STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE

IT IS HEREBY ORDERED that a hearing be had before this Court in the courtroom of the Minnesota Supreme Court, State Capitol, on October 11, 1989, at 2:00 p.m., to consider the adoption of the Proposed Amendments to the Minnesota Rules of Evidence.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 230 State Capitol, St. Paul, Minnesota 55155, on or before October 2, 1989, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before October 2, 1989, and

3. All persons wishing to obtain copies of the Proposed Amendments to the Minnesota Rules of Evidence shall write to the Clerk of the Appellate Courts.

Dated: July 12, 1989

BY THE COURT

Peter S. Popovich

Peter S. Popovich, Chief Justice

HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE

Supreme Court No. C3-84-2138

Hearing Date: October 11, 1989
2:00 p.m.
Supreme Court Chambers

NAME		DATE WRITTEN SUMMARY FILED	ORAL PRESENTATION YES	ORAL PRESENTATION NO	ORDER OF ARGUMENT	ALLOTTED TIME
Peter N. Thompson	Chair of Advisory Comm.	9-28-89 Letter	X			
Hon. Bertrand Poritsky	Judge of District Court 2nd Jud. District	9-28-89 Letter	x			
Kathleen M. Graham	Attorney, member	9-28-89 Letter	X			
Roger C. Park	Member Professor of Law, U of M	9-28-89 Letter	X			
Thomas Foley	President, Minn. County Attorneys Assn.	10-2-89		X		
Paul R. Kempainen	Asst. Attorney General	10-2-89	X			

PETER N. THOMPSON
1536 HEWITT AVENUE
ST. PAUL, MINNESOTA 55104
(612) 641-2968

September 26, 1989

Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155 C3-84-2138

Dear Clerk Grittner:

I enclose for filing 12 copies of a request to make an oral presentation, along with 12 copies of the material to be so presented at the Minnesota Supreme Court hearing on October 11, 1989 at 2:00 p.m., to consider the adoption of the Proposed Amendments to the Minnesota Rules of Evidence.

Very truly yours,

Peter N. Thompson

Peter N. Thompson
Chair, Supreme Court Advisory Committee on Rules of Evidence

/ds
Enclosures

STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

In re Hearing to Consider
Proposed Amendments to the
Minnesota Rules of Evidence

To: The Honorable Chief Justice and Associate
Justices of the Minnesota Supreme Court

Peter N. Thompson, Chair, of the Minnesota Supreme Court Advisory Committee on the Rules of Evidence, hereby requests the permission of this Court to appear and for Committee members, the Honorable Bertrand Poritsky, Kathleen M. Graham, and Roger C. Park to appear at the hearing scheduled for 2:00 p.m., Wednesday, October 11, 1989, to make oral presentations in support of the proposed amendments set forth in the July 28, 1989, Advisory Committee Report filed with this Court, as indicated in the outline attached to this request.

Dated: September 26, 1989

Peter N. Thompson

Peter N. Thompson
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 641-2968

STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

Outline of Oral Presentations
by Members of the Supreme Court Advisory Committee
on the Rules of Evidence

I. Peter N. Thompson, Advisory Committee Chair and Acting Dean, Hamline University School of Law:

Overview of Committee Proposal;

Proposed amendments to rules 103(b) and 201.

Time requested: 5 minutes.

II. Hon. Bertrand Poritsky, Judge of District Court, Second Judicial District:

Proposed amendments to rules 404(b), 404(c) and 412.

Time requested: 10 minutes.

III. Kathleen M. Graham, Leonard Street & Deinard:

Proposed amendments to rules 606(b), 609(a), 609(b), 609(d), 616, and 703(b).

Time requested: 10 minutes.

IV. Roger C. Park, Professor of Law, University of Minnesota Law Center:

Proposed amendments to rules 801(d)(1), 801(d)(2), 803(6), 803(8), 803(24), 804(b)5.

Time requested: 10 minutes.

PETER N. THOMPSON
1536 HEWITT AVENUE
ST. PAUL, MINNESOTA 55104
(612) 641-2968

October 9, 1989

Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

C3-84-2138

Dear Clerk Grittner:

I enclose for filing 12 copies of an amended request to make an oral presentation, along with 12 copies of the material to be so presented at the Minnesota Supreme Court hearing on October 11, 1989 at 2:00 p.m., to consider the adoption of the Proposed Amendments to the Minnesota Rules of Evidence. Kathleen Graham will be out of the country. Janet Newberg will present the rule changes in Article 6.

Very truly yours,

Peter N. Thompson

Peter N. Thompson
Chair, Supreme Court Advisory Committee on Rules of Evidence

/ds
Enclosures

STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

- -

In re Hearing to Consider Proposed Amendments to the Minnesota Rules of Evidence	AMENDED PETITION

- -

To: The Honorable Chief Justice and Associate Justices of the Minnesota Supreme Court

Peter N. Thompson, Chair, of the Minnesota Supreme Court Advisory Committee on the Rules of Evidence, hereby requests the permission of this Court to appear and for Committee members, the Honorable Bertrand Poritsky, Janet Newberg, and Roger C. Park to appear at the hearing scheduled for 2:00 p.m., Wednesday, October 11, 1989, to make oral presentations in support of the proposed amendments set forth in the July 28, 1989, Advisory Committee Report filed with this Court, as indicated in the outline attached to this request. Janet Newberg will substitute for Kathleen Graham who will be out of the country.

Dated: October 9, 1989

Peter N. Thompson

Peter N. Thompson
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 641-2968

STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

Outline of Oral Presentations
by Members of the Supreme Court Advisory Committee
on the Rules of Evidence

I. Peter N. Thompson, Advisory Committee Chair and Acting Dean, Hamline University School of Law:

Overview of Committee Proposal;

Proposed amendments to rules 103(b) and 201.

Time requested: 5 minutes.

II. Hon. Bertrand Poritsky, Judge of District Court, Second Judicial District:

Proposed amendments to rules 404(b), 404(c) and 412.

Time requested: 10 minutes.

III. Janet Newberg, Attorney General's Office:

Proposed amendments to rules 606(b), 609(a), 609(b), 609(d), and 616.

Time requested: 10 minutes.

IV. Roger C. Park, Professor of Law, University of Minnesota Law Center:

Proposed amendments to rules 703(b), 801(d)(1), 801(d)(2), 803(6), 803(8), 803(24), 804(b)5.

Time requested: 10 minutes.

Hamline UNIVERSITY
SCHOOL OF LAW

Office of the Dean
(612) 641-2400
Placement Office
(612) 641-2470
Registrar's Office
(612) 641-2468

M E M O R A N D U M

DATE: November 13, 1989

TO: Minnesota Supreme Court Rules of Evidence Advisory Committee

FROM: Peter N. Thompson, Chair PNT

I have submitted the attached letter to the court indicating that at this time we do not wish to supplement our presentations. I will review the later submissions and try to dispurse them to the committee as soon as possible. We will then make a judgment whether we should request additional leave from the court to respond. If you have any questions, please call.

PNT/ds
attachment

1536 HEWITT AVENUE, ST. PAUL, MINNESOTA 55104 - 1284

PETER N. THOMPSON
1536 Hewitt Avenue
St. Paul, Minnesota 55104
(612) 641-2968

November 13, 1989

Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

RE: Proposed Amendments to the Rules of Evidence
C3-84-2138

Dear Clerk Grittner:

I enclose for filing 12 copies of the Supreme Court Advisory Committee's response in the above entitled matter.

Very truly yours,

Peter N. Thompson

Peter N. Thompson
Chair, Supreme Court Advisory Committee
on Rules of Evidence

PNT/ds
Enclosures

STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

- -

**In re Hearing to Consider
Proposed Amendments to the
Minnesota Rules of Evidence**

- -

To: The Honorable Chief Justice and Associate Justices of the Minnesota Supreme Court

On behalf of the Supreme Court Advisory Committee on Rules of Evidence, I thank the court for the opportunity to provide additional comment. We have reviewed the submissions to date and considered the presentations at the hearing. At this time, we believe our oral presentations, our written comments, and the cases cited in the comments respond to the issues raised. We do not wish to add additional comment. We will review all written submissions as they are filed. If the court receives subsequent written comments that raise matters we have not addressed, we may request that the court allow the committee to respond.

If I or the committee can be of any service to the court, we would be pleased to assist the court in any way.

Dated: November 13, 1989

Peter N. Thompson

Peter N. Thompson, Chair
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 641-2968

PETER N. THOMPSON
1536 Hewitt Avenue
St. Paul, Minnesota 55104
(612) 641-2968

December 1, 1989

Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

RE: Proposed Amendments to the Rules of Evidence
C3-84-2138

Dear Clerk Grittner:

I enclose for filing 12 copies of the Supreme Court Advisory Committee's response in the above entitled matter.

Very truly yours,

Peter N. Thompson
Chair, Supreme Court Advisory Committee
on Rules of Evidence

PNT/ds
Enclosures

STATE OF MINNESOTA

IN SUPREME COURT

C3-84-2138

- -

**In re Hearing to Consider
Proposed Amendments to the
Minnesota Rules of Evidence**

- -

**To: The Honorable Chief Justice and Associate
Justices of the Minnesota Supreme Court**

The Supreme Court Advisory Committee on Rules of Evidence would like to supplement its comments in light of materials that were filed on the last day. While the committee believes that its written and oral presentations state clearly the views of the committee and the justifications for the proposed changes, in three instances the committee believes a brief comment will assist the court in the resolution of these issues.

