



## Checklist for Opposing Admission of Evidence Under Rape Shield

***Be prepared to argue that the victim has standing to challenge the use of the evidence.***

- **Does the victim have standing?** *Argue admission of the evidence would injure the victim; that the injury would be caused by the admission of the evidence; and that the injury can be redressed by a favorable decision.*
  - **Sample Authority:**
    - **Case Law:**
      - *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (“Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’ . . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be ‘likely’ . . . that the injury will be redressed by a favorable decision.”) (internal citations omitted).
      - *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (finding, in the context of appeal, that the rape victim did have standing to challenge the admission of evidence under rape shield: “No other party in the evidentiary proceeding shares [the victim’s interests in privacy] to the extent they might be viewed as a champion of the victim’s rights”).

***Before getting to rape shield, a party must satisfy standard rules of evidence.***

- **Is the evidence relevant?** *Argue evidence of sexual behavior is inadmissible propensity evidence. Evidence of prior acts is generally seen as irrelevant to prove the individual acted in conformity with those acts, and is therefore inadmissible.*
  - **Sample Authority:**
    - **Case Law:**
      - *State v. Stollwagen*, 659 P.2d 167, 170 (Kan. 1983) (“[A] rape victim’s prior sexual activity is generally inadmissible since prior sexual activity, even with the accused, does not of itself imply consent to the act complained of.”).
      - *Goldman v. State*, 9 So. 3d 394, 398 (Miss. Ct. App. 2008) (finding no error in court’s exclusion of evidence of prior sexual activity between defendant and victim, because such evidence would imply “that prior consent meant that this situation would have been consensual”).
      - *State v. Fish*, 681 P.2d 1106, 1110 (N.M. 1984) (“[T]he victim’s alleged propensities for engaging in sexual relations is not relevant to the issue of consent.”).
    - **Secondary Authority:**
      - Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant’s Past Sexual Behavior*, 44 Cath. U. L. Rev. 711, 741 (1995) (noting that exclusion of evidence of prior

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sexual relations with third parties is justified because it has “so little probative value”).

- Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 794 (1986) (noting that the “low probative value of character evidence is outweighed by an array of countervailing considerations”).

- **Is the evidence more probative than prejudicial?** *Argue evidence of victim’s sexual behavior would be prejudicial to the truth-finding process. First, it would be prejudicial to the jury. Juries are more likely to assign blame to the victim and not characterize the crime as rape if the victim engages in sexual behavior. Second, it would be prejudicial to the victim. Allowing introduction of the victim’s sexual history impacts the victim’s constitutional and statutory rights to privacy, fairness, dignity, and respect. Note that victims of sexual assault have been found to be entitled to heightened protections against invasions of privacy.*

- Sample Authority

- Case Law:

- *Southward v. Warren*, No.2:08-CV-10398, 2009 WL 6040728, \*14 (E.D. Mich. Jul. 24, 2009) (noting the great danger of inflaming the jury by introducing evidence of specific acts of sexual conduct).
- *In re Pannu*, 5 A.3d 918, 925 (Vt. 2010) (noting that introducing evidence of specific acts of sexual conduct could cause the jury to be “unable to comprehend how such a person could be raped”).
- *People v. Adair*, 550 N.W.2d 505, 509 (Mich. 1996) (noting that rape shield laws were passed because evidence of prior sexual activity discouraged victims from testifying “because they knew their private lives would be cross-examined”) (internal citation omitted).
- *Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (“The Michigan [rape shield] statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.”).
- *State v. Cuni*, 697 A.2d 550, 563 (N.J. App. Ct. 1997) (affirming trial court’s exclusion of evidence under rape shield in part because of victims’ state constitutional right to be treated with “fairness, compassion and respect by the criminal justice system”) (aff’d *State v. Cuni*, 733 A.2d 414 (N.J. 1999)).

- Secondary Authority:

- Karen G. Weiss, “Boys Will Be Boys” and Other Gendered Accounts: An Exploration of Victims’ Excuses and Justifications for Unwanted Sexual Contact and Coercion, 15 Violence Against Women 810, 812-13 (2009) (“Several studies have shown that women who are described in vignettes as being sexually promiscuous, having a bad reputation, or engaging in a variety of ‘unfeminine’ behaviors are more likely to be blamed for precipitating their own sexual assaults.”).
- Bettina Frese et al., *Social Perceptions of Rape: How Rape Myth Acceptance Modulates the Influence of Situational Factors*, 19 J. Interpers. Viol. 143, 144 (2004) (finding that factors such as the existence of a prior relationship with the rapist increase blame and decrease perceived levels of trauma).
- Regina A. Schuller and Patricia A. Hastings, *Complainant Sexual History Evidence: Its Impact on Mock Jurors’ Decisions*, 26 Psych. of Women Quarterly 252, 253 (2002) (concluding that evidence of the victim’s prior sexual history influenced participants’ case judgments).
- Jessica D. Khan, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 Vill. L. Rev. 641, 648 n. 44 (2007) (listing, among other reasons of not reporting rape, the fear of being “disbelieved” and “blamed”).
- *Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, NCVLI Bulletin (Nat’l Crime Victim Law Inst., Portland OR), Sept. 2010, p. 3 n. 26, 27 (collecting statutory authority).

