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RULE 412 LAID BARE: A PROCEDURAL RULE THAT CANNOT ADEQUATELY PROTECT SEXUAL HARASSMENT PLAINTIFFS FROM EMBARRASSING EXPOSURE

Andrea A. Curcio*

I. INTRODUCTION

Women who have consensual sex with one man are not offended by sexual overtures from other men.

Women precipitate harassment by the way they dress and talk.

Women who claim they are harassed are lying to get back at men they dislike or to cover poor job performance.

Women who claim they are sexually harassed are just overreacting to harmless jokes and flirtation.¹

These are some of the myths² and sexual stereotypes³ that have shaped sexual harassment law and, consequently, the evidence admissible in a sexual harassment case.

In sexual harassment cases, defendants have been permitted to discover and introduce evidence of the plaintiff's sexual conduct outside the workplace, the plaintiff's demeanor inside and outside the workplace, and the plaintiff's sexual conduct with non-harassing coworkers.⁴ Although some judges have found this kind of evidence irrelevant,⁵ others have used it as justification to defeat the plaintiff's claim.⁶

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1. For cases incorporating these views, see discussion *infra* Part II.B; see also *infra* notes 25-27.

2. See Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457 (1996) (arguing that mythic generalizations of women permeate legal doctrine); see also Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 153 (1994) (noting that "[s]exually harassing behavior is supported by cultural myths and stereotypes derived from the norms and expectations about behaviors of men and women").

3. See discussion *infra* Part III.C (discussing sexual stereotypes in sexual harassment claims).

4. See discussion *infra* Part II.B (discussing cases in which this type of discovery was permitted).

5. See, e.g., *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922, 932 (M.D. Ala. 1992) (dismissing the defendant's argument that abuse by plaintiff's boyfriend was relevant to whether she welcomed workplace verbal abuse and physical overtures); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (finding that private consensual activities with one coworker, unknown to alleged harassers, do not waive plaintiff's legal protections against sexual harassment).

6. See discussion *infra* Part II.B (discussing numerous district courts' use of a woman's sexual history to defeat her sexual harassment claim).

Judicial use of a woman's consensual sexual activities to defeat her sexual harassment claim raised the ire of feminist scholars and activists. Many argued that what was happening to sexual harassment victims was akin to what had happened to rape victims before the enactment of the rape shield laws—the accuser, rather than the accused, was put on trial.⁷

Congress attempted to solve this problem by amending Federal Rule of Evidence 412, adding a civil equivalent to the criminal “rape shield” statute.⁸ The articulated purpose of amending Rule 412 to include civil claims was to protect a sexual harassment plaintiff from the “invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.”⁹ The amended Rule 412 attempts to restrain judges’ ability to admit evidence of a sexual harassment plaintiff’s sexual history and conduct. By limiting the kind of evidence admissible in a sexual harassment trial, Congress

7. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 827 (1991); Grace M. Dodier, *Meritor Savings Bank v. Vinson: Sexual Harassment at Work*, 10 HARV. WOMEN'S L.J. 203, 221 (1987); Catherine A. O'Neill, *Sexual Harassment Cases and the Law of Evidence*, 1989 U. CHI. LEGAL F. 219, 220 (1989).

8. Rule 412 covers both criminal and civil cases. The relevant portions of the amended Rule are quoted below. The portion relating to civil cases (the amended Rule referred to in this text) is italicized.

Rule 412. Sex Offense Cases: Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; and
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions

(1) In a criminal case, the following evidence is admissible if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) *In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim. . . .*

FED. R. EVID. 412 (emphasis added).

Subsection (c) of the Rule deals with the procedures to determine admissibility of evidence permitted under subsection (b). See *id.*

9. FED. R. EVID. 412 advisory committee's note.

hoped to protect sexual harassment plaintiffs' privacy,¹⁰ and thus encourage suits aimed at redressing injuries caused by workplace sexual harassment.¹¹

This article reviews how the substantive sexual harassment law led many judges to condone a full exploration of a sexual harassment plaintiff's consensual sexual activities which led Congress to enact the amendments to Rule 412. The article then explores the application of amended Rule 412 and concludes that it has not achieved fully its stated purpose for at least three reasons: (1) some courts have been reluctant or unwilling to apply the evidentiary rule to civil discovery; (2) the Rule's "privacy" protections have been skirted by other procedural rules such as the rules governing expert witnesses and psychological examinations; and (3) the Rule has been applied by judges affected by gender-biased attitudes.¹² The article then offers potential solutions to these problems, such as changes to Rule 412, changes to the discovery rules, and educative efforts aimed at heightening awareness of gender-biased attitudes and sexual stereotypes.

II. BACKGROUND

A. Brief History of the Development of Title VII Sexual Harassment Claims

Sexual misconduct may give rise to various civil claims;¹³ however, it was the type of evidence being admitted in Title VII claims for sexual harassment that provided the impetus for Congress to amend Rule 412 to include civil claims.¹⁴ To understand the amended Rule and its

10. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Sept. 1993, § iv.

11. FED. R. EVID. 412 advisory committee's note.

12. This article focuses on women plaintiffs because, as Professor Radford notes, the majority of sexual harassment plaintiffs are women who allege they have been harassed by men. See Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 521 (1991). However, it is important to realize that men may be subjected to workplace sexual harassment as well, see, e.g., Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205 (D.R.I. 1991) (examining Title VII claim for sexual harassment brought by male employees), and that same sex harassment may also occur, see, e.g., Oncale v. Sundowner Offshore Serv., Inc., 118 S. Ct. 998, 1002 (1998). Many of the issues discussed herein apply to claims brought by men and to same-sex sexual harassment claims.

13. For example, a plaintiff may have a claim for intentional infliction of emotional distress, see Mitchell v. Hutchings, 116 F.R.D. 481 (D. Utah 1987), civil assault and battery, see Alberts v. Wickes Lumber Co., 1995 WL 117886 (N.D. Ill. Mar. 15, 1995), or negligent transmission of a sexual disease, see Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997).

14. Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1169 (1995).

successes and failures, it is important to understand the history of Title VII sexual harassment claims.

Some scholars have noted that when Title VII was enacted in 1964, the insertion of "sex" discrimination was a last-minute addition introduced to "highlight the absurdity" of the legislation and to defeat it.¹⁵ Others contend that its insertion was the result of "complex political struggles involving racial issues, presidential politics, and competing factions of the women's rights movement."¹⁶

Whatever the reason for the inclusion of the term "sex" into the Act, initially courts rejected Title VII sexual harassment claims because courts believed that sexual harassment did not qualify as "discrimination on the basis of one's sex."¹⁷ Even after courts decided that sexual harassment might constitute such discrimination, many early Title VII sexual harassment claims were still dismissed because some courts believed that women who suffered from unwanted sexual attention had somehow encouraged that attention. Thus, they were victims of "interpersonal difficulties" of their own making, rather than victims of sex discrimination.¹⁸

Courts also articulated other themes when denying these claims. Some courts feared that allowing Title VII sexual harassment claims would mean that all sexually oriented advances would become actionable and that it would be impossible to distinguish harmless flirtation from illegal harassment.¹⁹ Courts also worried that allowing a legal remedy would "open the floodgates."²⁰

By the late 1970s, courts began to recognize that tying job benefits or detriments, or a job itself, to a woman's compliance with an employer's sexual demands violated Title VII's prohibition against sex discrimination.²¹ This form of sexual harassment is known as "quid pro quo" sexual harassment.²²

15. Estrich, *supra* note 7, at 816-817.

16. Robert C. Bird, *More Than A Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997).

17. For a discussion of decisions articulating this position, see Michael D. Vhay, *The Harms of Asking: Towards A Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 329-33 (1988).

18. For a survey of cases positing this view, see Joan S. Weiner, Comment, *Understanding Unwelcome-ness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621, 622 (1997); Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement In Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1563 (1992).

19. For a discussion of these decisions, see Vhay, *supra* note 17, at 331-32.

20. *Id.*

21. See, e.g., *Williams v. Bell*, 587 F.2d 1240, 1244 n.33 (D.C. Cir. 1978); *Garber v. Saxon Bus. Prod.*, 552 F.2d 1032 (4th Cir. 1977).

22. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

A few years later, courts found that a cognizable sexual harassment Title VII claim may exist when an employer creates or condones a substantially discriminatory work atmosphere regardless of whether the complaining employee lost any tangible job benefits as a result of the discrimination.²³ This claim has come to be known as a "hostile work environment" claim.²⁴ Although courts became more willing to use Title VII to create a remedy for women subjected to a hostile work environment, the judges developing the law still feared that some women might use these claims to retaliate against an ex-lover,²⁵ to hide poor job performance,²⁶ or simply because they misunderstood "normal" workplace flirtations.²⁷

The tension between a desire to provide a remedy and a desire to protect employers from spurious claims is evident in the elements of a hostile work environment claim: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; and

23. See *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

24. Catherine MacKinnon's ground-breaking work, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979), helped courts to understand the inequitable work place power structures, and why, given the social realities, they needed a legal remedy for both "quid pro quo" and "hostile work environment" claims. See Holly B. Fechner, Note, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts*, 23 U. MICH. J.L. REF. 475, 485 (1990).

Recently the Supreme Court noted that the distinction between quid pro quo and hostile work environment cases serves to "instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or persuasive." *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998).

25. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976) ("An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turn[s] sour at some later time."). This attitude continues to influence some judicial decision making. See, e.g., *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 468 (8th Cir. 1995) (finding plaintiff's claim invalid because it was really a simple case of "a workplace romance gone awry"); *Rothenbush v. Ford Motor Co.*, 61 F.3d 904 (6th Cir. 1995) (characterizing plaintiff's claim as a "classic story of workplace romance turned sour").

26. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) (ordering remand when the trial court concluded plaintiff was dismissed for poor job performance and refused to consider her hostile work environment claim despite fact that court found that plaintiff's supervisor touched her buttocks and breasts and that these touchings were neither invited nor encouraged); *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1010-11 (7th Cir. 1994) (overturning the district court's finding that the plaintiff's poor attendance record and its impact on "shop morale," rather than the sexually harassing conduct of her coworkers is what made the workplace atmosphere "unbearable" for the plaintiff).

27. See, e.g., *Tomkins*, 422 F. Supp. at 557 (arguing that men and women are naturally attracted to each other); *Barnes v. Costle*, 561 F.2d 983, 999 (D.C. Cir. 1977) (finding that because sexual attraction often plays a role in daily workers' social interactions, "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected" sexual advances may be hard to determine); *Lipsett v. University of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988) (noting that a "determination of sexual harassment turns on whether it is found that the plaintiff misconstrued or overreacted to what the defendant claims were innocent or invited overtures").

(4) the harassment complained of affected a term, condition or privilege of employment.²⁸ These elements dictated the parameters of admissible evidence.

Recently, the Supreme Court clarified the standard for imposition of employer liability in sexual harassment claims.²⁹ It held that once a factfinder determines an employee has been a victim of workplace sexual harassment created by a supervisor, the employer is liable if the plaintiff suffered a "tangible employment action."³⁰ If the victimized employee did not suffer a tangible employment action, the employer may raise an affirmative defense to respondeat superior liability or to damages.³¹ The defense has two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to "avoid the harm otherwise."³² How these decisions will affect the kind of evidence admissible in sexual harassment claims is yet to be seen. However, it is not inconceivable that defendants will try and argue that the same kind of evidence that they have contended is relevant to prove that the conduct at issue was not unwelcome is also relevant to prove that the plaintiff failed to avoid the harm otherwise.³³

B. How the Substantive Law Led Courts to Admit Evidence of Sexual History

Unlike in other employment discrimination claims,³⁴ in a sexual harassment claim, the plaintiff must prove the defendant's conduct was unwelcome in that she did not solicit or incite such conduct³⁵ and that

28. See *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982).

29. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington*, 118 S. Ct. 2257.

30. *Faragher*, 118 S. Ct. at 2278-79.

31. See *id.* at 2279.

32. *Id.*

33. For example, defendants have argued that a plaintiff's way of dressing or speaking indicated that she welcomed the harassing conduct. See, e.g., *Carr v. Allison*, 32 F.3d 1007 (7th Cir. 1994) (arguing that the plaintiff's failure to wear a bra and her verbal sparring with coworkers indicated "welcomeness"). Employers, citing *Faragher*, may now argue that the same evidence is relevant to show that the plaintiff, by failing to change her manner of dress or language once she was being harassed, "failed to avoid the harm otherwise." For a discussion of why this argument may be based upon sexual stereotypical views and, if so, why it should not be admissible, see discussion *infra* Part III.C.3 (discussing how sexual stereotypes influence evidentiary decisions in sexual harassment claims).