1. Rule 404(b) Balancing Test

The proposed Rule 404(b) (2) requires that the evidence should not be admitted unless the probative value of the evidence outweighs the danger of unfair prejudice. . . ." This standard is consistent with existing case law in Minnesota. State v. Rainer, 411 N.W.2d 490, 497 (Minn. 1987); State v. Doughman, 384 N.W.2d 450, 454 (Minn. 1986); State v. Kumpula, 355 N.W.2d 697, 702 (Minn. 1984); State v. Filippi, 335 N.W.2d 739, 743 (Minn. 1983); State v. Bolts, 288 N.W.2d 718, 719 (Minn. 1980). Because the standard is different from the standard in Rule 403,

it is important that this standard be explicit in the rule unless the Court wants to change the standard.

2. Rule 404(b) Other Crimes

The Committee is persuaded by the argument of the Ramsey County Attorney's office that the proposed amendment to Rule 404(b) should include "wrongs and acts". The amended proposed rule should read:

ARTICLE 4. RELEVANCY AND ITS LIMITS

* * *

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes, Wrongs, or Acts

* * *

(b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show ~~that he acted~~ action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence of past sexual conduct of the victim in prosecutions under Minn. Stats. Sec. 609.342 to 609.346 is governed by Minn. R. Evid. 412.

In a criminal prosecution, if any party seeks to prove the commission of a crime, wrong, or act other than (i) a crime charged in the complaint, indictment, or tab charge, or (ii) a crime used to impeach a witness, evidence of the other crime, wrong, or act shall not be admitted unless:

(1) The other crime, wrong, or act and the participation in

it by a relevant person are proven by clear and convincing evidence; and

(2) The probative value of the evidence outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

3. Rule 703(b)

In response to the comments of Charles Hall, it is the Committee's view that the proposed rule does not necessarily supercede Ramsey County v. Miller, 316 N.W.2d 917 (Minn. 1982). To the extent that the opinion is limited to permitting an expert to testify about foundational matters that are trustworthy and helpful to the jury in understanding the opinion, the rule is consistent with the case. The rule would not permit a broad reading of Ramsey County v. Miller permitting an expert to testify on direct examination about all hearsay data or information that served as part of the basis for the opinion. For example, in an arson case or discrimination case, experts would not as a matter of course be permitted to testify on direct examination about hearsay statements obtained during their investigation that in part served as the basis for their opinion. Such a broad reading of the case would undermine the policies behind the hearsay rule and other exclusionary rules of evidence. The rule was not proposed to highlight the difference between

civil and criminal cases. The rule was proposed to encourage judges to carefully scrutinize studies, analyses prepared by third parties or other claimed basis of an expert's opinion.

Respectfully submitted

Peter N. Thompson

Peter N. Thompson, Chair
Minnesota Supreme Court Advisory
Committee on Rules of Evidence

December 1, 1989

C3-84-2138

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF EVIDENCE

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT.

Thank you for the opportunity of addressing you at the October 11, 1989, public hearing on the Proposed Amendments to the Minnesota Rules of Evidence. The following written remarks are intended to summarize and to supplement that presentation and to share with you the concerns and recommendations of the Ramsey County Attorney's Office regarding proposals on Rules 404(b), 404(c) (new 412), 609, 803(8), 803(24) and 804(b)(5).

As its stated goal, the Advisory Committee "followed the policy set by the original advisory committee for the Minnesota Rules of Evidence deferring to the language in the Federal Rules of Evidence unless there was a substantial state policy or substantial reason justifying a different rule in Minnesota." (Preliminary Comment, i to ii.) In the case of each of the rules cited above, however, the Advisory Committee has recommended a departure from the language of the Federal Rules in the absence of any compelling justification. There is, as the Committee recognizes, real value to maintaining uniformity wherever

possible with the Federal Rules just as there is real value to the bench and bar in having settled case law on the meaning and application of the rules. We urge the Court to consider this worthy goal foremost as you review the proposed amendments and these comments.

RULE 404(b): Spreigl Evidence.

The Advisory Committee proposes to modify the current balancing test with regard to the admission of other crime evidence in criminal cases. Currently, all of Minnesota's Article 4, Relevancy and its Limits, conforms to the federal rules.[1] Under present 404(b), Spreigl evidence may be admissible, for the limited purposes described therein, if it meets the general relevancy requirements of 401, 402 and 403. Specifically, the balancing test of Rule 403 applies, and Spreigl evidence "may be excluded if its probative value is substantially outweighed by unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

1. Reversal of Balancing Test.

Proposed 404(b) would reverse the balancing test for one type of relevant evidence, evidence of other crimes. It would require that other crime evidence not be admitted unless "the

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1. Federal Rule 412 parallels Minnesota Rule 404(c) but is even more restrictive and is discussed infra; Federal Rule 410 (inadmissibility of withdrawn guilty pleas) is somewhat narrower than Minnesota 410.

probative value of the evidence outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

This court has long recognized the proper admissibility of other crime evidence in criminal prosecutions, particularly in sex cases. See, State v. Schueller, 138 NW 937 (1912).[2] Long before the Rules of Evidence were adopted, other crime evidence in Minnesota could not be admitted unless it tended to establish motive, intent, absence of mistake or accident, identity of an accused, sex crimes or common scheme or plan. State v. Sweeney, 231 NW 225 (1930). The balancing test, too, predates the Rules of Evidence, State v. Gavle, 48 NW2d 44 (1951). Where other crime evidence has been properly admitted under one of the above exceptions, and where proper Spreigl-Billstrom notice has been given, this court has repeatedly affirmed its admission. In our tracking of this issue, we have found only one case in which a conviction has been reversed for abuse of discretion in applying the balancing test. State v. Kilker, 400 NW2d 450 (Minn. App. 1987), a case not reviewed by this Court. There is, in short, no

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2. There is a particularly strong need and relevance of other sex crime evidence in sex prosecutions. These crimes are inherently difficult to prove: they are almost always unwitnessed; they involve proof of inherently humiliating facts and the most intimate invasions of privacy; there is, unlike most other crimes, a tendency to blame the victim. Testimony is usually essentially one person's word against another's. What Spreigl evidence does is assist the jury in deciding who to believe.

history of abuse of other crime evidence in the trial courts of this state which would justify either a change of rules or abandonment of long-standing court precedent. Modification of the rule now absent sound policy reasons would throw this settled area of law into unwarranted confusion.

Rules of evidence, and particularly rules of relevance, should be the same for any proceeding, civil or criminal. Rules of relevance only determine what the factfinder hears, and factfinders should hear all relevant evidence that satisfies the general requirements of Rules 402 and 403. In criminal cases, the impact of these rules should always be considered in the context of the vastly higher standard of proof required as well as the presumption of innocence.

More than seventy years of case law, vigorously applied by the defense bar and trial courts of this state, have already greatly restricted the use of Spreigl evidence. In addition to meeting the requirements of the rules, the proponent must show the evidence is clear and convincing, the need great and the offense both strongly similar and not remote in time. The result, from a practitioner's point of view, is that in most cases in which it is sought to be admitted, it is not. Even when admitted, the use of the evidence is closely circumscribed by a strong cautionary JIG instruction. When admitted, it is also an almost certain appeal issue (at least when the defendant is

incarcerated). The virtual absence of reversals demonstrates the adequacy of the safeguards of the present rules.

2. Other Wrongs or Acts.

On a technical level, one final concern is that the proposed rule change and commentary omit mention of other wrongs or acts. Spreigl evidence frequently consists of other bad acts of the defendant which may or may not constitute a crime. Under the present rule, it is irrelevant, assuming the many other Spreigl requirements are met. The new rule could be construed to mean that in a criminal prosecution 1) the proponent of Spreigl evidence would have to prove the acts constituted crimes in order to be admitted or 2) a separate and easier standard applies to bad acts that are not crimes! Either result would be irrational and could result in unnecessary litigation on what should be a non-issue.

Recommendation: There is no compelling reason to alter the present rule. The technical changes proposed to the first paragraph of 404(b) should be adopted. The balance of the proposed changes should not.

PROPOSED RULE 412: Rape Victim's Past Behavior.

Present Minnesota Rule 404(c) currently conforms to M.S. 609.347, Minnesota's rape shield law. The Federal Rules contain a similar 'rape shield' provision in Rule 412. It makes sense to renumber Minnesota 404(c) as 412 to maintain the parallel to the Federal Rules, a change the Advisory Committee recommends.

However, there is no substantial state policy which supports altering the rule as the committee suggests. On the contrary, there is no rule for which the policy of this state has been more convincingly enunciated. Nor is there any rule (with the possible exception of special rules for the protection of children in child abuse cases) which should more clearly defer to state policy. Subject only to the always overriding requirements of protecting the defendant's constitutional rights (and the committee does not assert the present rule and statute violate them), the public has a right to demand vigorous prosecution of suspected rapists and to increase the likelihood of prosecution by protecting rape victims from being revictimized at trial. When a person is a victim of other crimes, the most intimate details of private life should not become an open book. Through much public discussion in this state, the public consciousness has been raised to the point that rape victims can now be assured that unless they have previously fabricated a claim of rape, engaged consensually in sex with the defendant or had contacts with someone else which could account for evidence in the current case of semen, pregnancy or disease, their prior sexual experience is irrelevant and, therefore, protected from public exposure.

