

CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION



The District of Columbia Bar

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SUMMARY OF POSITION OF CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION ON TITLE III OF BILL NO. 10-87, THE ANTI-SEXUAL ABUSE AMENDMENT ACT OF 1994

Sections 301 and 302 of this proposed legislation would require the Superior Court to apply the substance of Rule 412 of the Federal Rules of Evidence. That rule generally prohibits admission of evidence of the prior sexual history of the alleged victim of a sexual abuse crime with persons other than the accused. The Section fully supports that goal. Existing law in the District of Columbia, however, already has the same general prohibition. Existing law and the proposed legislation differ in their formulation of an exception to the general rule. Under existing law, a judge may admit such evidence when because of "unusual circumstances" the probative value of the evidence is "clearly demonstrated" and outweighs the prejudicial effect. The proposed legislation, in comparison, allows an exception only in two specific instances, when the evidence concerns the source of semen or injury of the victim (unless the Constitution otherwise requires admission of the evidence).

The Section believes that the approach under current law is preferable. We are aware of no instances when trial judges have abused their discretion under the rather more open-ended exception under current law. Experience with Rule 412, on the other hand, has shown that it is capable of producing unjust results when legitimately probative evidence happens not to fit into either of the narrow categories specified in Rule 412. On balance, therefore, the Section favors retention of current law over the provisions in Section 301 and 302 of Title III of the bill.

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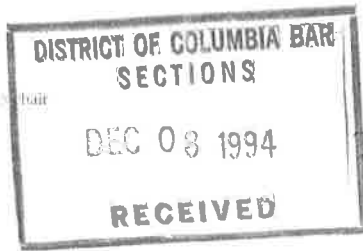
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December 7, 1994

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Chairman David A. Clarke
Counsellorperson James E. Nathanson
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

Re: Bill No. 10-87, the Anti-Sexual Abuse
Amendment Act of 1994

Committees:
Civil Rights
Criminal Rules and Legislation
Juvenile Justice
Lesbian and Gay Rights
Military and Veterans Rights

Dear Chairman Clarke and Councilperson Nathanson:

On behalf of the Criminal Law and Individual Rights Section of the District of Columbia Bar, we write concerning Title III of Bill No. 10-87, the Anti-Sexual Abuse Amendment Act of 1994, which comes up for final reading December 8, 1994.¹ In Sections 301 and 302, Title III would adopt for the Superior Court of the District of Columbia provisions substantially identical to Rule 412 of the Federal Rules of Evidence, which currently applies in United States District Court.

These provisions concern admission in sexual abuse cases of evidence of past sexual behavior of the alleged victim. They seek to protect those alleged victims from needless and invasive inquiry into their private lives; to avoid obstacles in the way of those victims coming forward to testify against their attackers; and to avoid sidetracking criminal trials into irrelevant and distracting inquiries into the alleged victim's prior life rather than the facts of the alleged crime.

The Criminal Law and Individual Rights Section supports all of these goals. Nonetheless, we believe that Sections 301 and 302 should not be

¹We want to be clear that the views expressed herein represent those of the Criminal Law and Individual Rights Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

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enacted. Current law in the District of Columbia, embodied in a line of judicial decisions beginning at least with McLean v. United States, 377 A.2d 74 (D.C. Ct. App. 1977), already protects against the same harms that Sections 301 and 302 seek to avert. At the same time, Sections 301 and 302 lack the flexibility of existing case law and could be interpreted to exclude legitimately relevant evidence. While it is sometimes desirable to codify existing judicial practice -- both to establish that practice in statute and for symbolic reasons -- we are concerned that Sections 301 and 302 could lead to unjust results. Because these provisions are unnecessary to reform existing practice, we believe that the risk of injustice outweighs any potential advantages, and we urge the Council not to enact Sections 301 and 302.²

In McLean, the District of Columbia Court of Appeals spoke out strongly against admission of irrelevant evidence concerning the prior sexual history of alleged victims in sexual assault cases (377 A.2d at 77-79):

The prejudice of such evidence is readily seen: it diverts the jury's attention to collateral matters and probes into the private life of the victim of rape. . . .

Generally, the law disfavors the admission of evidence of a person's character to prove conduct in conformity with that character In our view the proffer in the instant case [of the victim's alleged unchastity] fits into none of [the] exceptions to the general rule prohibiting the admission of character evidence based upon proof of past acts. . . .