34. As some scholars have noted, sexual harassment is the only Title VII claim which requires the plaintiff to prove "unwelcomeness." See *Vhay*, *supra* note 17, at 344; *Estrich*, *supra* note 7, at 826-34.

35. Some courts have stated that the test is whether the plaintiff solicited or *invited* (not incited) the conduct. See *Radford*, *supra* note 12, at 514.

she found the conduct undesirable.³⁶ The “unwelcomeness” or “welcomeness” element has led some courts to allow defendants to discover and introduce evidence of a plaintiff’s appearance, dress, and sexual activities unrelated to interactions with the alleged harasser³⁷—a trend that was reinforced by the dicta in *Meritor v. Vinson*.³⁸

In *Meritor*, the Supreme Court formally recognized that sexual harassment claims, including hostile work environment claims, are cognizable under Title VII. However, in dicta,³⁹ the Court rejected the appellate court’s finding that a woman’s speech, dress, and fantasies are presumptively irrelevant in determining whether the plaintiff welcomed, that is, solicited or incited, the alleged harassing conduct. Writing for the majority, Justice Rehnquist noted that:

While voluntariness in the sense of consent is not a defense to such a claim, it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of the “record as a whole” and the “totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.”⁴⁰

The Supreme Court found that balancing the probative value against the possibility of unfair prejudice of evidence of speech, dress, and other

36. See *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783-84 (1st Cir. 1990). The justification for placing the burden on the plaintiff to prove the conduct was unwelcome, was to ensure that “sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other.” *Vhay*, *supra* note 17, at 344 (discussing the Equal Employment Opportunity Commission’s Brief in *Meritor*).

37. See, e.g., *Neely v. American Fidelity Ins. Co.*, No. 77-0151-B, 1978 WL 65, at *2 (W.D. Okla. Feb. 21, 1978) (admitting evidence that plaintiff had been an amateur go-go dancer); *Wimberly v. Shoney’s Inc.*, No. CV584-098, 1985 WL 5410, at *8 (S.D. Ga. Sept. 19, 1985) (admitting evidence that plaintiff had given birth to an illegitimate child); *Collins v. Pfizer, Inc.*, No. H 82-1007, 1985 WL 56689, at *2 (D. Conn. July 5, 1985) (characterizing the plaintiff as an “attractive buxom” woman). In *Vinson v. Taylor*, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985), the appellate court observed that the district court’s finding that the plaintiff voluntarily participated in the conduct may have been based in part upon the voluminous testimony about the plaintiff’s dress and personal fantasies but held that consideration of these factors was improper. The Supreme Court disagreed with the court of appeals’s assessment of the irrelevance of this evidence. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986).

38. 477 U.S. 57 (1986).

39. The issue in *Meritor* was not the relevancy of the evidence about the plaintiff’s lifestyle, rather, the issue before the court was whether a woman had a cognizable claim for workplace sexual harassment under Title VII.

40. *Meritor*, 477 U.S. at 69 (citing 29 C.F.R. § 1604.11(b) (1985)).

conduct was a question properly addressed at the district court's discretion.⁴¹

Meritor did not mandate the admission of evidence of a plaintiff's sexual history, conduct, speech, or mannerisms.⁴² However, many courts have used the Supreme Court's totality of the circumstances dicta as justification for delving into aspects of a plaintiff's life unrelated to her interactions with her alleged harasser. In fact, in *Rabidue v. Osceola Refining Co.*, the United States Court of Appeals for the Sixth Circuit, relying on *Meritor*, noted that to properly assess whether a plaintiff proved a hostile work environment sexual harassment claim, a court should consider, among other things, the background and experience of the plaintiff.⁴³

Another factor that influenced the courts in considering a sexual harassment plaintiff's dress, speech, and lifestyle relevant was that to prevail in a hostile work environment claim, the plaintiff must prove both that a reasonable person, or reasonable woman,⁴⁴ would have found the workplace environment hostile and that the plaintiff in fact

41. *See id.*

42. The Court's directive to consider evidence of speech, dress, and other conduct as it applies to the "totality of the circumstances" could have been interpreted as allowing this evidence only in response to a defendant's actions or when the plaintiff's conduct was directed specifically at the defendant. However, courts refused to define "totality of the circumstances" so narrowly. Some courts considered all plaintiff's conduct, inside and outside of the workplace, to be part of the test. *See Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); *Jones v. Wesco Inv., Inc.*, 846 F.2d 1154, 1156 n.5 (8th Cir. 1988). Others considered only conduct known to the alleged harasser. *See Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Weiss v. Amoco Oil Co.*, 142 F.R.D. 311 (S.D. Iowa 1992).

43. *See Rabidue*, 805 F.2d at 620. *See also*, Jacqueline H. Sloan, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines Meritor Savings Bank v. Vinson*, 25 SW. U. L. REV. 363, 384-86 (1996). Sloan notes that courts took three different approaches to *Meritor's* language on considering the plaintiff's dress and lifestyle. *See id.* Some courts interpreted this to mean that the evidence was automatically admissible; others held it was relevant but only if the defendant was aware of the conduct; and, finally, some courts were much more restrictive and examined the evidence closely to see how it related to the plaintiff's complaints about her working environment. *See id.*

44. The circuit courts vary in the tests that they apply. Some circuits apply a reasonable woman, rather than a reasonable person test. *Compare* *Watkins v. Bowden*, 105 F.3d 1344 (11th Cir. 1997) ("reasonable person" test); *Reed v. Lawrence*, 95 F.3d 1170 (2d Cir. 1996) ("reasonable person" test); *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525 (1st Cir. 1995) ("reasonable person" test); *De Angelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995) ("reasonable person" test); *Berman v. Washington Times Corp.*, Civ. A. No. 92-2738, 1994 WL 750274 (D.D.C. Sept. 23, 1994) ("reasonable person" test); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990) ("reasonable person" test); *Andrews v. City of Phila.*, 895 F.2d 1469 (3rd Cir. 1990) ("reasonable woman" test); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *superseded on other grounds*, 900 F.2d 27 (4th Cir. 1990) ("reasonable person" test); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) ("reasonable person" test) *with* *Burns v. McGregor Elec. Indus.*, 989 F.2d 959 (8th Cir. 1993) ("reasonable woman" test); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) ("reasonable woman" test); *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) ("reasonable woman" test). *See also* *King v. Frazier*, 77 F.3d 1361 (Fed. Cir. 1994) (sexual harassment claims should be evaluated from the perspective of the one being harassed).

found it hostile.⁴⁵ This element served as a gateway for the admission of plaintiffs' sexual conduct and private lives.

Evidence of a plaintiff's sexual history and sexual conduct inside and outside the workplace has been introduced at sexual harassment trials to prove that the plaintiff was not the kind of person who would have found the workplace environment hostile. For example, in *Burns v. MacGregor*,⁴⁶ the trial judge permitted the defendant to introduce evidence that the plaintiff posed nude for a motorcycle magazine, that her father pierced her nipples, and that her brother observed the nude picture taking. These facts led the judge to conclude that the plaintiff was not the kind of person who would be offended by unwelcome workplace advances.⁴⁷ In *Stacks v. Southwestern Bell Yellow Pages*,⁴⁸ a hostile work environment case, the defendant hosted sales parties where men brought in "road whores" who were "berated, talked down to, made fun of and passed around."⁴⁹ Plaintiff testified that these parties made her feel "less than human' and 'dirty, like there's something wrong with being a woman."⁵⁰ Because the plaintiff admitted to having had an affair with a married man, the district court found that she could not have found the conduct at the sales parties offensive.⁵¹ In *Blankenship v. Parke Care Centers, Inc.*,⁵² plaintiffs complained that a coworker engaged in uninvited hugging and kissing, declarations of love, blowing kisses and licking his lips, making obscene gestures toward his crotch, making vulgar sexual remarks, repeatedly asking for dates, and approaching one plaintiff from behind and lifting her breasts with his hands.⁵³ In *Blankenship*, the court not only considered evidence of the plaintiffs' childhood sexual abuse relevant, but used this evidence as one reason to defeat the plaintiffs' claims. The court reasoned that the plaintiffs'

45. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993).

46. 807 F. Supp. 506, 512 (N.D. Iowa 1992), *rev'd*, 989 F.2d 959 (8th Cir. 1993).

47. The district court decision was overturned on appeal. See *Burns*, 989 F.2d at 963. The appellate court noted:

[P]laintiff's choice to pose for a nude magazine outside work hours is not material to the issue of whether plaintiff found her employer's work-related conduct offensive . . . Her private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer.

Id.

48. 27 F.3d 1316 (8th Cir. 1994).

49. *Id.* at 1320.

50. *Id.*

51. *Id.* at 1322. The appellate court disagreed, noting that a "person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment." *Id.* at 1327 (quoting *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).

52. 913 F. Supp. 1045 (S.D. Ohio 1995).

53. See *id.* at 1053-54.

histories may have made them peculiarly susceptible to the coworker's harassment.⁵⁴

Plaintiffs' "sexual history" has also been permitted as evidence for a myriad of other reasons. During discovery in a sexual harassment case in which the plaintiff alleged her supervisor raped her several times at a hotel where they both worked, the plaintiff was asked if she had ever watched X-rated films with her husband.⁵⁵ Defense counsel argued that the purpose of the question was to suggest that the plaintiff had concocted her allegations from movies she might have seen.⁵⁶ Other witnesses were asked if the plaintiff had slept with her husband before marriage and if she had dated other men.⁵⁷ The defense attorney argued that the questions about premarital dating were intended to show that the plaintiff's husband was not a jealous man and that the plaintiff, if raped, could have confided in him.⁵⁸

In a sexual discrimination case in New Mexico,⁵⁹ defense lawyers obtained a plaintiff's gynecology records from her college days at the University of California at Berkeley, asked the plaintiff's ex-boyfriend how often the couple had sex, and asked the plaintiff's therapists about the plaintiff's early sexual experiences, sex practices and relationships, and whether the plaintiff was promiscuous. They also inquired whether the plaintiff hated men because her former marriage was acrimonious

54. See *id.* at 1055 n.3.

55. See Ellen E. Schultz & Junda Woo, *The Bedroom Ploy: Plaintiffs' Sex Lives Are Being Laid Bare In Harassment Cases*, WALL ST. J., Sept. 19, 1994, at A1 (discussing the trial of Rosemary J. Martin in Norfolk, Va.).

56. See *id.*; see also *Kelly-Zurian v. Wohl Shoe Co., Inc.*, 27 Cal. Rptr. 2d 457 (Ct. App. 1994). In *Kelly-Zurian*, the plaintiff alleged that for three years, the defendant verbally and physically sexually harassed her by approaching her from behind and putting his hands on her breasts, pinching her buttocks, grabbing her crotch, and asking if she was wet. See *id.* at 460. The defendant also asked about her lingerie, her "pussy," if she "took it in the ass," and if she "swallowed." See *id.* The defendant claimed that he and the plaintiff had a consensual relationship and that he ended it when the plaintiff told him she was pregnant. See *id.* at 460 n.1. The trial court precluded defendant's attempt to use information about the plaintiff's viewing of adult videos with her husband, her abortions, her prior sexual history, and sexual conduct with individuals other than the defendant or other coworkers by granting plaintiff's motion in limine. See *id.* at 463.