The term "common scheme or plan" has been part of Minnesota's rape shield law since enactment in 1975. Under this exception, in consent defense cases, a victim's prior sexual

conduct has been relevant and admissible where the victim's common scheme was a prior false claim of rape. Such evidence is indisputably relevant (just as Spreigl evidence is indisputably relevant to a defendant's state of mind). The wording of this exception was redrafted in 1987, still preserving the phrase, to clarify the original intent after the defense in a Hennepin County "gang rape" case sought to construe the exception to mean that prior consensual sex by the victim with two men simultaneously was a common scheme or plan relevant to whether the defendants (6 other men) forcibly raped her. The committee comment to the proposed rule (at p. 24) suggests the committee misunderstands this history. The present rule has only one requirement (not two): a prior fabrication of sexual assault constitutes a common scheme or plan.

The Advisory Committee's proposal would eliminate the common scheme or plan exception accepted for 14 years in Minnesota and substitute the new and undefined phrase "definite pattern of sexual behavior so distinctive and so closely resembling the accused's version as to tend to prove the alleged victim actually consented to the act or acts charged."

The potential repercussions of this proposed change are enormous and, we feel, contrary to clearly expressed public policy that a rape prosecution should not put the victim on trial. Although the Comment to the proposal states the intent is that "distinctive pattern" evidence should be admitted in

exceptional circumstances, the practical reality would be fishing expeditions into the most intimate aspects of a victim's life looking for any sexual conduct arguably similar. Where police, rape counsellors and prosecutors can now with some confidence assure rape victims that their past consensual sexual behavior is irrelevant (unless with the defendant), that will no longer be the case.

The proposed rule eliminates the present requirement that the common scheme or plan (or, as redrafted, "distinctive pattern") involve a prior fabricated allegation of sexual assault. The fundamental error in this proposal is that it ignores the premise that is the heart of the present rule: prior consensual sexual conduct of a victim with anyone other than the defendant is irrelevant to the proof of the crime charged unless it is shown in some way to have motivated the defendant. The fact that a victim previously consented to sexual acts with someone else at another time under even identical circumstances is irrelevant to a defendant's criminal intent. Nor is there any nexus between a victim's prior consensual conduct and her credibility when she asserts that on this occasion she was raped. The proper credibility nexus is the showing of a prior fabrication: that is, a common scheme or plan to falsely claim rape.

Notwithstanding the assurances of the Comment to the proposed rule, the rule would only encourage discovery and

litigation aimed at embarrassing rape victims and ultimately deterring them from prosecution.

Finally, it is worth noting that Federal Rule 412 is more restrictive than the present Minnesota rule and statute. It allows evidence of the victim's past sexual behavior with persons other than the accused only on the issue of whether the accused was or was not the source of semen or injury.

Recommendation: Present Rule 404(c) should be renumbered as 412 to conform to the federal numbering. The substance of the present rule should, however, be maintained; in particular, the common scheme or plan section. Present commentary should be maintained except the link between common scheme or plan and fabrication should be clarified. The committee correctly points out in the new Comment that prior fabrication of rape may properly be admitted in some instances other than consent defense cases. In addition, the new Comment regarding the rare cases in which the defendant's constitutional rights would require admission of prior conduct evidence under circumstances not contemplated by the general rule is a useful summary of case law.

Rule 609: Impeachment by Prior Conviction

1. Crimes of Dishonesty. The proposed change to Rule 609(a)(2) deletes the present wording regarding impeachment for crimes involving "dishonesty or false statement" and substitutes "untruthfulness or falsification as a necessary statutory

element." The Comment to this proposed change asserts this change is consistent with the underlying purpose of the rule and conforms to accepted practice. The federal rule is identical to the present Minnesota rule. Many years of Minnesota and federal case law interpreting the present rule provide solid precedent for its application. The purpose of the rule is already clearly articulated and widely understood. There is no evil in need of correction.

The proposed change is narrower than the present rule thereby necessitating a new case law evolution. Moreover, by requiring untruthfulness or falsification as a necessary element, the proposed rule would exclude certain convictions long accepted as clear crimes of dishonesty. For example, Theft by Swindle does not have falsification or untruthfulness as a necessary element (see M.S. 609.52, subd. 2(4) and CRIMJIG 16.08). Yet, no offense is more clearly a crime of dishonesty. It is obviously relevant to the believability of a defendant to know he is a convicted "con man".

2. Time Limit.

Even more disturbing, in view of the committee's asserted goal of following the federal rule unless there is a substantial reason justifying a different Minnesota rule, are the changes proposed to 609(b). The present rule provides a time limit of 10 years (from date of conviction or release from confinement, whichever is later) for the admission of any

conviction except crimes of dishonesty, which currently have no time limit. Provision is made for exceptions to the 10-year rule upon written notice and hearing. The Minnesota and federal rules are identical.

The committee's proposal would make the 10-year rule absolute for all crimes other than crimes of dishonesty (or, as proposed, crimes with untruthfulness or falsification as a necessary statutory element). Crimes of dishonesty would no longer always be admissible but would be subject to possible admissibility beyond 10 years upon motion and hearing.

The committee Comment to this proposed rule contains no mention of any justification for this change, nor does the ABA Committee Proposal, upon which the 609(a)(2) change is based, contain any such proposal. Nor is there any caselaw indication of abuse of the present time limit rule in Minnesota.

Recommendation: Present Rule 609 should be modified to conform to the proposed federal amendments regarding gender-neutral language and deleting the requirement, long superceded by practice, of eliciting convictions on cross-examination. However, the proposed changes on crimes of dishonesty and time limit should be rejected.

Rule 803(8): Hearsay: Police Reports as Public Records

The underlying theory to exceptions to the hearsay rule is that certain hearsay is so inherently reliable that it should be admitted notwithstanding the inability to cross-examine the

declarant. The proposed change to Rule 803(8) making police reports admissible as public records on behalf of the criminal defendant may have been regarded by the committee as a technical one. (See remarks of Professor Roger Park at the public hearing of October 11, 1989.) However, it clearly is not.

The present Minnesota (and federal) rule prohibits the introduction of police reports in criminal cases. There is good reason for this exclusion. Police reports are, with the exception of certain officially recorded facts, such as the time and date of a call, not inherently reliable or complete public records. Initial incident reports, in particular, are generally written based on hastily taken notes in an often very excited setting and are meant solely as preliminary reports to serve as the commencement of an investigation. While they often contain extremely useful facts, including observations of officer, they are almost always incomplete and not infrequently contain errors. These facts are routinely explored in detail through direct and cross examination of the officer himself. To admit police reports when it suits the defendant as evidence of a police officer's observations would open the door to real misrepresentations of facts and would hinder the fact-finding process. Such evidence is inherently self-serving and would afford the defendant an opportunity to present a facially favorable version of the facts without subjecting it to cross-examination. See, State v. Taylor, 258 NW2d 615, at 622 (1977).

It would also increase the likelihood of such defense surprise tactics as producing a report in lieu of having to call the witness and subjecting him to direct examination, or, even worse, deliberately producing a report knowing the officer is unavailable to explain it. The state, assuming the witness can be located, would lose its ability to cross-examine an adverse witness since it would be forced to call the witness and conduct a direct examination. The proposed amendment also creates many practical problems. Most police reports contain a wide variety of information, observations, conclusions and speculations. The sources are often unclear. Some is inadmissible. Much court time would be wasted arguing about what should and should not be deleted from the report, what constitutes an "observation", whether it was the officer's or someone else's, what the officer meant by certain statements in his report--all in the absence of the one person who can explain his report and answer these questions.

The proposed change, however inadvertently, creates a substantive right for the criminal defendant. And it is a right more likely to obfuscate the truth and create confusion than to aid the truth-finding process. This is contrary to the purpose of rules of evidence which should be merely to assure, impartially, that a factfinder hear reliable evidence. If the observations of police officers contained in their reports were that reliable, they should be equally admissible by both sides.

The far better rule would continue to require that the witness be called and subjected to direct and cross-examination.

Finally, the Comment to the proposed amendment indicates that the new rule would overrule existing case law regarding the inadmissibility of discretionary conclusions and opinions under the public record exception. This is particularly disturbing if applied to the contents of police reports as discussed above.

Recommendation: The proposed amendments to Rule 803(8) regarding police reports offered by criminal defendants should be rejected and the present rule maintained. The clarification of the rule by moving the qualifying phrase "unless the sources of information or other circumstances indicate lack of trustworthiness" to the beginning of the rule and the first new paragraph of the Comment to 803(8) explaining this change (at p. 51) should be maintained. The balance of the proposed new Comment should be rejected.

Rule 803(24) and 804(b)(d): Catchall Exception

1. Higher Standard.

The proposed amendments to these companion rules would require a higher standard of reliability and trustworthiness for hearsay admitted under the catch-all exception than for any other admissible hearsay. The Comment offers no rationale for this change.

The present rules require any hearsay admitted as substantive evidence to have substantial guarantees of

reliability: that premise is the basis for each of the evidentiary exceptions. The catch-all exception is intended as an umbrella to cover those situations, unique to the facts of particular cases or identified as society and the law continue to evolve, which have equivalent indicia of reliability but were not or could not be contemplated by the drafters. The present rule, in conformity with the federal rule, properly requires equivalent guarantees of trustworthiness. A substantial line of Minnesota and federal cases has developed clearly articulating the rule and establishing accepted guidelines for its application. The amendment would mean this caselaw could not be relied upon and would be thrown in disarray. The implications for child abuse cases (probably the single type of case now most likely to use this exception) would be tremendous.