**Only after addressing whether the evidence is relevant and more probative than prejudicial should the argument turn to the jurisdiction's rape shield statute.**

- **Were proper procedures followed in seeking to admit the evidence?** *Argue that failure to follow proper evidentiary procedures can be a sound basis for excluding rape shield evidence and is not a per se violation of the Sixth Amendment.*
  - Sample Authority
    - *Case Law:*
      - *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991) (“The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion.”).
      - *United States v. Ramone*, 218 F.3d 1229, 1235-36 (10th Cir. 2000) (concluding that exclusion of evidence for defendant’s failure to obey the rape shield statute’s notice requirements did not violate his 6th Amendment rights).
      - *State v. Cuni*, 733 A.2d 414, 422 (N.J. 1999) (finding trial court’s determination that defendant’s procedural noncompliance required exclusion of rape shield evidence to be justified).
- **Does the evidence sought falls within the protections of rape shield?** *This Section discusses some of the most common exceptions to a rape shield provision. However, jurisdictions vary in their approaches to rape shield.*<sup>1</sup>
  - **Does it amount to sexual conduct?** *Argue that evidence such as photographs on Facebook amount to sexual conduct and fall within the scope of rape shield.*
    - Sample Authority:
      - *Case Law:*
        - *People v. Greenspan*, No. D054840, 2011 WL 809552, \*3 (Cal. Ct. App. Mar. 9, 2011) (finding that the trial court did not err in refusing to admit photographs of the victim in suggestive poses shortly after the rape under California’s rape shield statute).
  - **Does it involve specific instances sexual activity between the victim and defendant?** *Argue that the evidence should be excluded because it is irrelevant; more prejudicial than probative; in contravention of victims’ rights to be treated with fairness and respect for their dignity and privacy; and against public policy, as outlined above.*
    - Sample Authority:
      - *Secondary Authority:*
        - *Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, NCVLI Bulletin (Nat’l Crime Victim Law Inst., Portland OR), Sept. 2010.
- **Does it involve evidence of the victim’s sexual activity with another to explain the presence of semen, disease, pregnancy or other physical results of the rape?** *Argue that*

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<sup>1</sup> For a discussion of the varying tests, see *Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, NCVLI Bulletin (Nat’l Crime Victim Law Inst., Portland OR), Sept. 2010, p.2.

*the evidence is not being admitted in order to explain the presence of semen, disease, pregnancy, or other physical results, or that the evidence is irrelevant and being sought to be introduced for impeachment purposes.*

○ Sample Authority:

▪ *Case Law:*

- *State v. Trummer*, 683 N.E.2d 392, (Ohio Ct. App. 1996) (finding trial court did not err in excluding semen evidence where defendant had admitted to having sex with the victim, and therefore the evidence would only go to impeachment).
- *State v. Gettier*, 438 N.W.2d 1, 3 (Iowa 1989) (finding evidence that victim said she had sex with two people that day was not admissible to show source of semen or injury because defendant admitted to having sex with the victim that day).
- *Moore v. State*, 393 N.E.2d 175, 177 (Ind. 1979) (finding it was not error to not disclose victim's pregnancy to jury because the pregnancy was not a result of the rape).

- **Would exclusion of the evidence otherwise prejudice defendant's constitutional rights?** *Argue that this requirement is redundant, since application of the law must always be Constitutional. Responding to arguments under this provision will necessarily be fact-specific.*

○ Sample Authority:

▪ *Secondary Authority:*

- Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 84 (2002) (calling the constitutional catch-all provision "little more than an unimaginative attempt to avoid constitutional challenges" to rape shield laws.).
- Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 886 (1986).

**Keep in mind that in the event of an adverse decision, the victim may seek appellate review.**

- *Argue the victim has standing to pursue appeal under the traditional three-pronged analysis discussed above; the principles behind rape shield laws; or as a violation of victims' rights.*

□ Sample Authority:

▪ *Case Law:*

- *Doe v. United States*, 666 F.2d 43, 45-46 (4th Cir. 1981) (finding victim had standing to appeal adverse rape shield decision in an interlocutory appeal after balancing cost and inconvenience of delay versus the injustice of the delay, and noting the victim had a strong interest in protecting the privacy rights Congress intended to safeguard).

▪ *Statutory/Constitutional Authority:*

- Ariz. Rev. Stat. § 13-4437(A) (stating the victim has standing to appeal or enforce any right or challenge an order denying any right guaranteed under the victims' bill of rights; these rights include the rights to fairness, respect, dignity, and to be free from harassment).
- Md. Code, Criminal Procedure 11-103(b) ("a victim of a violent crime for which the defendant or child respondent is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider a right secured to the victim . . .").
- Or. Const. art. I, § 43(3)(b) (granting victims the right file a mandamus proceeding for a violation of a victims' right).