57. See Schultz & Woo, *supra* note 55, at A1.

58. See Schultz & Woo, *supra* note 55; see also *Sensibello v. Globe Sec. Sys., Inc.*, No. 814052, 1984 WL 1118 (D.C. Pa. Jan. 10, 1984). In *Sensibello*, the plaintiff was bluntly propositioned by numerous company executives. See *id.* at *2. One executive physically assaulted her, attempting to rip off her clothing. See *id.* at *3. The court considered the fact that the plaintiff was living with her immediate boss and noted that some of the more overt instances of sexual advances and propositions "were attributable to the arguably reasonable but, as it turns out, incorrect assumption that plaintiff was not averse to employing unconventional means of advancing her career." *Id.* at *8. Despite its view that plaintiff's sexual relationship was relevant, the court still found plaintiff had a meritorious sexual harassment claim. *Id.*

59. See Schultz & Woo, *supra* note 55.

and whether she had a "victim mentality" because she was raped as a teenager.⁶⁰

As sexual harassment law developed, a few courts stringently examined the relevance of evidence of a plaintiff's sexual history and some actually barred discovery.⁶¹ Those prohibiting discovery reasoned that evidence of a plaintiff's sexual activities with individuals other than the alleged harasser had no bearing on whether the plaintiff welcomed workplace overtures and merely served to embarrass and annoy the plaintiff.⁶² Additionally, some courts reasoned that permitting this kind of discovery had the potential to discourage sexual harassment litigants from prosecuting their claims, thus defeating the remedial effect intended by Congress when it enacted Title VII.⁶³

Although a few courts would not permit discovery of the intimate details of a plaintiff's private sexual life, many lower courts not only allowed discovery of details of plaintiffs' private lives, they admitted this evidence and then used it to defeat the plaintiffs' claims.⁶⁴ Despite the fact that many of these decisions were overturned on appeal because of the erroneous consideration of this evidence,⁶⁵ many scholars criticized the district court decisions allowing defendants to use evidence of plaintiffs' lifestyles to defeat their workplace sexual harassment claims.⁶⁶ Legal scholars argued that in deciding what evidence was relevant, judges confused sexual harassment with voluntary sexual activity and failed to understand that workplace sexual harassment is about power, not about sex.⁶⁷ They noted that this misconception was reminiscent of a similar misconception in rape cases.⁶⁸

60. *See id.*

61. *See Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal 1983); *Mitchell v. Hutchings*, 116 F.R.D. 481 (D. Utah 1987); *Longmire v. Alabama State Univ.*, 151 F.R.D. 414 (M.D. Ala. 1992).

62. *See generally Priest*, 98 F.R.D. 755; *see also Mitchell*, 116 F.R.D. 481.

63. *See Priest*, 98 F.R.D. at 761.

64. *See, e.g., Blankenship v. Parke Care Ctrs.*, 913 F. Supp. 1045, 1055 n.3 (S.D. Ohio 1995); *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1322 (8th Cir. 1994); *Burns v. McGregor Elec. Indus.*, 807 F. Supp. 506, 512 (N.D. Iowa 1992), *rev'd*, 989 F.2d 959 (8th Cir. 1993).

65. For example, appellate courts reversed decisions of trial courts in *Burns*, *see Burns*, 989 F.2d at 660, and *Stacks*, *see Stacks*, 27 F.3d at 1327. In fact, *Burns* was reversed, remanded, and then, reversed again. 989 F.2d at 961. The second time *Burns* was in the appellate court, the appellate court entered judgment in favor of the plaintiff and simply remanded the case for a finding of damages. *See id.* at 966.

66. *See, e.g., Estrich, supra note 7*, at 828-31; *Monnin, supra note 14*, at 1187-93; *Juliano, supra note 18*, at 1583-86.

67. *See generally Estrich, supra note 7*, at 820; Catharine MacKinnon, *Reflections on Sexuality Under the Law*, 100 YALE L.J. 1281 (1991); Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 308 (1991). *But see Susan T. Fiske & Peter Glick, Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, 51 J. SOC. ISSUES 97, 99 (1995) (noting that sometimes sexual harassment can be motivated by a man's desire to seek intimacy).

68. *See Estrich, supra note 7*, at 827; *see also Fechner, supra note 24*, at 493.

Some argued that, just as in rape cases, in many sexual harassment cases, the victim, rather than the alleged aggressor, was being put on trial.⁶⁹ Also, as in the earlier rape trials, evidence of a woman's sexual history or relationships, or evidence of her use of vulgar language and crude jokes, was misused, as this evidence encouraged the fact finder to infer that the victim was "unchaste and immoral . . . and . . . undeserving of protection."⁷⁰ Some noted that the defendant's conduct often was excused by the court's refusal to punish the defendant, and that some courts, in essence, reprimanded the woman for failing to conform to the societal norms of how a "lady" should act.⁷¹ Finally, some argued that admitting such evidence to show the plaintiff was not credible, or that the plaintiff likely welcomed the conduct, "reinforce[d] sexist attitudes and preclude[d] the educative function of the law."⁷²

Women's advocates also noted that, as in rape cases, a woman's fear of having her sex life publicly exposed was a strong disincentive to filing suit for sexual harassment.⁷³ In fact, in one survey, ninety percent of sexual harassment victims reported that they were unwilling to come forward for two primary reasons: fear of retaliation and fear of loss of privacy.⁷⁴

Congress ameliorated some of the problems arising from the misuse of a woman's sexual history in criminal rape trials by enacting Rule 412, the federal rape shield law.⁷⁵ Thus, it is not surprising that when the problems discussed above were brought to Congress' attention, Congress attempted to remedy them in the same way—by extending Rule 412 to include civil, as well as criminal cases.

69. See Estrich, *supra* note 7, at 827; O'Neill, *supra* note 7, at 244; Donna L. Laddy, Comment, *Burns v. McGregor Electronic Industries: A Per Se Rule Against Admitting Evidence of General Sexual Expression as a Defense to Sexual Harassment Claims*, 78 IOWA L. REV. 939, 957 (1993).

70. Monnin, *supra* note 14, at 1187.

71. See Laddy, *supra* note 69, at 951 n.93. For example, in *Burns v. McGregor Electric Industries*, 955 F.2d 559 (8th Cir. 1992), the district court found the defendant's conduct was unwelcome, but found no liability because the plaintiff, who had posed nude for a magazine and had pierced nipples and a tattoo, was not the type of person who would be offended by the defendant's physical overtures and crude remarks. Cf. Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 490 (1991) (discussing a Florida rape case in which the jury found the defendant not guilty because, by wearing a short see-through skirt, the victim "asked for it").

72. O'Neill, *supra* note 7, at 3.

73. For a discussion of how these rulings discouraged women from filing civil suits, see Estrich, *supra* note 7, at 833-34; O'Neill, *supra* note 7, at 8.

74. See SEXUAL HARASSMENT: RESEARCH AND RESOURCES: A REPORT PREPARED BY THE NATIONAL COUNCIL FOR RESEARCH ON WOMEN, (citing a study by Klein Associates, Inc., *The 1988 Working Women Sexual Harassment Survey Executive Report*).

75. But see Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 134 (1996) (arguing that rape shield reforms have been unsuccessful in achieving their aims).

C. *The Enactment of Amended Rule 412*

After extensive public hearings and discussion,⁷⁶ the Rules Advisory Committee promulgated an amended version of Rule 412 which applied the Rule to civil cases.⁷⁷ The amended Rule placed the burden on the proponent of sexual history evidence to show why the evidence's relevance outweighed the danger of unfair prejudice.⁷⁸ Pursuant to the Rules Enabling Act (REA), the Advisory Committee forwarded the amended Rule to the Supreme Court for adoption and transmittal to Congress.⁷⁹

Chief Justice Rehnquist expressed the Court's concern that the proposed amendment might "encroach on the rights of defendants,"⁸⁰ noting that in *Meritor*, the Court remarked that evidence of an alleged victim's "sexually provocative speech or dress" may be relevant in workplace harassment cases. The Supreme Court refused to forward the proposed rule to Congress because some Justices believed that the proposed Rule's limitations on the defendant's ability to use a plaintiff's sexual history evidence might so severely hamper a defendant's ability to present a defense that it would abridge a defendant's substantive rights, thus violating the REA.⁸¹

76. See, e.g., Advisory Committee on Evidence Rules, Minutes of the Meeting of May 6-7, 1993 (detailing comments by Federal Courts Committee of the Association of the Bar of the City of New York, The Women's Legal Defense Fund, The American College of Trial Lawyers, NOW Legal Defense & Education Fund). For an extensive discussion of the procedural history of amended Rule 412, see Monnin, *supra* note 14, at 1169-74.

77. As Professor Eileen A. Scallen explains, the normal procedure is for the Advisory Committee to prepare a draft rule or proposed change to a rule. This proposed rule then goes to the Standing Committee on Rules of Practice and Procedure which either accepts, rejects, or modifies the proposed rule. If the Standing committee accepts the draft, it forwards the rule and the Advisory Committee Notes to the Judicial Conference which, in turn, transmits its recommendations to the United States Supreme Court. The Court reviews the rule changes, modifies them if it wishes and then sends them to Congress through an Order of the Court. Congress then has a specific period of time in which it may modify or reject the rules. If it fails to act on the rules, they go into effect as transmitted by the Court. See Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1288-89 (1995).

78. See *supra* note 8 for the text of amended Rule 412.

79. See REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Sept. 1993 [hereinafter REPORT].

80. Letter from William Rehnquist, Chief Justice of the United States Supreme Court, to John F. Gerry, Chair, Executive Committee, Judicial Conference of the United States (Apr. 29, 1994) (on file with author).

81. The Supreme Court is authorized to prescribe general rules of practice and procedure and rules of evidence for cases in the United States District Courts. See 28 U.S.C. § 2072 (1994). However, such rules "shall not abridge, enlarge, or modify any substantive right." *Id.*

Congress solved the REA dilemma by disregarding the Court's concerns and enacting the amended Rule, along with the Advisory Committee Notes, without the Supreme Court's blessing.⁸² The Rule and Advisory Committee Notes were incorporated into the Violent Crime Control Act of 1994.⁸³

Under the amended Rule, evidence of an alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, is not "obviously relevant."⁸⁴ In fact, the opposite is true. This evidence now is inadmissible unless its probative value substantially outweighs the danger of prejudice to any party and harm to the victim.⁸⁵

The Advisory Committee Notes indicate that Congress intended Rule 412 to have a broad scope. According to the Advisory Committee Notes, the term "sexual behavior" "encompass[es] all activities involving or implying sexual intercourse or sexual contact, as well as activities of the mind, such as fantasies or dreams."⁸⁶ The Advisory Committee explained that the term "sexual predisposition" includes all "evidence that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder, such as evidence relating to the alleged victim's mode of dress, speech or lifestyle."⁸⁷

As the legislative history indicates, the revised Rule was enacted in an effort to "be fair to the victim and not focus on her past sexual behavior."⁸⁸ The Rule is intended to "expand the protection afforded alleged

82. Although Congress often accepts the Rules as promulgated by the Supreme Court, enacting rules different from those accepted by the Supreme Court is not without precedent. When the original Federal Rules of Evidence were proposed, Congress "held hearings and prepared committee reports, scrutinized the Rules, changed them substantially, and finally enacted the changed version in statutory form." CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 1.2 (1995).

83. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat. 1796, 1919) § 40141.

84. This is the dicta in *Meritor* that many courts relied upon in making evidentiary determinations. See *supra* notes 36-44 and accompanying text.

85. FED. R. EVID. 412(b)(2). Prior to the enactment of Rule 412, the evidence was presumptively admissible unless the plaintiff proved that the evidence's probative value was outweighed by the danger of undue prejudice. Under Rule 412, the evidence is presumptively inadmissible unless the defendant shows that the evidence's probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. See *Barta v. City of Honolulu*, 169 F.R.D. 132, 135 (D. Haw. 1996) (noting Rule 412 makes the evidence presumptively inadmissible).

86. FED. R. EVID. 412 advisory committee's note. Members of the Supreme Court disagree on the weight to be accorded to the Advisory Committee notes. See Scallen, *supra* note 77, at 1284-94 (noting that Justice Kennedy views the notes as an authoritative source that should be given great weight in interpreting the rules while Justice Scalia believes that although the advisory committee notes may be persuasive, they are not authoritative).

87. FED. R. EVID. 412 advisory committee's note.

88. 140 CONG. REC. H8968-01, H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes).

victims of sexual misconduct.”⁸⁹ It is aimed at safeguarding the alleged victim against the “invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process,”⁹⁰ thereby affording the protection necessary “to encourage victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”⁹¹

In choosing between the competing concerns of protecting a sexual harassment plaintiff’s privacy and protecting an alleged harasser, or harasser’s employer,⁹² against the possibility of an unjust verdict, Congress tipped the balance in favor of protecting the plaintiff. However, it did not tip the balance very far. Application of Rule 412 leaves to the district courts the difficult task of balancing a plaintiff’s privacy interests against a defendant’s right to prove the plaintiff was not offended or that the plaintiff welcomed the alleged harasser’s overtures.