We endorse the approach taken by [other] courts, viz., the exclusion from evidence of prior acts of sexual intercourse with others besides the defendant because such evidence

²Another problem, which others have addressed, is that Section 302(b) would establish a motion procedure that is incompatible with Superior Court motion practice.

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is not probative to the issue of the prosecutrix's consent.

. . . It should be obvious that evidence of prior sexual acts by the prosecutrix has no relevance whatsoever to her credibility as a witness and therefore defense counsel should be precluded from asking the prosecutrix questions concerning her past sex life. . . .

. . . [T]he rationale for excluding evidence of specific acts of sexual intercourse applies with equal force to the exclusion of reputation testimony.

The Court of Appeals nonetheless recognized that in rare and unusual cases, evidence of an alleged victim's prior sexual history should be admitted to prevent an injustice (377 A.2d at 78 n.6):

There can be unusual circumstances where the defense may inquire into specific sexual acts by the prosecutrix when the probative value of the evidence is clearly demonstrated and is shown to outweigh its prejudicial effect.

The Court did not attempt to categorize beforehand all such unusual circumstances that might arise. It left it to the good judgment of trial judges (in the first instance) to apply both the general rule excluding evidence of prior sexual history, and the "unusual circumstances" exception that applies only when such evidence has clearly demonstrated probative value, and when that probative value outweighs its prejudicial effect.

The proposed Section 302 also creates an exception, in subsection (a)(2)(A), for evidence of the alleged victim's past sexual behavior with persons other than the accused, but only on the issue of whether the defendant was "the source of semen or bodily injury" with respect to the alleged victim.³

³Subsection (a)(2)(B) creates a further exception for evidence of prior sexual behavior with the defendant when properly offered on the issue of consent.

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Thus the essential difference between the judicial approach of McLean and the legislative approach of Sections 301 and 302 is that McLean created a flexible exception, whereas Section 302 would limit admission of prior sexual behavior with persons other than the accused to just two preconceived categories -- on the issues of source of semen or bodily injury.⁴

Between the two approaches, we strongly believe that the McLean approach is superior. It is beyond the ability of human beings to predict every set of unusual circumstances that may arise and may require, in the interest of justice, admission of such evidence. The McLean decision did not attempt to make such a prediction. It entrusted trial judges to exercise their discretion wisely when a defendant presents a claim of "unusual circumstances" calling for admission of evidence of the alleged victim's prior sexual behavior. We are aware of no evidence whatsoever that the judges of the Superior Court are abusing their discretion on this issue.

On the other hand, the risk is real that Sections 301 and 302 will lead to injustice. One United States Court of Appeals has applied the analogous federal rule, with its rigid exceptions, to reach a result that we believe was palpably unjust. In United States v. Shaw, 824 F.2d 601 (8th Cir. 1987), the prosecution offered the alleged victim's broken hymen as evidence that the defendant had committed a sexual assault. Yet the court rejected evidence of the alleged victim's prior acts of sexual intercourse when offered to rebut this argument, on the ground that a broken hymen did not constitute an "injury." According to the Eighth Circuit, federal courts were powerless to admit this evidence because it did not fit into the narrow exception established in Rule 412.

⁴Section 302(a)(1) also, to be sure, would allow admission of evidence prior sexual conduct when exclusion of the evidence would be so egregious as to violate the Constitution. We believe that District of Columbia law should seek to prevent injustices whether or not they are so extreme as to violate the nation's fundamental law.

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Shaw well may have been wrongly decided, even under the language of the federal rule (or of Section 302). But it highlights the problem: When trial judges are denied the flexibility to decide whether probativity outweighs prejudice of proffered evidence, the process of admitting evidence is in danger of becoming an entirely mechanical exercise. Justice may be sacrificed as a result.

We believe that the judicial approach exemplified in McLean has served the District of Columbia and its residents well. To our knowledge, no one has attempted to make a case to the contrary. Sections 301 and 302 of Title III of the Anti-Sexual Abuse Amendment Act of 1994 pose an unwarranted risk of unjust results. We respectfully urge the Council not to enact Sections 301 and 302.

On behalf of the Criminal
Law and Individual Rights
Section,


Niki Kuckes

Charles M. Rust-Tierney

Cochairs