexual behavior. Without a specific rule, including a required pretrial procedure for screening evidence, the uncertainty over what questions will be asked at trial is a significant deterrent to a victim participating in a case involving sexual misconduct.

In light of the foregoing, the Committee recommends the adoption of a new evidence rule, Rule 412, to further the policies identified by the Utah Supreme Court. The Committee has patterned Rule 412 on the provisions of the draft amended Rule 412 issued by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in July of 1993. However, unlike the draft federal rule, the Committee has chosen, at the present time, to limit Rule 412's application to criminal cases because of the lack of judicial experience or precedent imposing these evidentiary restrictions in a civil context.

Rule 412 seeks to protect the fact finding process from evidence which has an "unusual propensity" to "distort the jury's deliberative process." State v. Dibello, supra. It also safeguards the alleged victim from 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 criminal proceedings against alleged offenders. See generally State v. Williams, 773 P.2d 1368, 1370 (Utah 1989) quoting State v. Johns, supra, 615 P.2d at 1264 (Evidence inadmissible unless "its probative value outweighs the inherent danger of unfair prejudice to the prosecutrix, confusion of issues, unwarranted invasion of the complainant's privacy, considerations of undue delay and time waste and the needless presentation of cumulative evidence.").

To achieve these objectives, Rule 412 creates a specific rule expressly disfavoring the admission of evidence of sexual behavior and predisposition in criminal proceedings. It bars the admission of such evidence, whether offered as substantive evidence or for impeachment, except in designated circumstances. The rule permits the evidence's admission in these designated circumstances because the probative value of the evidence significantly and ordinarily outweighs the possible harm to the victim or to the fact finding process. See generally State v. Johns, supra, 615 P.2d at 1264 ("[A]bsent circumstances which enhance its probative value, evidence of a rape victim's sexual promiscuity, whether in the form of testimony concerning her general reputation or testimony concerning specific acts with

persons other than defendant is ordinarily insufficiently probative to outweigh the highly prejudicial effect of its introduction at trial.").

In addition to limiting admissibility, the rule creates a procedure for determining the admissibility of evidence falling within one of the rule's exceptions. This procedure should reduce or eliminate, prior to trial, the victim's uncertainty over the admissibility of this evidence thereby encouraging victims to participate at trial. The procedure also serves to focus the bench and bar's attention on the unique characteristics of this evidence.

The rule applies in all criminal cases involving sexual misconduct, even if the sexual misconduct is not included in the charges or is not criminal. When the case does not involve alleged sexual misconduct, the rule does not exclude relevant evidence relating to a witness' alleged sexual activities. The witness may, however, be protected by other rules such as Rules 403, 404, and 608.

The phrase "alleged victim" is used because there will often be a factual dispute whether sexual misconduct occurred. There is no requirement that the misconduct be alleged in the charging document. The rule applies if a defendant's sexual misconduct is to be a matter of proof, even though the crime charged is not a sex offense. For example, if the prosecutor wants to show rape as a motive in a kidnapping prosecution, Rule 412 will come into play. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a victim of alleged sexual misconduct.

Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.

Paragraph (a). Rule 412 bars evidence offered to prove the victim's sexual behavior or sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other rule of evidence, must be excluded if Rule 412 so requires.

The phrase "other sexual behavior" in paragraph (a)(1) is used to suggest some flexibility in admitting evidence of acts of sexual conduct involving the victim which are "intrinsic" to the alleged sexual misconduct at issue in the case. For example, the rule does not exclude evidence of sexual behavior which is inextricably intertwined with the crime charged. Cf. United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990)(Under Rule 404(b), evidence is "'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged.").

Past sexual behavior connotes all activities that involve actual physical conduct (i.e. sexual intercourse and sexual contact) or that imply sexual intercourse or sexual contact. See, e.g., United States v. One Feather, 702 F.2d 736, 739 (8th Cir. 1983)(birth of an illegitimate child inadmissible under Rule 403); State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986)(evidence of venereal disease inadmissible); 23 C. Wright & K. Graham, Jr., Federal Practice and Procedure, § 5384 at p. 544 (1980)(use of contraceptives within Rule 412 since use implies sexual activity). In addition, the word "behavior" includes mental activities, such as fantasies or dreams. See 23 C. Wright & K. Graham, Jr.,

supra, § 5384 at p. 548 ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of [former federal] Rule 412 is broad enough to encompass the behavior of the mind.").