The attempt to balance these interests has led to a wide range of decisions. These decisions demonstrate that Rule 412, by itself, has not adequately protected sexual harassment plaintiffs. The next section of the article discusses why the Rule has failed to protect plaintiffs as Congress intended. It suggests there are three main reasons: (1) problems applying Rule 412 to discovery in sexual harassment cases; (2) difficulty reconciling the Rule with other evidentiary rules such as expert opinion rules; and (3) the interplay of the Rule’s discretionary nature with the potential impact of gender bias and subconscious judicial ambivalence towards sexual harassment claims.

III. WHY RULE 412 CANNOT ACHIEVE ITS STATED GOALS

A. Problems Applying Rule 412 to Discovery Issues

1. Differing Goals of Evidentiary and Discovery Rules

One of the main reasons Rule 412 cannot adequately protect sexual harassment plaintiffs’ privacy is that it is a rule of evidence, not of discovery. In most criminal rape trials there is little formal pre-trial

89. FED. R. EVID. 412 advisory committee’s note.

90. *Id.*

91. *Id.*

92. See *supra* notes 29-33 and accompanying text (discussing employer liability in sexual harassment claims).

discovery from the victim.⁹³ An evidentiary rule adequately protects an alleged rape victim's privacy because the trial is the first time she may be questioned by opposing counsel about intimate details of her private life.⁹⁴ This is not true in civil cases. It is during the discovery process in civil cases that the plaintiff's private life becomes the focus of the defendant's inquiry.

Defense attorneys use pre-trial discovery to explore the plaintiff's sexual history, relationships, and any incidents of sexual abuse or violent sexual encounters.⁹⁵ Plaintiffs' attorneys contend that these tactics are designed to pressure plaintiffs to drop cases or to settle for unfairly low amounts.⁹⁶ Defense attorneys claim that these are legitimate inquiries which are relevant to liability and damages.⁹⁷ Both parties are aware that because discovery rulings are not immediately appealable, the

93. Only a few states allow a criminal defendant to depose material witnesses as of right. See FLA. R. CRIM. P. 3.220(b)(1)(A), 3.220(h)(1); N.D. R. CRIM. P. 15(a); VT. R. CRIM. P. 15(a). In a minority of states, the defendant may seek a court ordered deposition of a material witness if the witness refuses to consent to an interview and if the witness was not questioned at a preliminary hearing. See, e.g., ARIZ. R. CRIM. P. 15.3(a)(2) (giving the court discretion to order the examination of a material witness if the person was not a witness at the preliminary hearing and the person will not cooperate in granting a personal interview); IOWA CODE ANN. § 813.2 (West 1994); IOWA R. CRIM. P. 12(1) (allowing depositions in criminal cases, but permitting the state to object if the witness is a foundation witness or has been adequately examined at the preliminary hearing); MONT. CODE ANN. § 46-15-201(1)(c) (1993) (allowing a deposition if the prospective material witness is unwilling to provide relevant information to the requesting party); NEB. REV. STAT. § 29-1917 (1989 & Supp. 1993) (allowing a deposition in the court's discretion); N.H. REV. STAT. ANN. § 517-13(II) (Supp. 1993) (giving the court the discretion to order a deposition); N.M. DIST. CT. R. CRIM. P. 5-503(A) (permitting compelled witness statements from uncooperative witnesses); TEX. CRIM. P. CODE ANN. art. 39.02 (West 1997) (allowing deposition upon petition stating facts necessary to constitute good cause to depose); WASH. ST. SUPER. CT. CRIM. R. 4.6(a) (allowing defendant to depose a material witness who refuses to discuss the case with defense counsel). For a discussion about the lack of formal pre-trial discovery devices in criminal cases, see Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845 (1995).

94. Prior to the enactment of the rape shield statute, defendants elicited evidence of a complainant's prior non-marital or extramarital sexual activity by cross examining the complainant, calling one or more men to testify about their prior sexual relations with her, or by calling witnesses to testify about the complainant's reputation of chastity or promiscuity. See Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 714 (1995).

95. See *supra* Part II.B (discussing the types of information sought during discovery in sexual harassment claims).

96. See Schultz & Woo, *supra* note 55; Jane Daugherty, *Sexual Harassment Takes Devastating Toll*, DETROIT NEWS, Jan. 28, 1997, at D1 (quoting a plaintiff's attorney who stated, "some defense attorneys go into the workplace with an industrial strength vacuum and suck up every piece of dirt, innuendo and rumor. Then they throw all this at the victim, hoping some of it will stick in the minds of the jury or break the victim down.").

97. See Ann Davis, *Ruling May Halt Defense Strategy of Using Plaintiffs' Pasts in Suit*, WALL ST. J., Dec. 29, 1997, at B5 (quoting a defense attorney who notes that when a plaintiff is seeking damages for emotional distress, the lawyer makes inquiries about the plaintiff's entire life because, "in fairness, the company has the right to see what else has happened in [her] life").

district court's decision is crucial.⁹⁸ If the district court permits extensive discovery despite a plaintiff's objection, the plaintiff has no recourse other than to comply with the discovery request, to dismiss her claim, or to settle her claim, perhaps for much less than its true value. On the other hand, if the court fails to allow discovery, it may unfairly hamper a defendant's ability to defend against spurious claims.

The Advisory Committee Notes to Rule 412 advise courts to make discovery orders with Rule 412 in mind and to seal the file when appropriate.⁹⁹ However, this admonition provides courts with little guidance and trial courts are struggling with what role, if any, Rule 412 plays in discovery issues.

One significant problem for courts involves reconciling the two different purposes served by evidence and discovery rules. The Rules of Evidence "attempt to manage the various risks and opportunities that the trial process presents in an adversary setting."¹⁰⁰ Many evidence rules are designed to lessen the chance that jurors will overvalue certain evidence and to further substantive legal and social policies.¹⁰¹ Evidence rules limit the information presented to the fact finder.

In contrast, discovery rules are intended to produce a free flow of information before trial, rather than to limit it. The underlying philosophy of the discovery rules is that "prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged."¹⁰² Discovery principles were developed to combat the earlier practices of "trial by ambush" making the trial "less of a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."¹⁰³

Rule 26 of the Federal Rules of Civil Procedure embodies the principle that discovery's purpose is to further the information gathering process by allowing for discovery of all evidence "relevant to the subject matter involved in the pending action The information sought need not be admissible at the trial if the information sought appears reason-

98. Discovery rulings are interlocutory and not immediately appealable. See 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2006, (2d ed. 1994). But see, Kent D. Stressman, Note, *Headshrinkers, Marmanchers, Moneygrubbers, Nuts & Shuts: Reexamining Compelled Mental Examinations In Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1325-29 (1995) (arguing that courts should expand the availability of interlocutory appeals in Rule 35 discovery orders).

99. See FED. R. EVID. 412 advisory committee's note; see also *infra* text accompanying note 110 (quoting language used by the Advisory Committee).

100. See MUELLER & KIRKPATRICK, *supra* note 82, at 1.

101. See *id.* at 2.

102. CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS*, § 81, at 587 (5th ed. 1994).

103. *Id.* at 578.

ably calculated to lead to the discovery of admissible evidence."¹⁰⁴ The phrase "relevant to the subject matter" has been liberally construed "to encompass any matter that could bear on any issue that is or may be in the case."¹⁰⁵ As Professor Wright noted,

The central notion of the discovery practice set out in the rules is that the right to take statements and the right to use them in court must be kept entirely distinct. In this way discovery at the pretrial stage is not fettered with the rules of admissibility that apply at a trial. The utmost freedom is allowed at the discovery stage, but restrictions are imposed on the use of the products of discovery in order to preserve traditional methods of trial.¹⁰⁶

Because of these two different purposes, discovery often delves into areas which would be inadmissible at trial but from which an attorney may make a colorable argument that she will discover admissible evidence. For example, one commentator noted that if a plaintiff makes statements about her chastity, an attorney then has an argument to discover information about the plaintiff's outside-the-workplace sexual conduct as impeachment evidence.¹⁰⁷ The same commentator suggested that defendants may encourage such "door-opening" admissions by accusing the plaintiff in her deposition of prior "questionable" or "loose sexual conduct" based on workplace rumors.¹⁰⁸ Although at trial most judges will not allow an opponent to "bait" the witness and thus open the door, during discovery counsel has much greater latitude in asking questions. In part, that is because judges do not monitor questions during depositions. Additionally, parties are afforded greater latitude during discovery because discovery is the stage of the litigation process in which the parties gather evidence to determine whether their respective claims and defenses are meritorious.¹⁰⁹ Defendants may argue that it may be impossible to distinguish meritorious from spurious claims without searching discovery, some of which will uncover information which may embarrass the plaintiff.

104. FED. R. CIV. P. 26(b)(1).

105. WRIGHT, *supra* note 102, at 587.

106. *Id.* at 581.

107. See Richard G. Moon & Julie Boesky, *Discovery Problems and Solutions in Sex Harassment Cases*, 463 PLI/LIT 63, 72 (1993). Such an approach was urged upon the court in *Barta v. City of Honolulu*, 169 F.R.D. 132 (D. Haw. 1996), where the defendants argued that the plaintiff's claim that she was a strict Mormon opened the door to extensive discovery regarding extramarital relationships to impeach the plaintiff. See *id.* at 136.

108. See Moon & Boesky, *supra* note 107, at 72.

109. See, e.g., *United States v. Ling-Temco-Vought, Inc.*, 49 F.R.D. 150, 152 (W.D. Pa. 1970) ("The [discovery] Rules are intended to procure the truth and the factual circumstances as they relate to the matter for the purposes of avoiding long drawn-out trials, by narrowing the points in dispute.").

The purpose of the discovery rules—to allow full exploration of information that may lead to admissible evidence—is one reason why Rule 412 may not adequately address a plaintiff's privacy concerns. Another reason the Rule may be inadequate is that courts are unclear about how to apply it in the discovery context.

2. Inadequate Directives on How The Rule Applies to Discovery

The Advisory Committee recognized that Federal Rule of Civil Procedure 26 could prove to be an obstacle to accomplishing the goals of Evidence Rule 412. Although it acknowledged that discovery continues to be governed by Rule 26 it cautioned:

In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to [Federal Rule of Civil Procedure 26(c)] to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case and cannot be obtained except through discovery.¹¹⁰

Courts vary in the weight they give these advisory notes in discovery decisions and in the way they integrate amended Rule 412 with Rule 26. Some courts have attempted to apply the Rule 412 balancing test to discovery issues, balancing the probative value of evidence against its potential for prejudice and harm to the victim.¹¹¹ However, because the facts and issues have not been fully developed it is much more difficult for a judge to determine what evidence may be potentially relevant, let alone how the evidence fits into the Rule 412 balancing test. Additionally, until discovery occurs, the court has not seen the evidence sought, so it may not have the information it needs to decide the relevancy of the evidence in the context of the facts of that case.¹¹² As one court stated:

However difficult this balancing of interests may be at the time of trial, it is substantially more difficult when made at the time of discovery and before the facts, issues, and positions of the parties have crystallized and before a majority of the evidence surrounding the

110. FED. R. EVID 412 advisory committee's note.

111. See, e.g., *Barta*, 169 F.R.D. at 135-36; *Albert v. Wickes Lumber Co.*, No. 93-C-4397, 1995 WL 117886 (N.D. Ill. Mar. 15, 1995); *Herchenroeder v. Johns Hopkins Univ.*, 171 F.R.D. 179, 181 (D. Md. 1997).

112. See *Sanchez v. Zahibi*, 166 F.R.D. 500, 502 (D.N.M. 1996).

alleged incident is in the possession of the parties, much less before the court.¹¹³

Some courts have attempted to apply the Rule 412 balancing test and have barred discovery¹¹⁴ or limited it.¹¹⁵ However, other courts have found Rule 412 inapplicable to discovery¹¹⁶ or have held it does not limit discovery because relevance for discovery purposes is very different than relevance at trial.¹¹⁷

Discovery encompasses both liability and damages. Different issues arise when considering the relevancy of evidence to liability and to damages. The next section begins with a discussion of how a plaintiff's sexual history and predisposition may apply to discovery related to liability issues. It first compares factually similar pre and post-Rule 412 decisions. It then looks at other liability discovery issues decided under Rule 412. The final part of this section discusses cases applying Rule 412 to damages discovery issues. A review of these decisions demonstrates that court decisions after the amendment to Rule 412 are as divergent as they were before the amendment was enacted, and in at least one case, a post-Rule 412 decision was more expansive in allowing discovery than a pre-Rule 412 decision that was based upon similar facts.¹¹⁸

3. Liability Discovery Issues—A Comparison of Pre and Post-Rule 412 Cases

One way to examine the effect of Rule 412 on liability issues is to look at similar cases decided before and after the amendment's enactment. This subsection looks at two sets of cases with very similar facts. In one set of cases, the post-Rule 412 court allowed broader discovery than the pre-Rule court. In the second set of cases, the holdings of the pre- and the post-Rule courts were virtually identical; amended Rule 412 made no difference in the outcome.