An examination of 803(24) caselaw indicates no evil in need of correction and no state policy that would compel a departure from the federal rule. On the contrary, state policy as enunciated by this Court in 803(24) cases and by the legislature (as in M.S. 595.02, subd. 3) is consistent with the present rule.

2. Material Fact.

The committee also proposes deletion of predicate requirement (A): that the statement is offered as evidence of a material fact. The Comment argues that the "materiality" language is merely redundant to the general 403 requirement of

relevance. In practice, however, the (A) prong has been construed to require catch-all evidence not merely to be relevant but also important (i.e., not trivial). In this sense, prong (A) continues to have some value and would also maintain the parallel to the federal rule.

Recommendation: The gender-neutral modifications proposed to these rules should be adopted. The higher standard for catch-all evidence should be rejected. Prong (A) on material facts should be maintained.

Dated: November 15, 1989

Respectfully submitted,

TOM FOLEY
Ramsey County Attorney

Jeanne L. Schleh

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October 11, 1989

Mr. Frederick Grittner
Clerk of Appellate Courts
230 State Capitol
St. Paul, Minnesota 55155

Re: In Re Proposed Amendments To The
Minnesota Rules of Evidence
Court File No. C3-84-2138

Dear Mr. Grittner:

I would like to have my name added to the list of those requesting time for an oral presentation to the Supreme Court at its hearing on the Proposed Amendments to the Minnesota Rules of Evidence, scheduled for October 11, 1989.

I will be speaking on behalf of the Ramsey County Attorney's Office.

Very truly yours,

Jeanne L. Schleh

JEANNE L. SCHLEH
Assistant Ramsey County Attorney

/bak

11-9-89

THOMAS L. JOHNSON
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November 8, 1989

OFFICE OF
APPELLATE COURTS

NOV 9 1989

FILED

Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

Re: Proposed Amendments to the
Rules of Evidence - Specifically,
Proposed Rule 703(b)
C3-84-2138

Dear Mr. Grittner:

Our office takes this opportunity to go on record in opposition to the language of proposed Rule 703(b), insofar as the proposed rule language is intended to supersede the holding in Ramsey County vs. Miller, 316 N.W.2d 917 (Minn. 1982), as stated in the comments to the proposed rule change.

We also, attached hereto, offer substitute language for the language of the proposed rule change.

This office handles nearly 2,000 real estate tax petitions each year and several hundred parcels of land in condemnation actions. The holding in the Miller case was meant to allow court testimony to conform to the realities of the real estate marketplace, and that holding should not now be abrogated. Our court stated in Miller, 316 N.W.2d at p.922, as follows:

> "We take the position that, in light of current practices in the real estate area, ... all relevant evidence relating to market value should be admissible, ... We see no reason to allow an expert to testify as to value and then permit the very bases for his testimony to come out only in cross examination, if at all."

The court then specifically allowed on direct examination such things as specific prices of comparable sales, assessor's valuation of the subject property, the owner's acquisition and improvement costs, and developmental costs. All of these items were deemed admissible on direct examination, since they are

consistently and reasonably relied upon by expert real estate appraisers informing an opinion on value, and because in the real estate marketplace the reasonable and prudent buyer and seller also rely on such data and therefore these items should be readily available to a jury when value is in issue.

We therefore propose the substitute language attached for the proposed Rule 703(b), and respectfully suggest that the comment reference to the rule as superseding Ramsey County vs. Miller be deleted from the comment material.

Thank you for your consideration in this matter.

Respectfully submitted,

THOMAS L. JOHNSON
Hennepin County Attorney

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[CRH:bs]

Enc.

REVISIONS TO PROPOSED RULE 703(b)
MINNESOTA RULES OF EVIDENCE

We submit the following as substitute language in Proposed Rule 703(b):

> "In criminal cases, underlying expert facts or data must be independently admissible in order to be received upon direct examination. In civil cases, however, when the underlying facts or data are particularly trustworthy and of a type reasonably relied upon by experts in the particular field, the court may admit such facts or data upon direct examination for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert facts or data when inquired into on cross examination."

Comments: If the change proposed to Rule 703 is essentially to highlight the difference between criminal cases and civil cases, it is not necessary to revert to the pre-Miller dark ages holding that such foundational data is inadmissible on direct examination.

The ruling in Miller admitting foundational data was driven by current practices and realities in the real estate marketplace where reasonable persons consider sales price data and other facts in their everyday real estate affairs.

The rule change as currently proposed seems to be just the type of "artificial rules of evidence" which the court in Miller was trying to get away from recognizing the realities of the real estate marketplace and the desirability of having such data out in the open in front of jurors who must arrive at a value consensus.

STATE OF MINNESOTA
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October 2, 1989

Mr. Frederick Grittner
Clerk of Appellate Courts
230 State Capitol
St. Paul, Minnesota 55155

Re: In Re Proposed Amendments To The
Minnesota Rules of Evidence
Court File No. C3-84-2138

Dear Mr. Grittner:

I would like to have my name added to the list of those requesting time for an oral presentation to the Supreme Court at its hearing on the Proposed Amendments to the Minnesota rules of Evidence, scheduled for October 11, 1989.

I will be speaking on behalf of the Attorney General's Office. If there are any questions, please do not hesitate to call.

Very truly yours,

Paul R. Kempainen

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PRK:njr

C3-84-2138

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF EVIDENCE

WRITTEN STATEMENT BY
THE MINNESOTA ATTORNEY GENERAL

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT.

Thank you for this opportunity to submit written commentary on the Proposed Amendments to the Minnesota Rules of Evidence formulated by this Court's Advisory Committee on the Rules of Evidence. The Advisory Committee worked long and hard in producing its report. The Attorney General especially appreciates the dedication exhibited by the Committee members, and the honest discussion each of them undoubtedly brought to their task. In general, the Advisory Committee has produced a very fine set of recommendations.

However, two of the proposed amendments will unfortunately result in adverse consequences to the fair administration of criminal justice in our State. These are the proposed changes to Rule 404(b), and portions of the proposed new Rule 412. Because the concepts embodied in them run counter to the strong public policy Minnesota has adopted in fighting sexual violence against women and

children, the Attorney General recommends the disapproval of these proposed rules. I will separately address my concerns as to each of these proposals.

I. THE CHANGE TO RULE 404(b) WOULD UNNECESSARILY RESTRICT SPREIGL EVIDENCE IN CASES WHERE IT IS NEEDED MOST, CRIMES OF SEXUAL VIOLENCE BY REPEAT OR PREDATORY OFFENDERS, AND WOULD NOT BE UNIFORM WITH THE FEDERAL RULES OF EVIDENCE.

The Advisory Committee proposes to amend Rule 404(b) so as to read:

> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show ~~that he acted~~ action in conformity therewith. It may however,8 be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence of past sexual conduct of the victim in prosecutions under Minn. Stats. §§ 609.342 to 609.346 is governed by Minn.R.Evid. 412.
>
> In a criminal prosecution, if any party seeks to prove the commission of a crime other than (i) a crime charged in the complaint, indictment, or tab charge, or (ii) a crime used to impeach a witness, evidence of the other crime shall not be admitted unless:
>
> (1) The other crime and the participation in it by a relevant person are proven by clear and convincing evidence and
>
> (2) The probative value of the evidence outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The most damaging feature of this proposal is its modification of the current balancing test with respect to admission

of evidence of other crimes in criminal prosecutions (Spreigl evidence). At present, Minn. R. Evid. 403 sets out the general rule that relevant evidence may be excluded only if its probative value is "substantially outweighed" by unfair prejudice, confusion of the issues, misleading the jury, undue delay or cumulative evidence. Under the proposed amendment, however, otherwise valid and necessary Spreigl evidence will not be admitted if the Rule 403 factors merely outweigh--as opposed to substantially outweigh--the probative value.

This change in the balancing test is neither warranted by any compelling public policy, nor by any evidence that the introduction of Spreigl evidence under the current rule has resulted in injustice. Indeed the proposed change would reverse Minnesota's current strong public policy of vigorously prosecuting crimes of sexual violence committed by repeat and predatory offenders. These are exactly the sort of cases where legitimate Spreigl evidence is often needed most.

Minnesota is now recognizing the tragic consequences and enhanced danger of repeat sexual offenders. For example, the work of the Attorney General's recent Task Force on the Prevention of Sexual Violence Against Women found that "there is a significant likelihood that rapists will commit additional crimes." Preliminary Recommendations For Offender Control, Attorney General's Task Force on the Prevention of Sexual Violence Against Women (October, 1988), p. 13. In prosecuting such offenders there often arise close questions of identity, intent, or absence of mistake that would make

the admission of otherwise proper Spreigl evidence concerning prior crimes highly relevant.

The Advisory Committee's proposed change in the balancing test for introduction of such evidence would unnecessarily limit its use. It runs counter to the long held view that issues of relevancy should be determined broadly in favor of admissibility. See, e.g. State v. Upson, 162 Minn. 9, 201 N.W. 913 (1925). As stated in Dunnell's:

> The tendency is to give as wide a scope as possible to the investigation of facts--to admit evidence freely, leaving it to the jury to determine its weight.

7A Dunnell Minn. Digest 2d Evidence, § 2.01 (3d ed. 1986).