The rule also excludes all evidence of the alleged victim's sexual predisposition. It excludes evidence that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder. Consequently, unless the proponent satisfies the (b)(3) exception, evidence of the alleged victim's dress, speech, or life-style would not be admissible. Several reasons exist for applying the rule to all criminal cases where sexual misconduct is involved and for not limiting it to cases where a sexual misconduct crime is charged. The strong social policy of protecting a victim's privacy and encouraging victims to report criminal acts is not confined to cases that involve a charge of sexual assault. For example, the need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence of the defendant's alleged rape of the victim is offered to prove motive or as background. Moreover, the propensity of evidence of the victim's past sexual behavior to distort a jury's fact finding exists regardless of the crime charged. See, e.g., State v. Young, 853 P.2d 327, 345 (1993); Id. at 386 (J. Durham opinion)(discussing admissibility of victim's prior sexual behavior in case where rape was an aggravating factor in capital murder case).

Paragraph (b). Paragraph (b) spells out the specific circumstances in which the court may admit evidence otherwise inadmissible under the general rule expressed in paragraph (a). Evidence is admissible under paragraph (b) only if it falls within one of the exceptions and if it also satisfies the other requirements of the Utah Rules of Evidence, including Rule 403. Subparagraphs (b)(1) and (b)(2) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of reputation or opinion evidence. But see State v. Howard, 544 P.2d 466 (Utah 1975)(requiring the admission of reputation evidence under the facts of that case).

Under subparagraph (b)(1), evidence of specific instances of sexual behavior with persons other than the accused may be admissible if offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. See United States v. Begay, 937 F.2d 515, 523 & n.10 (10th Cir. 1991).

Under the exception in subparagraph (b)(2), evidence of specific instances of sexual behavior involving the alleged victim and the accused may be admissible if offered to prove consent, or if offered by the prosecution. This exception might admit evidence of specific sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible under this exception and Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Evidence offered for the purposes identified in subparagraphs (b)(1) and (2) may still be excluded if it does not satisfy requirements of the other evidence rules, including Rule 403. See State v. Williams, supra.

Subparagraph (b)(3) states a truism. A court may not exclude evidence of an alleged victim's sexual behavior or predisposition if to do so would deny the accused Constitutional protections. The United States Supreme Court has recognized that in various circumstances a defendant may have a right under the Confrontation Clause to introduce evidence otherwise precluded by an evidence rule. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988)(defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to challenge credibility). The precise scope of the accused's constitutional right turns on the case's specific facts. Compare State v. Moton, 749 P.2d 639 at 643-44 (trial court properly excluded some evidence of ten year old's sexual experience, offered to show knowledge)(opinion of J. Howe) with State v. Butterfield, 817 P.2d 333, 338-41 (Utah App. Ct. 1991)(trial court properly admitted evidence of fourteen year old's experience, offered to explain hymen condition and to show knowledge.)

Paragraph (c). Paragraph (c) is intended to alleviate victims' fears that their past sexual behavior or predisposition will unexpectedly become an issue at trial. This is accomplished by requiring a pretrial motion and hearing as a precondition to the evidence's admission. These procedures apply equally to the accused who seeks admission under subparagraphs (b)(1), (2), & (3) and to the prosecutor who seeks admission under subparagraph (b)(2).

The court may consider a late filed motion upon a showing of good cause. Such a showing could include newly discovered evidence which could not have been obtained earlier through the exercise of due diligence; or new issues which arise unexpectedly at trial.

The rule requires that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim must be afforded the right to be present and an opportunity to be heard. To safeguard alleged victims and their privacy, the prosecutor, rather than the accused or the accused's attorney, is responsible for notifying the alleged victim of the motion and hearing.

All papers connected with the motion and any record of a hearing on the motion ~~must be kept and remain under seal during the course of the trial and appellate proceedings~~ are classified as protected, unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.