The cases that reached different results on very similar facts involve Title VII hostile work environment sexual harassment claims. The cases

113. *Albert*, 1995 WL 117886, at *1.

114. See *Howard v. Historic Tours of Am.*, 177 F.R.D. 48 (D.D.C. 1997); *Burger v. Litton Indus.*, No. 91CIV0918, 1995 WL 476712 (S.D.N.Y. Aug. 10, 1995).

115. See *Herchenroeder*, 171 F.R.D. at 182; *Sanchez*, 166 F.R.D. at 503.

116. See *Ramirez v. Nabil's, Inc.*, Civ. A. No. 94-2396, 1995 WL 609415 (D. Kan. Oct. 5, 1995).

117. See *Holt v. Welch Allyn*, No. 95-CV-1135, 1997 WL 210420 (N.D.N.Y. Apr. 15, 1997).

118. See discussion *infra* Part III.A.3.

are *Sanchez v. Zahibi*,¹¹⁹ a post-Rule decision, and *Priest v. Rotary*,¹²⁰ a pre-Rule decision. In both *Sanchez* and *Priest*, the defendants claimed that the plaintiffs were the sexual aggressors and thus that the defendants' conduct was not unwelcome.¹²¹ The defendants in both cases sought information about men with whom the plaintiffs had been sexually involved for the past ten years, arguing that the evidence was relevant to their sexual aggressor defense.¹²²

In *Priest*, the court declared that the only potential use for the evidence was as propensity character evidence, suggesting that if the plaintiff had been the aggressor in previous relationships, she was likely to have been the aggressor in this one.¹²³ Because such character evidence is inadmissible, the court reasoned that discovery of evidence of this nature was unlikely to lead to any admissible evidence.¹²⁴ The *Priest* court thus issued a protective order which prohibited the defendant from developing this line of inquiry.¹²⁵ In doing so, it noted that, "discovery of intimate aspects of plaintiffs' lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage sexual harassment litigants from prosecuting lawsuits such as the instant one."¹²⁶ It further found that discouraging plaintiffs from prosecuting their claims would contravene the remedial effect intended by Congress in enacting Title VII.¹²⁷

The post-Rule *Sanchez* court analyzed the situation differently. Although it noted that Rule 412 was applicable and that it was intended

119. 166 F.R.D. 500 (D.N.M. 1996).

120. 98 F.R.D. 755 (N.D. Cal. 1983).

121. *Sanchez*, 166 F.R.D. at 501; *Priest*, 98 F.R.D. at 756.

122. In *Sanchez*, the defendant sought to compel the plaintiff to answer interrogatories which asked whether, in the previous ten years, the plaintiff: (1) had made "any personal, romantic, or sexual advances towards any coworker . . ." (2) had "been the subject of personal, romantic or sexual advances by a coworker . . ." (3) "had a close personal, romantic, or sexual relationship, however brief, with any coworker . . ." 166 F.R.D. at 501. If she had, for each person, she was asked to identify the person, the dates and places of employment, the frequency of the advances, whether the advances were welcome or unwelcome, whether she ever complained about the advances, and the length and duration of any such relationships. *See id.*

In *Priest*, among other things, the defendant sought to compel the plaintiff to answer questions about the identity of any men with whom she had sexual relations since leaving the defendant's employment; the identity of each person with whom the plaintiff had had sex within the last ten years, and the name of each individual who had sexually propositioned her or whom she had propositioned within the last ten years. *Priest*, 98 F.R.D. at 756.

123. *Priest*, 98 F.R.D. at 759, 760. Rule 404(a) of the Federal Rules of Evidence prohibits the use of evidence of character traits to prove that a person acted in conformity with that particular trait on the occasion in question. *See* FED. R. EVID. 404(a).

124. *See Priest*, 98 F.R.D. at 759.

125. *See id.* at 762.

126. *See id.* at 761.

127. *See id.*

to protect victims of sexual misconduct from undue embarrassment and intrusion,¹²⁸ the *Sanchez* court reasoned that, as it had not seen the information sought, it did not have the information needed to make a final decision on admissibility.¹²⁹ It did not attempt to articulate why the evidence might be admissible, nor did it address the Federal Rule of Evidence 404 propensity character issue. Instead, it tried to fashion a compromise solution by limiting the discoverable information to three years, and ordering that the answers be submitted under seal.¹³⁰ This ruling thus allowed greater discovery than in *Priest*.

The other set of similar cases involved discovery of sexually suggestive photographs of the plaintiff. In *Holt v. Welch Allyn*,¹³¹ a post-Rule 412 case, pictures taken by the plaintiff's coworker's wife showed the plaintiff at a bachelorette party attended by a male exotic dancer.¹³² The court found that because the plaintiff did not object when the pictures were shown to coworkers, the pictures may be relevant to whether her coworkers perceived that their behavior, which included openly displaying nude pictures of women and vaginas and subjecting Holt to sexual and derogatory statements, was "unwanted harassment."¹³³ The court reasoned that discovery, governed by Federal Rule of Civil Procedure 26, is much broader than admissibility, governed by Evidence Rule 412¹³⁴ and thus permitted the discovery of the photos, noting that the relevance at trial was "a matter for another day."¹³⁵

This is identical to the result reached in *Mitchell v. Hutchings*,¹³⁶ a pre-Rule 412 case involving Title VII and intentional infliction of emotional distress claims. The court allowed discovery of sexually suggestive pictures of the plaintiff which were displayed at the workplace and privately displayed to coworkers on the theory that the evidence may establish the context of the relationship between the plaintiff and her coworkers and may have bearing on whether her coworkers thought their conduct was welcome.¹³⁷ However, it noted that only the pictures

128. See *Sanchez v. Zahibi*, 166 F.R.D. 500, 501 (D.N.M. 1996).

129. See *id.* at 502.

130. See *id.* The interrogatories sought to discover whether the plaintiff had made any personal, romantic, or sexual advances toward any coworker, or had had a close, personal, romantic or sexual relationship with any coworker. The court also limited discovery by striking the word "personal" on the grounds it was too vague.

131. No. 95-CV-1135, 1997 WL 210420 (N.D.N.Y. Apr. 15, 1997).

132. See *id.* at *7.

133. *Id.* at *7-8.

134. See *id.* at *7.

135. *Id.* at *8.

136. 116 F.R.D. 481 (D. Utah 1987).

137. See *id.* at 484.

seen by the alleged harassers would be relevant to the Title VII claim to determine welcomeness.¹³⁸

In *Holt* and *Sanchez*, Rule 412 did not lead to a result markedly different than in similar cases decided before the amendment to Rule 412 was enacted. That is not to say that Rule 412 has not made any difference. As illustrated below, in some cases the Rule has led to limitations on discovery.¹³⁹

4. Other Rule 412 Liability Discovery Cases

In *Howard v. Historic Tours of America*,¹⁴⁰ the defendants sought to discover plaintiffs' personal or sexual relationships with non-harassing coworkers. The court found that the policy underlying Rule 412—to reduce the inhibition women felt about filing sexual harassment claims because of the shame and embarrassment of sexual history inquiries—exists equally at the discovery stage and is “not relieved by knowledge that the information is merely sealed from public viewing.”¹⁴¹ The court stated that permitting defendants to demand that plaintiffs disclose sexual behavior with coworkers is “as inhibitory of their exercising their legal rights as answering the same question at trial,”¹⁴² and that “compelling an answer which the amended rule may not permit and protecting it from disclosure until trial . . . violates the clear intentment of [Federal Rule of Evidence 412].”¹⁴³ Because the requested evidence was based upon the “illogical proposition” that a woman who welcomes a relationship with one person equally welcomes overtures from another, the court found the evidence sought irrelevant, or of such minimal probative value that its relevance would be outweighed by the other considerations of Rule 412. Because it found the evidence had such minimal relevance, the court reasoned that the defendants were not unfairly prejudiced by its exclusion. According to the court, “the defendants were not unfairly prejudiced because they

138. See *id.* In *Burns v. McGregor Electric Industries, Inc.*, 989 F.2d 959 (8th Cir. 1993), another pre-Rule 412 case, plaintiff's coworkers brought nude magazine pictures of the plaintiff into the workplace. Although the appellate court noted that the pictures could be relevant to the totality of the events that ensued, the pictures could not constitute a defense to a hostile work environment sexual harassment claim when there was no evidence that the pictures constituted an invitation to engage in sexual discourse. See *id.* at 964.

139. See *infra* Part III.A.4.

140. 177 F.R.D. 48 (D.D.C. 1997).

141. *Id.* at 51.

142. *Id.*

143. *Id.*

could secure the evidence sought from others if it existed."¹⁴⁴ Thus, the court used Rule 412 to bar discovery of this information.¹⁴⁵

Another case in which Rule 412 was used to bar discovery of a plaintiff's sexual activities was *Barta v. City and County of Honolulu*.¹⁴⁶ In *Barta*, the defendants deposed the plaintiff's roommate and asked her to describe rumors she had heard about the plaintiff's sexual relationships in situations unrelated to the plaintiff's sexual harassment allegations.¹⁴⁷ When the defendants sought additional discovery about these matters, the plaintiff moved for a protective order. The court, using the Rule 412(b)(2) balancing test, prohibited the defendants from further inquiry into the plaintiff's sexual relations or sexual conduct with persons other than the named defendants or any conduct which occurred while she was on duty or on the job site.¹⁴⁸ It also ordered that all further discovery in this area be kept confidential.¹⁴⁹

Finally, in *Herchenroeder v. Johns Hopkins University*,¹⁵⁰ the court used Rule 412 to reach a compromise between the broad parameters of discovery and the more narrow confines of Rule 412. In that case, the defendant sought to ask the plaintiff, during a deposition, about the plaintiff's conversations with a business associate regarding engaging in a sexual relationship with him.¹⁵¹ The court decided to permit the questions, but not in a deposition. Instead, the court drafted two questions it would permit the defendant to ask in interrogatories, with permission to return to the court for broader discovery if the interrogatory answers indicated a need for further information.¹⁵²

These cases illustrate the different approaches used by courts in applying amended Rule 412 to liability discovery issues. Some courts use the Rule to bar discovery, others refuse to apply the Rule at all, and still others rely on the Rule to fashion a compromise—attempting to balance the Rule's mandate to protect a plaintiff's privacy against the principles of discovery and a defendant's need for information.

144. *Id.*

145. *See also* *Burger v. Litton*, No. 91CIV0918, 1995 WL 476712 (S.D.N.Y. Aug. 10, 1995) (making an analogy to Rule 412 to justify barring discovery of whether a non-party witness had a sexual relationship with any of the defendant's employees).

146. 169 F.R.D. 132 (D. Haw. 1996).

147. *See id.* at 135.

148. *See id.* at 136.

149. *See id.*

150. 171 F.R.D. 179 (D. Md. 1997).

151. *See id.* at 180.

152. *See id.* at 182.

5. Rule 412 Damages Discovery Cases

As difficult as it may be to decide how to apply Rule 412 to liability discovery issues, the problems become even more complex when they involve discovery regarding damages issues. In 1991, Title VII was amended to permit plaintiffs to seek compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses."¹⁵³ These emotional distress damages create some of the most difficult issues for courts attempting to apply Rule 412 to discovery issues.

Defendants may seek to attribute a plaintiff's emotional distress to some cause other than the alleged harassment. For example, they may attempt to discover information about other potential causes, such as abortions, other problem relationships, or childhood sexual abuse to prove that the defendant's conduct was not a substantial cause of the plaintiff's emotional distress. Courts that have addressed such damages discovery requests have reached different conclusions concerning the extent of Rule 412's protections.