Another danger in the proposed change to the balancing test would be the increased possibility of widely varying rulings by different trial judges on the admissibility of other crimes evidence. Not only would the new balancing test be different from the well recognized test contained in Rule 403, and the Federal Rules of Evidence, but it would also be different from that applied to admitting Spreigl evidence of other "wrongs or acts" as opposed to other "crimes." There simply is no compelling reason to subject trial judges and the practicing bar to such increased complexity. Instead, the current Rule 403 balancing test should remain in effect for all Spreigl evidence.

With respect to the other major proposed change in Rule 404(b), it is simply not necessary to incorporate the judicially developed "clear and convincing" standard into the Rules

of Evidence, especially where such an action would result in substantial variance from the Federal Rules of Evidence. Our Rules' preliminary comment cites the significance of the history and scholarly study which led to the Federal Rules as a primary reason for adopting the Federal Rules exactly as enacted, unless there is a substantial state policy requiring deviation.

Because the current Minnesota standard requiring clear and convincing evidence of other crimes is judicially created, and predates our Rules of Evidence, State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967), the standard should be left to the State Supreme Court. This is especially true in light of the recent holding of the United States Supreme Court in Huddleston v. United States, ___ U.S. ____, 108 S.Ct. 1946 (1988). In Huddleston the Supreme Court examined the legislative history of Federal Rule 404(b), and found that Congress was more concerned with the free admissibility of this type of evidence rather than any prejudicial affect it might have. Huddleston adopted a preponderance of the evidence standard, which our own Supreme Court may wish to adopt in the future. Unnecessary codification of the clear and convincing standard would unduly hinder such a development in an appropriate case.

In sum, the Attorney General believes that Minnesota's present Rule 404(b) and existing case law already provide sufficient safeguards to the admissibility of other crimes evidence. The proposed additions to Rule 404(b) are not necessary and are not supported by any public policy. If anything, a substantial policy

favoring the free admissibility of this evidence exists in our state.

II. THE PROPOSED NEW RULE 412 UNNECESSARILY BROADENS ADMISSIBILITY OF EVIDENCE OF A VICTIM'S PRIOR SEXUAL CONDUCT CONTRARY TO MINN. STAT. § 609.347.

The proposal for a new Rule 412, and particularly the language in section 412(a)(1)(A), is an unnecessary restriction to Minnesota's rape shield law, Minn. Stat. § 609.347, and should be rejected to the extent they are inconsistent. The public policy behind our rape shield law would suffer enormously, leading to more reluctance on the part of victims to come forward and report crimes, rather than less. This would be especially true in the case of victims of "date rape" or prostitution rape, who should generally have the right to say "no" to a sexual encounter, whatever may have been their past sexual conduct.

Unlike Minn. Stat. § 609.347, which currently allows for admission of previous sexual conduct only to prove common scheme or plan when the judge finds the victim made prior allegations of sexual assault that were fabricated, the proposed Rule 412(a)(1)(A) would admit certain "pattern evidence" that is distinctive and similar to the accused's version of events. This will undoubtedly have a chilling effect on society's ability to deal with the problem of sexual violence through effective reporting and prosecution. If such evidence is ever constitutionally required to be admitted, current case law on the right of due process already is available. Therefore, I urge the Court to maintain uniformity between the Rules of Evidence and Minnesota's rape shield law.

Thank you for the opportunity to present the Attorney General's views. If there are any questions, I hope to answer them at the hearing on October 11, 1989.

Dated: October 2, 1989

Respectfully submitted,

HUBERT H. HUMPHREY, III
Minnesota Attorney General

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C3-84-2138

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF EVIDENCE

ADDITIONAL WRITTEN STATEMENT BY
THE MINNESOTA ATTORNEY GENERAL'S OFFICE

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT.

I. INTRODUCTION

By its Order dated October 12, 1989 this Court judiciously extended the period of time for receiving written commentary on the recently proposed amendments to the Minnesota Rules of Evidence. Hopefully this action will result in increased and beneficial discussions that will aid the Court in its decision-making process with respect to each of the proposed changes.

In that spirit, the Attorney General's Office would like to supplement its earlier written commentary. Further study by members of this Office, chiefly Special Assistant Attorney General Robert A. Stanich, has brought to light some additional points which the Court may want to consider. These are set forth separately below.

II. GENERALLY, STANDARDS OF PROOF AND REMEDIES ARE BETTER LEFT TO CASE LAW RATHER THAN A CODE OF RULES.

It may be questionable whether it is wise for a codification of evidentiary rules to get into such matters as the standard of proof (i.e. the proposed standard for admission of Spreigl evidence under Rule 404(b), and coconspirator statements under Rule 801(d)(2)(E); and specific remedies where evidence is conditionally admitted and the condition is not fulfilled (i.e. the change in the coconspirator statements rule requiring mistrial or curative instruction). In would seem that these matters are best governed by caselaw. We are unaware of any other rule of evidence which prescribes either a standard of proof or a specific remedy. For example, Rule 104(b), which governs the conditional admission of relevant evidence, does not prescribe a remedy in the event the condition goes unfulfilled.

III. RULES 404(b) AND 412.

These changes were addressed in the Attorney General's original written comments.

IV. THE PROPOSED AMENDMENT TO RULE 609 IS TOO RESTRICTIVE.

The proposed substitution of "dishonesty or false statement" with "untruthfulness or falsification, as a necessary statutory element" would seem to settle debate as to which crimes involving dishonesty are automatically admissible for impeachment.

However, it is a very restrictive approach, limited to perjury, forgery, welfare fraud, and not much else. What about thefts and particularly thefts by swindle? One could hardly imagine more clear examples of showing a person's general character for untruthfulness, which after all is the purpose of impeachment.

Furthermore, it does not seem logical to look only at the statutory elements of a crime, rather than the manner in which it is committed, to determine impeachment value. Surely, juries should be entitled to know whether a witness uses the tool of lying in order to further commission of a crime.

In addition, there seems to be no reason for the statement in the Comment that the trial court should make explicit findings as to the factors it considered and the reasons for its decision. Trial courts can and do make decisions based on wrong reasons or with no stated reason at all--the question is whether the decision was objectively reasonable. If the appellate courts need such explicit findings for purposes of review, they should be required in caselaw. The requirement has no proper place in rules of evidence.

V. THE PROPOSED AMENDMENTS TO RULE 615 COMMENT, RULE 616 AND RULE 703(b) ARE POSITIVE.

As noted in the Attorney General'S first comments, the Committee has recommended some positive changes, and the proposed Comment to Rule 615 is one of them. Finally there is authoritative recognition that an investigator and certain other kinds of

witnesses can be essential to the trial process and should not be sequestered.

Likewise, the proposed new Rule 616 is an excellent and necessary addition, including the Comment that bias is not a collateral matter.

The new addition proposed as Rule 703(b) is also a needed clarification of existing law that does not seem to present any particular problems.

VI. THE PROPOSED CHANGE TO RULE 801(d)(1)(B) MAY GO TOO FAR.

At first blush, the broadened language to Rule 801(d)(1)(B) [Prior Consistent Statement of Witness] ("helpful to the trier of fact in evaluating the declarant's credibility") seems to be an improvement over the requirement that the statement be offered to rebut a charge of recent fabrication, improper influence, or motive. Yet it may be too broad: the only limitation on introduction of a witness's prior consistent statement would seem to be relevancy.

A real concern could arise that the new language in the rule would allow, for example, the introduction of self-serving prior declarations of the defendant. It should be examined whether this change is consistent with a change in the federal rule.

On the other hand a clearly positive change does appear in the Comment, which makes clear that a sex victim's prompt complaint constitutes substantive evidence.

VII. THE PROPOSED AMENDMENTS TO RULE 801(d)(2)(E).

As mentioned at this Court's October 11, 1989 hearing, there are some concerns with the proposed changes to Rule 801(d)(2)(E) dealing with coconspirator statements. These are (1) prescribing a standard of proof, and (2) prescribing mandatory remedies (including a mistrial) if the statements are conditionally admitted and the requisite showing is not made.

The other substantive changes are certainly acceptable and need to be stated, but it seems they should be stated in the Comment rather in the text of the rule itself. In this regard, it should be noted that the corresponding federal rule has not been amended, even after the Supreme Court decision in Bourjaily v. United States, 484 U.S. 171, 107 S.Ct. 2775 (1987), upon which the proposed changes in the Minnesota rule are based. Uniformity with this particular federal rule is especially important, given the precedential value of interpretations of this rule by the federal courts, where a large percentage of conspiracy cases are handled.

The proposed amendment contains two substantive departures from existing Minnesota law both of which can be done in the Comment. First, it changes the standard of proof for the requisite showing from a prima facie showing, as stated in State v. Thompson, to a showing by a preponderance of the evidence, as stated in Bourjaily. This is not a significant change, or one that is particularly burdensome. It appears that for preliminary questions generally (see Rule 104), the most commonly accepted standard is the

preponderance test. See McCormick on Evidence, § 53 at 136 n. 8 (E. Clearly, 3d ed. 1984).

Second, the proposed rule change adopts the view in Bourjaily that the statement itself may be considered in determining whether the required showing has been made--an obvious improvement over a contrary holding in State v. Thompson.

However, both of these changes, it seems, can simply be stated in the Comment, as having been adopted, and contrary holdings in Thompson disapproved. This is the approach the Committee took in the Comment to Rule 801(d)(1)(B), disapproving State v. Fader. It would have the desirable affect of maintaining uniformity with the federal rule's language.

Finally, it would be better if the second-to-last paragraph of the Comment would specify the prior Minnesota law which is continued regarding order of proof--namely, State v. Thompson.

VIII. THE PROPOSED CHANGE TO RULE 803(8) DEALING WITH PUBLIC RECORDS.

Police reports should either be uniformly admissible or inadmissible--for both sides in a lawsuit. The Comment, it should be emphasized, simply states that such records can be used by the defendant, without providing any rationale for determining admissibility of such evidence on the basis of which party offers it.

IX. THE PROPOSED CHANGES TO RULES 803(24) AND 804(b)(5), DEALING WITH THE RESIDUAL EXCEPTIONS TO THE HEARSAY RULE.

There is no problem with eliminating the "materiality" requirement, as that vague term seems to be encompassed in the definition of "relevant evidence" in Rule 401.

However, there appears to be no logical reason for requiring "substantial" rather than "equivalent" guarantees of trustworthiness--particularly in light of language in the Comment that "only highly reliable and trustworthy evidence should be admitted" under these rules. This ups the ante considerably, and takes too much of the fact finding role away from the jury.

After all, "substantially trustworthy" is hardly the same as "highly reliable" in any event. Equally as important, a "substantial trustworthiness" standard is vague and provides little guidance to practitioners and the courts. As things presently stand, for a statement to be admissible under this exception, its guarantees of trustworthiness must be equivalent to the specific exceptions set out in Rules 803 and 804--which provides a clear point of reference from which to measure the trustworthiness of the statement in question.

Because the whole purpose of the "residual" exception is to build on existing exceptions (which may or may not be "substantially trustworthy" or "highly reliable"), we should keep the ability to get away from an inflexible "pigeonhole" approach. However, this change makes for entirely too much flexibility: it is an essentially standardless approach which leaves the admissibility of

perhaps critical evidence dependent upon the predelictions of a particular judge.

CONCLUSION

Thank you again for the opportunity to present the views of the Attorney General's Office.

Dated: November 15, 1989

Respectfully submitted,

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Minnesota Attorney General

for PAUL R. KEMPAINEN
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Sexual Violence Center
of
Hennepin County

STATEMENT OF THE MINNESOTA COALITION OF SEXUAL ASSAULT SERVICES CONCERNING THE PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE

Good afternoon. My name is Nancy Fride Biele. I am representing the Minnesota Coalition of Sexual Assault Services which includes 34 community-based programs funded through the Department of Corrections to provide services across the state to victims of sexual assault. During the last biennium, services were provided to over 11,000 victims and their family members and friends. I am also the Executive Director of the Sexual Violence Center of Hennepin and Carver Counties. It is an agency that provides a crisis phone line, outreach and advocacy, counseling, public education and professional training.

I appreciate the opportunity to be with you today. I would like to speak in opposition to Rule 412 replacing Rule 404(C) which deals with evidence of past sexual conduct for victims of sexual assault. Under the proposed rule "pattern" evidence of prior sexual conduct would be admissable when consent is a defense.

I speak from the perspective of 15 years of working with sexual assault victims who become the primary and very vulnerable witnesses should their cases get to court. I speak as an advocate for those victims who choose to enter into the stress of reporting to not altogether sensitive law enforcement personnel, who choose to undergo invasive medical procedure to gather evidence to help build a case, who choose to run the risk of being called not credible enough or the wrong kind of rape victim, who choose to risk public exposure in order to seek protection for future victims and justice for themselves.

For years it was thought to be in the best interests of justice to determine whether or not a sexual assault had occured by utilizing the requirement of utmost resistance. We learned that that judged not the offender's behavior but the victim's. For years it was thought to be in the best interests of justice to demand corroboration. We learned that not only do few falsely report the crime but that the majority of sexual assault victims choose not to report at all. For years it was thought to be in the best interests of justice to question the veracity of rape victims dependent on their virtue, their chastity or, in more recent times, evidence of their prior sexual behavior. We learned that most often this had no bearing whatsoever on the case being prosecuted. And when it did have probative value, we learned to admit it into evidence.

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So for years what was thought to be in the best interests of justice was often a revictimization of the victim. Let me take you for just a moment into the world of victims of sexual assault. First statistically:
a) In 1988, the Uniform Crime Reports reported 92,486 rapes. Given FBI estimates that between one in five and one in ten victims reports the crime, there are somewhere between 462,430 and 924,860 victims of sexual assault each year in this country;
b) In Minnesota the same year, of the victims to whom sexual assault centers provided services, in 41% of the cases it was intrafamilial sexual abuse, in 7% the offender was a spouse or other adult living in the home, in 42% the offender was a friend, a coworker, an employer, or other acquaintance and in only 10% of the cases was the offender a stranger;
c) In a landmark 1985 study of 7,000 students on 32 campuses, Mary Koss of Kent State found that one in eight females had been raped although many did not use that word to label the experience, and one in 12 males admitted to having forced or attempted to force a woman to have intercourse through physical force or coercion although virtually none of the men identified themselves as rapists; and
d) A study done by Barry Burkhart of Auburn University found 20% of the female undergraduate students surveyed admitted to having been raped. When he interviewed 600 victims of acquaintance rape, he found that only four had reported to the police.

Let us look at the effects of sexual assault on victims. Some common characteristics include an extreme sense of vulnerability, loss of control over their lives, fear both generally and specific to the offender, anxiety, sleep disturbances, guilt, shame, embarrassment, anger and the need to weigh the therapeutic benefits of talking about it versus the risks of telling anyone. A recent study that followed rape victims for two years after the assault found both short and long-term problems with self-esteem, relationships with significant others, work satisfaction, relationships with authorities, hope for the future and happiness with life.

Studies have also found among the general public significant correlation between victim chastity and the perceived seriousness of the rape. Holding all other facts constant, the rape of an "experienced" woman is viewed as a less serious assault. In the many victims I have worked with over the years, I have never found a victim who viewed her or his rape as less serious because they were not virgins at the time of the attack. Nor is the healing process any less painful for someone raped as an acquaintance rather than as a stranger; in fact in some ways it is more difficult.

Under the proposed rule, which would particularly affect victims of acquaintance rape, evidence should be admitted when the Court finds that the victim's previous sexual conduct is part of a definite pattern of sexual behavior that is distinctive and similar to the accused's story. Where would the Court draw the line on distinctive sexual behavior? A young woman who once engaged in sexual activity with more than one partner at a time who is gang raped by five others a year later? A coed who attends football games with a different date each weekend and subsequently has consenting sex with some of them on those dates and is then raped by the date she thought she knew best? The divorced woman who has had sex since her divorce and then is raped? The gay man who had consenting sex with partners in his own home and then one time is sexually assaulted? There are only two defenses in a sexual assault case; one is mistaken identity and the other is consent. The law defines consent as "a voluntary uncoerced manifestation of a present agreement to perform a particular sexual act." Most often proving sexual assault has little to do with proving consent in prior settings. And when prior sexual history is proven to be relevant, there is law and precedence to introduce it. To change the rule would have a definite effect on victims' willingness to report, on the willingness of County Attorney's to charge the most common type of sexual assault and the likelihood of conviction after public humiliation is questionable.

There seems to be no significant need to change to rule. Minnesota has been a leader in reforming rape laws and in humane treatment of victims. To introduce this rule change would seem to be a step backwards in our leadership role. Victims of sexual assault deserve what small protection they can get when they enter the seemingly hostile world of the criminal justice sytem.

Thank you for the opportunity to address this issue.

Respectfully submitted,

Nancy Fride Biele
Sexual Violence Center and
Minnesota Coalition of Sexual Assault Services

Sexual Violence Center
Hennepin County

Mr. Frederick Grittner
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ADDENDUM TO THE STATEMENT OF THE MINNESOTA COALITION OF SEXUAL ASSAULT SERVICES CONCERNING THE PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE

I appreciated the opportunity to address the Supreme Court on October 11, 1989 and provided some written testimony at that time. I would like at this time to simply add some "food for thought" regarding Rule 412. Since I testified I have heard the dismantling of the "rape shield" portion of the law referred to as a fairnes issue. In a fair world, we would not have to deal with sexual assault. There would be no victims of violent crime. The word fairness implies an equal power base. It implies that there are two people who had equal say in the activity that led to a criminal sexual conduct charge. It implies that, because of consensual activity a victim engaged in prior to the assault, somehow an offender would have a right to the assault.

The "rape shield" was enacted to create a bit of fairness in a criminal justice setting the victim did not choose to be in regarding an activity the victim did not choose to participate in. If we are choosing to be fair, let us keep what little protection we can for the victim of a crime.

I have enclosed a copy of a column by George Will from the Washington Post for your information.

Respectfully submitted,

Nancy Fride Biele

Nancy Fride Biele
Executive Director

11/13/89

1222 W. 31st Street Minneapolis, MN 55408
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When brutes win compassion

By George F. Will
The Washington Post

Washington
New York's Cardinal John O'Connor visited the victim of the Central Park gang rape. Then "as I reflected on it," he says, he decided to visit the accused rapists in jail. "I didn't want to be seeming to single anyone out."

Recently the Washington Post reported that 16 years ago a man who until he resigned last week was House Speaker Jim Wright's principal aide, and who in 1973 was a store manager, led a young woman customer into a storeroom, smashed her skull five times with a hammer, stabbed her repeatedly, slit her throat and left her for dead. She survived. He was sentenced to 15 years in a Virginia prison but served less than 27 months in a county jail, then joined Wright, the father-in-law of his brother.