In one reported case, Rule 412 failed to provide any protection for a plaintiff. In *Ramirez v. Nabil's, Inc.*,¹⁵⁴ the plaintiffs alleged that they suffered emotional distress and loss of self esteem as a result of workplace sexual harassment.¹⁵⁵ The defendants sought to discover plaintiffs' medical and psychiatric records, including information about "adolescent problems," on the basis that they may have contained information about conditions and experiences which may have been the cause of some or all of the plaintiffs' emotional distress.¹⁵⁶ The plaintiffs objected to the discovery on the ground that the probing of "their juvenile past is exactly the kind of intrusiveness that Rule 412 was meant to stop."¹⁵⁷

The magistrate rejected the plaintiffs' argument, noting that Rule 412 is a rule of admissibility and that discovery remains governed by Civil Rule 26.¹⁵⁸ The court then found that "the requests for the medical

153. 42 U.S.C. § 1981a(b)(3) (1994). Sexual harassment plaintiffs also may seek back pay, reinstatement, and other remedies, such as medical expenses or lost wages, necessary to make the plaintiff whole. Plaintiffs may also seek punitive damages. See 42 U.S.C. § 2000e-5(g) (1994). The total of front pay, compensatory, and punitive damages is capped at \$50,000 to \$300,000 depending on the number of defendant's employees. See 42 U.S.C. § 1981a(b)(3) (1994); see also Debra L. Raskin, *Sexual Harassment in Employment*, SB42 ALL-ABA 121, 163-180 (1997) (discussing cases in which the various elements of damages were awarded).

154. Civ. A. 94-2396, 1995 WL 609415 (D. Kan. Oct. 5, 1995).

155. See *id.* at *2.

156. See *id.* Defendants also sought discovery on liability issues. Defendants claimed that the records might also lead to discovery of one of the plaintiff's sexual propensity. See *id.*

157. See *id.* at *3.

158. See *id.*

records and other information appear[ed] reasonably calculated to lead to the discovery of admissible evidence regarding the claims of emotional distress by Cook and Boden [the plaintiffs] and possibly the sexual propensities of Cook.”¹⁵⁹ The magistrate did not attempt to perform the balancing test of Rule 412. In fact, Rule 412 played virtually no role in this decision.

In contrast to *Ramirez*, the court in *Bottomly v. Leucadia National*¹⁶⁰ recognized that Rule 412 may limit damages discovery. In *Bottomly*, the plaintiff claimed severe emotional distress as part of her damages in a hostile work environment case.¹⁶¹ The court originally allowed production of all documents relevant to plaintiff’s therapist’s expert testimony on the causal relationship between the plaintiff’s claims of psychological and emotional distress.¹⁶² However, it permitted the plaintiff to redact “matters of third person diagnosis which were irrelevant to plaintiff’s condition.”¹⁶³ Following the plaintiff’s production of redacted records, defendants sought full disclosure of all the plaintiff’s therapy and medical records.¹⁶⁴

The court held that although expert testimony is not required to prove psychological damage under Title VII,¹⁶⁵ it is admissible as probative of damages and causation. To rebut the plaintiff’s evidence, the defendant may “if legitimate, make an attribution of psychological damage to another exclusive cause.”¹⁶⁶ However, the court also noted that Rule 412, like Rule 404, limits discovery of evidence unrelated to causation and damages.¹⁶⁷ The court decided to read the records and plaintiff’s suggested redactions to see if the requested material bore any relevance to the causation issue.¹⁶⁸ It noted that it would exercise caution to make certain that the records were relevant to causation and were calculated to lead to admissible evidence to protect the plaintiff from a “second sexual harassment by the manner of discovery.”¹⁶⁹

159. *Id.*

160. 163 F.R.D. 617 (D. Utah 1995).

161. *See id.* at 619.

162. *See id.*

163. *Id.*

164. *See id.*

165. *See id.* at 619-20 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)).

166. *Id.* at 620.

167. *See id.*

168. *See id.* at 621.

169. *Id.* In a footnote, the court explained that it allowed extensive deposing of plaintiff regarding other instances of sexual harassment during a prior employment relationship to allow defendants to explore their “modus operandi” theory that plaintiff had a pattern of alleging sexual harassment. However, it noted that “this allowance may not be used to justify prying into unrelated sexual activities or history that merely attacks plaintiff’s character and subjects her to harassment or unjustified embarrassment not rationally incident to the litigation.” *Id.* at 622 n.3.

These two cases, like the liability issue discovery cases, demonstrate that Rule 412 does not guarantee a sexual harassment plaintiff protection from public exposure of intimate details of her sexual history and private life. The degree of protection Rule 412 affords depends upon a particular judge's view of the limits Rule 412 places upon the broad mandate of the discovery provisions. The Rule gives judges discretion to use precautions in developing sexual history and predisposition evidence. As shown above, how judges choose to exercise their discretion varies greatly.¹⁷⁰

B. Problems Applying Rule 412 to Cases Involving Experts

Courts face even more difficult questions concerning the applicability of Rule 412 in cases involving expert witnesses. Experts may be used for both liability and damages issues. They also may be used if there has been a Federal Rule of Civil Procedure 35 psychological examination.¹⁷¹ This section examines the effect of Rule 412 in cases involving experts.

1. General Discovery Issues Involving Experts

A sexual harassment plaintiff may offer expert testimony for a number of reasons: to help explain why the workplace was hostile,¹⁷² to help determine the contours of the objective standard of the reasonable woman;¹⁷³ to explain plaintiff's participation in workplace sexual conduct or why she did not complain about such conduct;¹⁷⁴ or to

170. See *supra* notes 154-69.

171. See FED. R. CIV. P. 35.

172. Mark S. Dichter, *Use of Experts in Sexual Harassment Litigation*, 505 PLI/Lit 27, 43 (1994). For example, Dr. Susan Fiske has testified about factors which increase the prevalence of sex stereotyping and help to explain why the workplace atmosphere was hostile to women. See *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36 (1989) (using Dr. Fiske as an expert witness on sexual stereotyping in a sexual discrimination claim based on failure to promote an employee).

173. See Mark S. Dichter & Mark E. Gamba, *Investigating Complaints of Sexual Harassment*, 524 PLI/Lit 129, 155 (1995) (explaining that a plaintiff may need a psychological expert to show "not only that the plaintiff was detrimentally affected by the environment, but that a 'reasonable woman' would have been similarly affected"); Wayne N. Outten & Jack A. Raisner, *The Role of Experts in Sexual Harassment Litigation: Plaintiff's Perspective*, 505 PLI/Lit 107, 114 (1994) (citing *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (noting that experts may be used to help the fact finder have a complete understanding of the victim's view by providing an analysis of different perspectives of men and women). But see *Lipsett v. Univ. of P.R.*, 740 F. Supp. 921 (D.P.R. 1990) (refusing to permit expert testimony on the reasonable person standard because this testimony usurped the jury's role).

174. See Mark S. Dichter, *Sexual Harassment: A New Perspective on Litigating These Cases*, 565 PLI/Lit 63, 95-96 (1997).

support plaintiff's emotional distress damages claims.¹⁷⁵ Defendants may use experts: to rebut plaintiffs' experts; to show that the plaintiff's personality led her to misperceive workplace interactions, thereby countering the plaintiff's claim that the workplace was a hostile environment;¹⁷⁶ or to show that the defendant's conduct was not a cause of the plaintiff's emotional distress.¹⁷⁷

When the plaintiff intends to use an expert to help explain why the workplace environment was hostile, defendants may argue that all activities in the workplace are discoverable.¹⁷⁸ Defendants may also contend that the plaintiff's lifestyle outside of work may be relevant to an expert's opinion as to what subjectively would create a sexually intimidating environment¹⁷⁹ or to determine if the defendant's conduct was a substantial factor in the plaintiff's emotional distress.¹⁸⁰ Some courts may find outside-the-workplace conduct discoverable if it serves as a basis for the expert's opinion on the plaintiff's perceptions or reactions.¹⁸¹ For example, a defendant may argue that discovery of plaintiff's childhood sexual abuse is the kind of information its expert needs to determine whether plaintiff's personality led her to misperceive workplace interactions.¹⁸² As long as defendants can show that the information requested is the type reasonably relied upon by experts in the field,¹⁸³ it may be discoverable.

2. Rule 35 Examinations by Potential Experts

Connected to the expert opinion rules and privacy issues is yet another intrusive discovery issue not dealt with by Rule 412—a Rule 35 psychological examination. When the mental condition of a party is in controversy, upon a motion showing good cause, Rule 35 permits the court to order the party to submit to a mental examination by a suitably licensed or certified examiner.¹⁸⁴ Because sexual harassment plaintiffs often claim they have suffered emotional distress, defendants seek

175. See Dichter & Gamba, *supra* note 173, at 160-63.

176. See *id.* at 162-63.

177. See *id.* at 152-53; Dichter, *supra* note 172, at 55-61 (citing numerous cases in which expert testimony on causation and damages was admitted).

178. See Moon & Boesky, *supra* note 107, at 76.

179. See *id.* at 86.

180. See *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997).

181. See Moon & Boesky, *supra* note 107, at 87.

182. See *Knoettgen v. Superior Ct.*, 273 Cal. Rptr. 636, 637 (Ct. App. 1990).

183. See FED. R. EVID. 703.

184. See FED. R. CIV. P. 35.

permission to subject the plaintiff to a Rule 35 psychological examination.¹⁸⁵

At least one court has held that Rule 412 does not apply to requests for a Rule 35 examination.¹⁸⁶ In many Rule 35 examinations, the examining psychologist will inquire about the plaintiff's private sexual life, asserting that it may be relevant to whether she has a personality disorder which may have caused her to exaggerate the conduct creating the allegedly hostile environment,¹⁸⁷ or it may be relevant to her emotional distress damages. A psychiatrist seeking to assess the effect of the alleged harassment on the plaintiff may attempt to determine the plaintiff's psychological status before the harassment. This may involve an exploration into other stressors in the plaintiff's life, such as childhood sexual abuse, extramarital affairs, abortions, or other relationship issues.¹⁸⁸ In fact, defense attorneys have been advised that if a "medical examination is allowed as part of discovery, defendants should be careful to seek all information regarding the employee's past sexual history both at and away from the workplace."¹⁸⁹

Some courts have limited areas of inquiry in a Rule 35 exam.¹⁹⁰ However, even if the examiner does not seek details about the plaintiff's sexual history, the psychological examination itself is extremely intrusive, and Rule 412 provides no protection from a such an examination.¹⁹¹

3. Issues Arising When Experts Testify At Trial

Rule 412 may do little to limit discovery when the case involves expert witnesses. It may also be ineffective at trial when an expert seeks

185. For a discussion of the different interpretations of what constitutes "good cause" for a Rule 35 examination in sexual harassment claims, see *infra* text accompanying notes 341-46.

186. *Usher v. Lakewood Mfg.* 158 F.R.D. 411, 412-13 (N.D. Ill. 1994).

187. See Dichter, *supra* note 174, at 92.

188. See Moon & Boesky, *supra* note 107, at 92; Charles C. Warner, *Defending Compensatory, Punitive and Liquidated Damage Claims in Employment Discrimination Cases*, 565 PLI/Lit 535, 568-69 (1997) (noting that once a plaintiff claims damages for emotional distress, the defendant should discover all other potential causes of her emotional distress).

189. Moon & Boesky, *supra* note 107, at 92. They go on to note that although a plaintiff may seek a protective order claiming that certain information is irrelevant or that the information sought is an unreasonable intrusion into the plaintiff's private life, by merely engaging in the battle, the defendant "may get concessions in the form of stipulations that plaintiff will not introduce certain types of evidence or will not assert certain types of facts." *Id.*

190. See *Vinson v. Superior Ct.*, 740 P.2d 404, 410-11 (Cal. 1987) (refusing to permit questions about sexual history). *But see Kresko v. Rulli*, 432 N.W.2d 764, 770 (Minn. Ct. App. 1989) (holding that a mental examination may include questions about sexual history).

191. For a discussion of potential solutions to the issues raised by the intrusiveness of a Rule 35 examination, see discussion *infra* Part IV.

to testify about evidence that would be inadmissible under Rule 412. Evidence inadmissible under Rule 412 may still be admissible if it forms the basis of an expert's opinion.¹⁹² For example, a plaintiff's previous abortion may be inadmissible under Rule 412; however, if there is some evidence that the plaintiff suffered emotional trauma following the abortion, and that the abortion occurred near the time of the alleged sexual harassment, her abortion may come out as part of the basis of the expert's opinion that the plaintiff's distress was caused by the abortion rather than the defendant's conduct.¹⁹³ As some commentators note, it may be possible to use all kinds of embarrassing information that a defense psychiatrist learns through examination, which is arguably irrelevant to the case in chief, but can be stated by the psychiatrist as relevant to his or her opinion.¹⁹⁴

4. Experts and the Discovery and Use of Evidence That the Plaintiff Was Sexually Abused

Anecdotal evidence suggests that many sexual harassment plaintiffs also have been victims of childhood sexual abuse.¹⁹⁵ Defendants seek to discover these incidences of childhood abuse and to use the abuse at trial to prove that the defendant is not liable because the plaintiff was "hypersensitive."¹⁹⁶ They also attempt to use this evidence to show that a plaintiff has a borderline personality disorder which caused her to interact in eroticized or seductive ways indicating that she "welcomed" the

192. See FED. R. EVID. 703.

193. See also Outten & Raisner, *supra* note 173, at 113 n.8 (noting that a psychiatrist may circumvent the rules of evidence if the question and answer or reaction serve as part of the basis for the expert's opinion of plaintiff's emotional or mental condition). *But see* Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 857-58 (1st Cir. 1998) (defense counsel sanctioned for disobeying court order to approach the bench before questioning plaintiff's psychologist about plaintiff's multiple relationships with married men; appellate court upheld sanction, noting that the defense counsel knew from deposition testimony that plaintiff had not told her psychologist about her relationships with married men).

194. See Moon & Boesky, *supra* note 107, at 93-94.

195. See Lisa Bloom, *Crete! Fights Back: Representing Sexual Harassment Plaintiffs Who Were Sexually Abused As Children*, 12 BERKELEY WOMEN'S L.J. 1, 2-3 (1997). Apparently, no studies have been done that examine the incidence of childhood sexual harassment in workplace sexual harassment plaintiffs. *See id.* at 1 n.7. However, studies do indicate that victims of incest "are more likely to be victims of later acts of sexual abuse, exploitation, or unwanted sexual advances than nonincest victims." *Id.* at 1.

196. James J. McDonald & Sara P. Feldman-Schorrig, M.D., *The Relevance of Childhood Sexual Abuse in Sexual Harassment Cases*, 20 EMPLOYEE RELATIONS L.J. 221, 224-26 (1994) (arguing that childhood sexual abuse may make a woman more "hypersensitive" to sexual cues in the workplace). *But see* Michael G. Moore, *Harassment Claims: Defending Against Discovery of Psychological History*, N.C. LAWYERS WKLY., May 26, 1997, at 12 (arguing that it misconstrues sexual harassment law to allow a defendant to use the plaintiff's alleged hypersensitivity to defeat liability).

conduct.¹⁹⁷ Finally, defendants seek to use this evidence to show that their conduct was not the cause of the plaintiff's current emotional distress.¹⁹⁸

At least two district courts have found that Rule 412 does not cover childhood sexual abuse because it is not "sexual behavior."¹⁹⁹ It is true that sexual abuse certainly is not "sexual" behavior and thus is not explicitly covered by Rule 412. Additionally, some may argue that the Rule does not cover childhood sexual abuse, because Rule 412 was enacted to protect a sexual harassment plaintiff from use of her sexual history to imply that she is the kind of person who would welcome workplace advances or would not be offended by a sexualized workplace atmosphere.²⁰⁰ In essence, it is a special character evidence rule for sexual harassment plaintiffs.²⁰¹ Like the character evidence rules, Rule 412 is designed to prohibit the use of a sexual harassment plaintiff's sexual history or predisposition for propensity inferences.²⁰² The implications that childhood sexual abuse made the plaintiff hypersensitive, or caused her to unconsciously act in a sexualized manner, are not propensity inferences. Thus, arguably, the Rule's legislative history does not support this evidence from being governed by Rule 412.

On the other hand, there is a strong argument that Rule 412 protects plaintiffs from exposure of childhood sexual abuse as it relates to liability issues. The Rule was enacted specifically to protect sexual harassment plaintiff's privacy²⁰³ and to encourage plaintiffs to file suit to redress workplace injuries without fear of public exposure of intimate details of their lives.²⁰⁴ There is nothing more intimate than childhood sexual

197. See McDonald & Feldman-Schorrig, *supra* note 196, at 226-28.

198. See, e.g., Zorn v. Helene Curtis, Inc., 903 F. Supp. 1226, 1242 (N.D. Ill. 1995) (noting defendant's argument that plaintiff's psychological problems stemmed from causes other than workplace harassment and that plaintiff's reaction to the work environment was "overblown" because plaintiff was overly sensitive); Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997) (noting that the magistrate incorrectly permitted the defendant to discover personal events, such as domestic abuse and information about personal relationships, to prove that plaintiffs' experience outside of the work environment caused plaintiffs' emotional injuries).

199. See McClelland v. Montgomery Ward & Co., No. 95-C-23, 1995 WL 571324, at *4 n.1 (N.D. Ill. Sept. 25, 1995); Ramirez v. Nabil's Inc., No. Civ.A. 94-2396, 1995 WL 609415 (D. Kan. Oct. 5, 1995).

200. See Monnin, *supra* note 14, at 1187 (arguing that the conception that a victim's past conduct is reflective of her receptiveness on the occasion charged perpetuates one of the most pernicious stereotypes undermining the effectiveness of sexual harassment law). The Advisory Committee specifically noted that Rule 412 is intended to protect the victim of sexual harassment against sexual stereotyping based upon her conduct. See FED. R. EVID. 412 advisory committee's notes.

201. Rule 404, the character evidence rule, prohibits courts from allowing use of past behavior to imply the witness acted in conformity therewith on the occasion in question. See FED. R. EVID. 404(a).

202. For example, a propensity inference is that the plaintiff, because she slept with ten coworkers, is the kind of person who would welcome an advance from the eleventh coworker.

203. See REPORT, *supra* note 79, pt. IV.

204. See FED. R. EVID. 412 advisory committee's notes.

abuse, and nothing as potentially devastating to a plaintiff than to have that abuse publicly exposed. As one court noted, "turning a case based on the conduct of a plaintiff's coworkers into an investigation of the plaintiff's childhood thwarts the goals of not offensively intruding into plaintiffs' intimate lives and not unjustifiably discouraging complainants from coming forward."²⁰⁵

Further, criminal case precedent suggests a strong argument that the term "sexual behavior" refers to childhood sexual abuse. In both civil and criminal cases, Rule 412 uses the term "sexual behavior,"²⁰⁶ and the definition of sexual behavior does not differ in criminal and civil actions.²⁰⁷ The policies underlying the enactment of the criminal portion of the rule—to protect the victim from unwarranted intrusions into her privacy, to encourage her to report the rape, and to limit the use of evidence that has low probative value and a high potential for misuse²⁰⁸—are the same policies underlying the enactment of the civil rule.²⁰⁹ In criminal cases, courts routinely have found that Rule 412 covers childhood sexual abuse.²¹⁰

However, even if Rule 412 protects a plaintiff from use of childhood sexual abuse evidence at trial, it may not protect plaintiffs when it comes to discovery. A defendant may argue that the abuse, rather than the defendant's conduct, was the sole or substantial cause of the plaintiff's emotional injury,²¹¹ or that the plaintiff had pre-existing emotional distress and the defendant should only be responsible for "aggravation" damages.²¹² This contention has led many courts to allow defendants

205. *Knoettgen v. Superior Ct.* 273 Cal. Rptr. 636, 638 (Ct. App. 1990) (discussing similar California evidentiary rule). For an in-depth discussion of *Knoettgen*, see *infra* notes 303-09 and accompanying text.

206. For the full text of Rule 412, see *supra* note 8.

207. See FED. R. EVID. 412 advisory committee's note.

208. See, e.g., Sakthi Murphy, Comment, *Rejecting Unreasonable Sexual Expectations: Limits on Using A Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 CAL. L. REV. 541, 551-52 (noting that rape shield statutes were enacted, among other reasons, to protect rape victims' privacy, to encourage victims to come forward, and to enhance the accuracy of the outcomes in rape trials by excluding irrelevant and prejudicial evidence).

209. See *supra* notes 8-11 and accompanying text (explaining the reasons Rule 412 was amended to include civil claims).

210. See, e.g., *United States v. Rouse*, 100 F.3d 560, 566 (8th Cir. 1996) (noting defendants failed to file a formal motion as required by Rule 412 regarding the defendants' intent to introduce evidence of sexual abuse by non-defendant family members); *United States v. Cardinal*, 782 F.2d 34, 36 (6th Cir. 1985) (finding no abuse of discretion in ruling inadmissible under federal "rape shield" rule evidence that 13-year-old victim had reported other incidents of sexual assault by non-defendant family members); *United States v. Begay*, 937 F.2d 515, 519-23 (10th Cir. 1991) (holding that refusal to admit other instances of childhood sexual abuse did not comport with the exception in Rule 412(b)(1)(c) which allows such evidence if its admission is necessary to protect the defendant's constitutional rights).

211. See *infra* note 213 for cases in which the defendant made this argument.

212. In determining liability for emotional distress damages in Title VII cases, courts have used tort negligence principles. See, e.g., *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1292-94 (8th Cir. 1997).

to conduct discovery about the plaintiff's childhood sexual abuse.²¹³ If defendants have sufficient evidence that a plaintiff's childhood sexual abuse, rather than the alleged abuse, caused the plaintiff's damages, evidence of such childhood sexual abuse will be admissible at trial.²¹⁴

In sum, some courts refuse to apply Rule 412 to instances of childhood sexual abuse, while others believe that defendants have the right to investigate a plaintiff's childhood sexual abuse, at least during discovery. Thus, the exploration of a plaintiff's childhood sexual abuse, at trial and during discovery, is yet another reason Rule 412 has a limited ability to protect a plaintiff from exposing very private and painful information.

C. *The Effect of Gender Bias and the Rule's Discretionary Nature*

Unlike in criminal cases, in civil cases Rule 412 does not bar evidence unless it falls within a particular exception.²¹⁵ Instead, the civil rule requires that judges perform a balancing test.²¹⁶ This balancing test affords judges somewhat greater discretion when applying Rule 412 in civil cases than they have in criminal cases.²¹⁷ Because of the discretion

In tort law, a negligent actor is liable for the harm to another, even if the harm is greater than that which a reasonable person should have foreseen as a probable result of his conduct. See RESTATEMENT (SECOND) OF TORTS § 461. However, defendants are only liable for those damages they caused. If part of the plaintiff's damage is attributable to other causes, the defendant must only compensate the plaintiff for the "aggravation" or activation of the pre-existing condition. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 292 (5th ed. 1984). Courts are undecided if the doctrine involving a pre-existing condition is limited to physical conditions or whether it extends to underlying emotional conditions. See *Jenson*, 130 F.3d at 1293.

A pre-existing condition is different than an "eggshell skull plaintiff." With an eggshell skull plaintiff, the plaintiff may have been particularly vulnerable, but, until the time of the incident, she was not injured. In fact, but for the defendant's conduct, she may have continued throughout her life being particularly vulnerable, but that vulnerability would not have manifested itself in an injury. On the other hand, if a plaintiff was injured prior to the defendant's conduct, rather than being merely susceptible to a more severe injury than the average person, the plaintiff may only recover damages for the injury caused by the defendant's conduct. See KEETON, *supra* note 212, at 292.

213. See, e.g., *Jenson*, 130 F.3d at 1295-98; *Ramirez v. Nabil's, Inc.*, No. Civ.A. 94-2396, 1995 WL 609415 (D. Kan. Oct. 5, 1995); *McClelland v. Montgomery Ward & Co.*, No. 95 C 23, 1995 WL 571324, at *2 (N.D. Ill. Sept. 25, 1995). But see *infra* notes 303-09 and accompanying text (discussing *Knoetgen v. Superior Ct.*, 273 Cal. Rptr. 636, 638 (Ct. App. 1990)).

214. See *McClelland v. Montgomery Ward & Co.*, No. 95-C-23, 1995 WL 571324 (N.D. Ill. 1995).

215. In criminal cases, Rule 412 bars admission of sexual history or predisposition evidence unless the evidence is (1) introduced to prove a person other than the accused was the source of semen, injury or other physical evidence, (2) offered to prove consent, or (3) if the exclusion would violate the defendant's constitutional rights. See FED. R. EVID. 412(b)(1).

216. In civil cases, evidence offered to prove the sexual behavior or predisposition of any alleged victim is admissible if it is otherwise admissible and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. See FED. R. EVID. 412(b)(2).