The attacker said the reason he "just blew my cool for a second" was that he was under stress. And a psychiatrist reported that the attacker believed he had "reacted in a way in which any man would perhaps react under similar circumstances."

Rep. Steny Hoyer, D-Md., is, like O'Connor, too evenhanded to single out anyone. Calling the Post story "stale news," Hoyer says: "There was a tragedy on both sides. The tragedy has now been compounded."

Hoyer's histrionic rhetoric, assigning "tragedy" promiscuously, is the sixth hammer blow. His inanity is the ultimate indignity, condemning the woman forever to close confinement with her attacker in the embrace of a cold abstraction: She and he are casualties of a "tragedy."

The word "tragedy" is just one of those puffy dumplings of words that tumble together in jumbles of blather when politicians, confronted by an event and a microphone, turn on their spigots of sententiousness. The mind of the congressman, who sees tragedy distributed "on both sides," is like the mind of the cardinal, who is too scrupulous to "single out" the victim from the victimizers.

Someone who speaks facilely of tragedy on all sides really sees it on none. The concept of tragedy presupposes a moral order that Hoyer's use of the word denies. If there is tragedy on both sides — the woman whose body was slashed and smashed, the man whose "cool" was "blown" — then life is too random, too absurd to support the idea of human dignity inherent in tragedy.

Conspicuous consumption has been supplanted by a new vulgarity — conspicuous compassion (Allan Bloom's phrase). It is flaunted by people too evenhanded to "single out" the raped from the rapists. It is the moral ostentation of people so sensitive that they will not discriminate between the wielder of the hammer and the one whose skull was hammered. This egalitarian compassion is a result of modern man's liberating moral transaction: The right to judge has been exchanged for immunity from judgment. Even the worst acts are said to arise from causes both trivial ("cool" is "blown" for "a second") and irresistible ("any man" might act the same).

Unlimited tolerance in the form of indiscriminate compassion is supposed to yield "nihilism with a happy ending" (Bloom, again). But the real result is the re-animalization of man, an inevitable moral anarchy.

If there is nothing that can be called human nature, if there are only random results of varied socializations, then there is no natural right. The great enterprise of philosophy — presenting a coherent view of nature and the right way of living in it — is dead.

So universities might as well practice "democracy of the disciplines" with curricula in constant flux. If there are no real truths, there can be no texts that deserve to be called classics because they teach real truths.

It is an age in which children are taught not to discover the good but to manufacture "values" so they can devise pleasant "lifestyles." It is an age in which the aim of life is not autonomy in the sense of the regulation of life by real standards but, rather, "authenticity" in following strong feelings.

In such an age, indiscriminateness is a moral imperative. In such an age, there will be clerics who, as a sign of tender sensibility, will not "single out" the brutalized from the brutes. And there will be lawmakers who insist that the dignity of tragedy is an entitlement to be distributed democratically, one portion per voter.

that only the brutalized deserve

Mpls Star Tribune
Sun. May 14, 1989

THOMAS L. JOHNSON
COUNTY ATTORNEY

(612) 348-5550

OFFICE OF THE HENNEPIN COUNTY ATTORNEY
2000 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

October 10, 1989

Mr. Fred Grittner
Minnesota Supreme Court
230 State Capitol Building
St. Paul, Minnesota 55155

Dear Mr. Grittner:

On October 6, 1989, this office learned about several proposed changes to the Minnesota Rules of Evidence. We understand that a hearing on these changes is scheduled for October 11, 1989 at 2:00 p.m.

We respectfully request an opportunity to speak to the Court about the proposed changes.

We apologize for our failure to respond to the published notice and request permission to speak or submit written comments within the published time limits.

Sincerely,

Paul R. Scoggin
Assistant County Attorney

PRS:ks

THOMAS L. JOHNSON
COUNTY ATTORNEY

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OFFICE OF THE HENNEPIN COUNTY ATTORNEY
2000 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

November 13, 1989

Mr. Fred Grittner
Clerk, Minnesota Supreme Court
230 State Capitol
St. Paul, Minnesota 55155

Dear Mr. Grittner:

Enclosed please find 13 copies of written comments submitted on behalf of the Hennepin County Attorney on the proposed changes to the Minnesota Rules of Evidence.

Sincerely yours,

P. R. Scoggin

Paul R. Scoggin
Assistant County Attorney
C-2100 Government Center
Minneapolis, Minnesota 55487
(612) 348-5161

PRS:jml

Enclosures

C3-84-2138

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF EVIDENCE

WRITTEN COMMENTS ON BEHALF OF
THE HENNEPIN COUNTY ATTORNEY

I thank the members of the Court for an opportunity to comment on some of the proposed changes to the Rules of Evidence. By arrangement with the Ramsey County Attorney's Office, I restrict my comments to the proposed Rule 412.

I urge the Court to reject the "pattern evidence" exception to the general prohibition against victim's prior sexual history for several reasons:

1. The proposed Rule is a substantial obstacle to women seeking justice in the criminal system.
2. The proposed Rule is contrary to the overwhelming public policy recently embodied in Minnesota Statute §609.347.
3. The proposed Rule reopens the door to embarrassing pretrial fishing expeditions and humiliating cross-examination.

4. The proposed Rule is not Constitutionally required.

5. Rejection of pattern evidence places Minnesota in the mainstream of the state Rape Shield Laws.

The final report submitted by the Task Force on Gender Bias to this Court accurately points out a phenomenon well known to prosecutors. Rape convictions are hard to come by. Practical experience suggests two reasons. Jurors expect stereotypical facts in rape cases. Jurors expect victims to be white, middle-class, chaste, and to have done nothing to place themselves at risk. Jurors expect the defendant to be a predatory stranger who leaps out of the bushes. Reality is very different. Over 80% of the charged cases in Hennepin County arise out of some sort of relationship.

Acquaintance rape is the rule, not the exception. This surprises jurors and defense counsel know it. As a consequence, the most common defense offered in rape trials is consent. When consent is posed as a defense, a second and more difficult hurdle faces a rape victim. Many jurors cling to the notion that victims can be divided into two classes: "good girls who don't" or "bad girls who do." As a consequence, jurors demand resistance. Lack of physical injury dramatically reduces the likelihood of conviction. Similarly, jurors demand victims who otherwise lead moral chaste lives. As the task force points out, defense counsel regularly appeal to these gender stereotypes and "rape myths" as a means to obtain acquittal. Final Report of the Supreme Court's Task Force on Gender Bias, pg. 61 (1989).

Jurors will go to "great lengths" to be lenient if any prior behavior suggests the victim invited the crime. Id., pg. 63. The jurors' impressions of the victim's moral character in many cases eclipses the facts of the crime. It is here that "pattern evidence" is fundamentally unfair. Although admitted for the supposed good purpose of establishing a "distinctive pattern" of behavior, many jurors will not look that far. Introduction of evidence of prior sexual conduct with third parties invites jurors to draw the unfair conclusion that "yes once" is "yes always". It invites jurors to ignore a woman's right to pick and choose her sexual partners.

Attempts to use prior sexual conduct in the 1985 Augsburg wrestling team case originally sparked efforts to amend the statute. In that case, several young men were accused of criminal sexual conduct during a college drinking party. The trial court ordered a pretrial hearing to consider the testimony of two other young men who claimed the victim participated in group sex on a prior occasion. At that hearing, the victim was left in the difficult position of denying consent or participation on two, not one, occasions. The State declined to prosecute the case after a lengthy consultation with the victim. The State simply felt that introduction of evidence of group sex with third parties would destroy the possibility of conviction. This unfortunate result led to extensive lobbying efforts to close the door to such inquiry. Minnesota Statute §609.347 is a result of those lobbying efforts.

The statute expressly draws the line at sex with third parties. It is an embodiment of a very strong public policy in favor of drawing a bright line between admissible and inadmissible prior sexual conduct. The chilling effect on women wishing to report and testify in rape cases simply outweighs the probative value prior conduct may present.

The chilling effect of proposed Rule 412 will never reach the appellate courts of the State. It is in the cases never reported to the police, the complaints never drawn, the prosecutions dismissed, and the extraordinary plea bargains reached that this Rule will take its toll. In order to admit pattern evidence one must, prior to trial, find it. Such fishing expeditions expose the victim to searing revelations of her sexual history long before she reaches the courtroom door. On more than one occasion, I have listened to victims tearfully recount calls from ex-boyfriends, ex-lovers, and ex-one-night-stands demanding money in exchange for their silence.

Few procedural devices reach further out of the courtroom than the Rape Shield Law. The proposed Rule is not simply an evidentiary device. It will have a profound effect on victims' personal lives and their willingness to participate before the case is ever charged.

I recognize this Court's reluctance to blindly defer to the Statute. The Court's concern that the legislature should not invade the procedural province of this State's Courts is well taken. However, of the 49 States with rules or statutes

governing this area, only eight, and the federal government, do so by rule. The remainder do so by statute. Similarly, in Minnesota, many evidentiary devices such as competency, privilege, conspirator testimony, and confessions are governed by statute. The historical context of this Court is that regulation of these matters has been shared. I respectfully ask the Court to balance its "colleagial" need to develop clear and consistent rules of evidence with the legitimate legislative expression of public policy found in §609.347.

Obviously the statute is not determinative. In light of the amendment directly dealing with the issue of sexual conduct with third parties, the decision to repeal the statute and allow pattern evidence should not be lightly undertaken. Absent Constitutional requirements, this change should not be undertaken at all.

The reasons put forth by the advisory committee to change existing law are not persuasive. The proposed Rule is a hybrid. It grafts the ABA model rules pattern evidence approach onto the widely-used exclusionary approach. No state has adopted the model ABA rules. Of the 25 states presumptively excluding prior sexual history, only two carve out an exception for pattern evidence.

Uniformity with the federal rules is also not a compelling reason for change. Very few criminal sexual conduct cases are tried in Federal Court. In the Federal District of Minnesota, indictments on criminal sexual conduct charges are

brought no more than once or twice a year. The federal system simply does not provide enough of a track record to look to for guidance.

The Constitution does not require a pattern evidence exception. The present statute does except prior sexual conduct with the accused and prior conduct that explains physical evidence from the general prohibition against prior sexual history. A review of case law reveals that this statutory scheme meets Constitutional requirements.

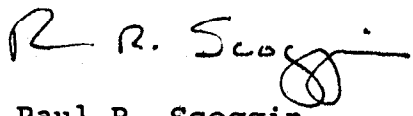
Professor Galvin's exhaustive review of the case law in those states excluding pattern evidence fails to produce a single decision striking down the exclusion of pattern evidence on Constitutional grounds. Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minnesota Law Review, 763, 830-848 (1986). This is not to say that all pattern evidence can be Constitutionally excluded. Exactly what set of pattern facts are Constitutionally required is simply unknown. The advisory committee's attempts to quantify the unknown is unnecessary. This matter is best left to case-by-case development, paralleling the extra-statutory exceptions for prior conduct as an explanation of sexual knowledge, State v. Caswell, 320 N.W.2d 417 (Minn. 1982) and prior fabrication, State v. Benedict, 397 N.W.2d 337 (Minn. 1986). The interests of rape victims and the rights of defendants are best balanced by deleting the pattern evidence exception and including a comment

acknowledging that there may be some fact patterns of prior sex with third parties that require admission under the Constitution.

The rape victim's position in a criminal trial is unique. The revictimization historically heaped upon those women brave enough to report an acquaintance rape requires a very cautious approach to reopening prior sexual history. Past consent to prove present consent is an invitation to victim bashing. This Court should simply leave the door closed unless and until the demands of a specific case require further consideration.

Finally, I urge the appointment of an urban county prosecutor to sit on any future committee the so that the interests of the urban community are accurately represented.

Respectfully submitted,



Paul R. Scoggin
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Dated: November 13, 1989

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Attorney at Law

Direct Dial (612) 337-9230

November 7, 1989

Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

Re: Prop. Rules of Evidence
609(a)

C3-84-2138

Dear Mr. Grittner

I strongly oppose limitation of impeachment to "convictions involving untruthfulness or falsification as a necessary statutory element" for two reasons. First, this appears to distinguish between various kinds of theft. Some forms may fall within the scope of the rule while some may not. This appears arbitrary besides creating additional unnecessary burdens of identifying the theory of the prior case before a ruling can be made. I suggest amending the rule to allow the use of any theft offense, felony, or other crime involving dishonesty or false statement.

Sincerely,

Paul D. Baertschi

PDB/mw

THE MINNESOTA

COUNTY ATTORNEYS

ASSOCIATION

40 North Milton Street
Suite 200
St. Paul, Minnesota 55104

612/227-7493

October 2, 1989

Mr. Frederick Grittner
Clerk of Appellate Courts
230 State Capitol
St. Paul, MN 55155

Dear Mr. Grittner:

Enclosed please find 12 copies of the MCAA Written Statement concerning the proposed amendments to the Minnesota Rules of Evidence. The MCAA would like our concerns addressed by this written statement, so we are not requesting time for an oral presentation.

Sincerely,

Tom Foley
President

THE MINNESOTA
COUNTY ATTORNEYS
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St. Paul, Minnesota 55104
612/227-7493

October 2, 1989

Mr. Frederick Grittner
Clerk of Appellate Courts
230 State Capitol
St. Paul, MN 55155

C3-84-2138

RE: **WRITTEN STATEMENT OF THE MINNESOTA COUNTY ATTORNEYS ASSOCIATION CONCERNING THE PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE**

Dear Mr. Grittner:

As President of the Minnesota County Attorneys Association I am presenting this written statement for consideration by the Minnesota Supreme Court at the hearing to consider adoption of proposed amendments to the Rules of Evidence. The comments contained in this statement express the thoughtful views of the Board of Directors of the Association.

Our association supports the majority of the proposed amendments to the Rules of Evidence. We do, however, take issue with proposed changes in two specific rules: (1) Rule 404(b) and (2) Rule 412. I will individually address our concerns as to each of these rules.

Rule 404(b)

This rule governs the admissibility of evidence of other crimes (Spriegl evidence). The proposed amendment adds language to the end of this rule which incorporates into the rule a clear and convincing standard of proof and shifts the balancing test of Rule 403. This additional language does not exist in the Federal Rules of Evidence. The preliminary comment to our Rules of Evidence indicates that uniformity with the Federal Rules of Evidence is the goal of our rules unless a substantial state policy requires deviation. The addition of this language will act to restrict the introduction of other crime evidence at a time when our state is tragically recognizing the inherent danger of predatory, repeat offenders. There is no substantial state policy supporting the further restriction of the admissibility of this type of evidence.

judicial interpretation. A recent Wisconsin appellate case interpreting the Wisconsin Rules of Evidence which are also modeled after the Federal Rules adopted the federal standard of proof which is preponderance of the evidence rather than clear and convincing evidence. State v. Schindler, 429 N.W.2d 110 (Wisc. App. 1988). The Wisconsin Court analyzed the rule in light of the recent holdings of the United States Supreme Court in Huddleston v. United States, 108 S.Ct. 1946, 99 L.Ed.2d 771 (1988). In Huddleston the Supreme Court examined the legislative history of Rule 404(b). The Court found that Congress was more concerned with the free admissibility of this type of evidence rather than any prejudicial affect it might have. As previously stated, the standard of proof should be left to judicial interpretation arising from the thorough analysis which can only be obtained by briefing and oral arguments in appropriate cases heard by the highest court of our state.

The shift in the Rule 403 balancing test would greatly limit the introduction of other crimes evidence. Not only would the standard of proof be higher than the Federal Rules contemplated, but even in those cases where the standard is met, the rule would further limit admissibility. Rule 403 of the Minnesota Rules of Evidence provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence". (Underlining added for emphasis.) Under the proposed rule change, the party offering other crimes evidence would have to show that the relevancy of this evidence outweighs the danger for prejudice, etcetera. This standard is much more restrictive on the admissibility of this type of evidence. The proposed change would greatly increase the variance in the admissibility of other crimes evidence by different judges. The rule would limit the admissibility of this evidence in the types of cases where it is most notably helpful. This evidence often arises in cases of great public concern (e.g. child sexual abuse, predatory sex offenders).

The present rule and the existing case law in Minnesota provide sufficient safeguards to the admissibility of other crimes evidence. The proposed additions to Rule 404(b) are not necessary and are not supported by a substantial policy of the State of Minnesota. If anything, a substantial policy favoring the free admissibility of this evidence exists in our state.

Rule 412

This new rule would replace Rule 404(c) which deals with evidence of past conduct of victims of sexual crimes. In the past, Rule 404(c) has basically incorporated the intent of the legislature as set forth in Minnesota Statutes 609.347. The proposed Rule 412, particularly 412(a)(1)(A), would modify the language of Minnesota Statutes 609.347. If this language is adopted, the effectiveness of our rape shield law will be greatly diminished. The difficulty of prosecuting troubling sexual crimes such as "date rape" will increase. Victims of these kinds of sexual offenses will become more reluctant to report the crime and cooperate in the prosecution of the offender.

Under the proposed rule certain "pattern evidence" would be admissible when consent is a defense. The rule would provide that this evidence should be admitted when the Court finds that the victim's previous sexual conduct is part of a definite pattern of sexual behavior that is distinctive and similar to the accused's version of the offense. Minnesota Statutes 609.347 would allow for the admission of this kind of evidence only if the Judge finds that the victim has previously made allegations of sexual assault which were fabricated.

Any Sixth Amendment concerns created by the rape shield law can be handled by reference to existing Minnesota and federal case law. Cases such as State v. Benedict, 397 N.W.2d 337, 341 (Minn. 1986) and Olden v. Kentucky, 488 U.S. 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) provide sufficient guidance to the trial court on the issue of when due process and the right to confrontation require the admission of this type of evidence despite the prohibition found in rape shield laws.

The addition of this exception for so called "pattern evidence" will have a chilling effect on society's ability to deal appropriately with the victims of some of the most difficult sexual offenses of our time. The variance from Minnesota Statutes 609.347 found in Rule 412(a)(1)(A) should be rejected.

In conclusion, I would like to thank the Supreme Court for the opportunity to be heard on the proposed amendments to the Rules of Evidence. Our comments are intended to be constructive in the areas of these specific concerns. Like the Court, we seek a criminal justice system that treats the individual with the fairness contemplated by the Constitution, state law and court rule while protecting the interests of society and most particularly, the victim of violent crime.

Respectfully submitted,

Thomas Foley, President
Minnesota County Attorneys Assn.