217. But see *Hunter*, *supra* note 75, at 138 (arguing that criminal rape shield statutes have too many

ary nature of the rule, subconscious gender-biased attitudes may play a greater role in the civil rule's application.

This section discusses the empirical evidence of gender bias in the courts and how that bias manifests itself in the judicial decision-making process. This section looks at gender bias in its broadest sense, as it applies to all women. However, the effect of gender-biased attitudes may not be the same for all women. The impact of gender bias may be compounded by a plaintiff's racial or ethnic heritage, economic or class background, or sexual orientation.²¹⁸ Additionally, some of the same attitudes that lead to decisions affected by gender bias also may lead to the application of subconscious stereotypical views in same-sex sexual harassment claims.²¹⁹

1. Gender Bias Studies

Even if judges intend to be fair and objective, sex-based stereotypes and beliefs often may subconsciously affect their decisions. As Justice Blackmun stated, "[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and color one's thinking and conclusions."²²⁰

Although most lawyers and judges "aspire to equal treatment of all," their "success does not always match aspirations."²²¹ Numerous studies by state and federal courts document that gender bias plays a role in the

exceptions which allow courts too much discretion and that the new Rule 412 allows even broader exceptions in civil cases).

218. See, e.g., *id.* at 127-28 (noting that many feminist theorists criticize the use of the generalized categories of "women" and "gender bias" as reflecting only the experience of white, heterosexual, middle class women and ignoring the various intersections of race, class, and sexual orientation with gender); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2498-2502 (1994) (discussing the need to acknowledge and account for the intersection of race and gender in Title VII sexual harassment claims).

219. In *Oncale v. Sundowner Offshore Services*, 118 S. Ct. 998 (1998), the Supreme Court held that same-sex harassment is actionable under Title VII. See *id.* at 1003. It is not hard to imagine that, just as judges believe that women who voluntarily have sex with one male coworker welcome advances from another male coworker, judges may believe that a lesbian would welcome advances from female coworkers.

220. Nicole D. Rizzolo, Comment, *A Right with Questionable Bite: The Future of "Abusive or Hostile Work Environment" Sexual Harassment as a Cause of Action for Women in a Gender-Biased Society and Legal System*, 23 NEW ENG. L. REV. 263, 273 n.52 (1988); see also Brown, *supra* note 2, at 459-60 (noting that there is no such thing as a neutral judge).

221. FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1993), reprinted in THE EFFECTS OF GENDER IN THE FEDERAL COURTS; THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, 67 S. CAL. L. REV. 745 (1994) [hereinafter NINTH CIRCUIT REPORT].

behavior and attitudes of judges and other participants in the legal system, and in sexual harassment claims.²²²

Gender bias has been defined as "any action or attitude that interferes with impartial judgment."²²³ It occurs when

[D]ecisions are made or actions are taken based upon preconceived or stereotypical notions about the nature, roles, and abilities of women and men, rather than upon an evaluation of each individual or his or her situation Gender bias does not require deliberate intent and often arises from a lack of knowledge.²²⁴

There is no way to know how often overt manifestations of hostile sexist attitudes or gender bias occur in sexual harassment cases; however, there is no question that these attitudes exist. For example, one judge allegedly announced in open court "that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and most women like that."²²⁵ In another case, a state appellate court found that the trial judge had made no secret of the fact that he found sexual harassment cases detrimental to everyone concerned and a misuse of the judicial system.²²⁶ The judge's hostility toward the plaintiff's sexual harassment claim was so strong that the appellate court overturned the verdict on the ground that the judge's gender bias deprived the plaintiff of her due process right to a fair trial.²²⁷

In addition to overt gender-biased conduct such as that described above, subtle forms of gender bias also exist. For example, women victims of sexual offenses historically have been thought of as fabricating the alleged sexual offense and their testimony has been considered inherently unreliable.²²⁸ That attitude has not disappeared.²²⁹ The

222. See, e.g., *id.* at 883-92; REPORT OF THE WORKING COMMITTEES TO THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL AND ETHNIC FAIRNESS IN THE COURTS, app. A, at 285-91 (1997) [hereinafter SECOND CIRCUIT REPORT]. At least forty-three state task forces have studied gender bias in the courts. For a list of those state task forces, see Marsha S. Stern, *Courting Justice: Addressing Gender Bias in the Judicial System*, 96 ANN. SURV. AM. L. 1, n.5-6 (1996).

223. Case Comment, *Commission on Gender Fairness in the Courts*, reprinted in 72 N.D. L. REV. 1115, 1129 (1996).

224. *Report of the Maine Commission on Gender, Justice, and the Courts*, 49 ME. L. REV. 135, 138 (1997); Comment, *supra* note 223, at 1130.

225. SECOND CIRCUIT REPORT, *supra* note 222, app. A, at 285.

226. See *Catchpole v. Brannon*, 42 Cal. Rptr. 2d 440, 446 (Ct. App. 1995).

227. See *id.*

228. As late as 1970, Professor Wigmore, a renowned evidence treatise author, recommended that women complainants in criminal sexual offense cases be psychologically examined to determine if they were credible. 3 A.J. WIGMORE, EVIDENCE § 924, at 736-37 (1970).

229. In *Catchpole*, the appellate court determined that the trial judge found the plaintiff was not credible based on stereotyped thinking about women and misconceptions of the social and economic

Ninth Circuit Gender Bias Task Force found that women's testimony is often "disbelieved or discounted as complaints about life rather than as providing evidence of legally cognizable harms."²³⁰ The New York Task Force on Gender Bias noted that, often, women plaintiffs and witnesses are seen as overly emotional, hypersensitive, and prone to exaggerate.²³¹

How can one determine whether these attitudes affect the judicial decision-making process in sexual harassment claims? The Ninth Circuit Task Force suggests that one way to ascertain whether gender bias affects the decision-making process is to examine district court opinions. The task force reviewed all reported sexual harassment opinions between January 1987 and December 1991 and found a very high reversal rate. In twenty-three of twenty-six appellate court decisions, defendants prevailed in the trial courts. On appeal, fifty-two percent of those cases were reversed in full or in part.²³² The published opinions studied also indicated that the majority of sexual harassment claims were dismissed by the district courts, either by granting the defendant's motion to dismiss or motion for summary judgment.²³³ From this data, the task force concluded that "[t]he approach to sexual harassment cases taken by the district courts often reflects both a restrictive application of the law to sex discrimination claims in general and an impatience with these cases."²³⁴

The task force also conducted focus groups consisting of plaintiffs' attorneys and defense attorneys from the public and private sectors.²³⁵ Plaintiffs' attorneys participating in the focus groups reported that in sexual harassment cases before male judges, the judges minimized their clients' trauma.²³⁶ They also reported an "across the board lack of understanding" as to the female plaintiff's situation and point of view.²³⁷ Focus group participants also noted that judges were more "impatient" and less interested in these "small stakes"²³⁸ cases than their state court

realities many women confront. 42 Cal. Rptr. 2d at 454; see also Lynn Hecht Schafran, *Credibility in the Courts: Why is There a Gender Gap?*, JUDGES J., Winter 1995 at 5 (1995).

230. NINTH CIRCUIT REPORT, *supra* note 221, at 955.

231. See Rizzolo, *supra* note 220, at 279 (citing the New York Task Force Report, at 185).

232. See NINTH CIRCUIT REPORT, *supra* note 221, at 886. The report does not note whether this statistic differs from other types of employment discrimination claims, nor does it note how the reversal rate compares to the general reversal rate.

233. See *id.*

234. See *id.* at 886.

235. See *id.* at 884.

236. See *id.* at 887.

237. *Id.*

238. Only recently has Title VII been amended to allow for compensatory and punitive damages. The study did not discuss whether this change in the law is likely to change judicial attitudes about the

judicial counterparts.²³⁹ Additionally, many of these cases are referred to magistrate judges, the vast majority of whom are men.²⁴⁰ Focus group participants noted that several of the magistrate judges were openly biased against or uncomfortable with female litigants in employment cases.²⁴¹

The Second Circuit Task Force attempted to replicate the Ninth Circuit Task Force's methodology.²⁴² It, too, studied lower court opinions and reversal rates. Because of its small sample size, it found reversal rates inconclusive but suggestive of "reasons for concern" and "cause for further study."²⁴³ Even in its small sample size, this task force found evidence that some federal judges are impatient with sexual harassment claims and express stereotypical thinking about the seriousness of the claims.²⁴⁴ To illustrate their point, the task force reported that:

In one instance, a district court judge expressed considerable skepticism that a woman who was not fired and who got promotions and pay raises during the period in which her supervisor allegedly demanded sexual favors, could nevertheless be found to have suffered legally cognizable emotional injuries if her claims were proven. In another case, the lower court's handling of it suggested a belief on the judge's part that the plaintiff's consumption of alcohol at a business dinner, rather than the egregious misconduct of her fellow employees, was the proximate cause of her rape. In a third, the judge unexpectedly awarded summary judgment to the defendant on the merits—a ruling requested by neither side, and made despite the fact that neither plaintiff nor defendant had yet addressed in detail any issue in the litigation except for jurisdictional questions.²⁴⁵

Judges' lack of receptivity to sexual harassment claims may be attributed to reasons other than gender bias. As the Second Circuit

value of these cases. Although compensatory damages are statutorily capped at \$50,000 to \$300,000, depending on the number of employees, 42 U.S.C. § 2003-5(a) (1994), there is no cap on punitive damages. Thus, sexual harassment cases can be potentially "big money" claims. For example, a jury awarded Rena Weeks, a secretary at the law firm of Baker & McKenzie, \$7.1 million, which the appellate court reduced to \$3.8 million. See *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Ct. App. 1998). Recently Chevron settled a claim by four female employees for \$2.2 million. See Douglas Robson, *Huge Surge of Sexual Harassment Cases Hits the Courts*, S.F. BUS. TIMES, May 16, 1997, at 12A. Mitsubishi settled a sexual harassment lawsuit for \$34 million. See *Judge OKs Mitsubishi Settlement*, CHI. TRIB., June 24, 1998, at 1A.

239. See NINTH CIRCUIT REPORT, *supra* note 221, at 887.

240. See *id.* at 889.

241. See *id.* This data is particularly relevant to the scope of discovery in sexual harassment cases because magistrate judges often make discovery rulings.

242. See SECOND CIRCUIT REPORT, *supra* note 222, at 283-89.

243. See *id.* at 289.

244. See *id.* at 289-290.

245. *Id.* at 290.

Task Force noted, some judges may dislike these claims because of a perception that these cases do not belong in the federal system, but instead should be handled by administrative agencies.²⁴⁶

Obviously, not all decisions adverse to plaintiffs are due to gender-biased attitudes. However, it is important to recognize that even well-intentioned judges who believe they are free from stereotypical beliefs may be subconsciously applying stereotypical beliefs in the decision-making process.

2. How Subconscious Gender-Biased Attitudes May Affect the Decision-Making Process

Stereotypes are a cognitive strategy people use to help themselves efficiently process information.²⁴⁷ The problem with stereotypes is that they have "the virtue of efficiency, but not of accuracy."²⁴⁸

Professor Jody Armour developed a model, based on empirical research, that helps explain how subconscious stereotypical attitudes influence legal decision makers.²⁴⁹ Professor Armour distinguishes stereotypical attitudes from prejudicial ones. He posits that stereotypes are well-learned sets of associations established early in childhood, before individuals have the cognitive ability to decide rationally whether to accept the associations.²⁵⁰ Prejudice, on the other hand, is the "endorsement or acceptance of the content of a negative cultural stereotype."²⁵¹ Social scientists classify people who consciously endorse and accept stereotypical views as high-prejudiced persons; those who have thought about cultural stereotypes and recognize them as inappropriate bases for relating to others and deliberately reject them are classified as low-prejudiced persons.²⁵² However, even low-prejudiced people may apply stereotypes in the decision making process. Professor Armour argues that this is because stereotypical views are constantly reinforced by the social environment, including the mass media.²⁵³ Nonprejudiced personal beliefs are newer cognitive structures

246. *See id.* at 279.

247. *See* Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening The Judicial Dialogue*, 46 EMORY L.J. 1487, 1494-95 (1997) (discussing social and cognitive psychologists' findings about stereotypes).

248. *See* Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 32 (1992).

249. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995).

250. *See id.* at 741.

251. *See id.* at 742.

252. *See id.*

253. *See id.* at 743. For example, there was significant coverage of a case in which Jerold MacKenzie

that result from a low-prejudiced person's conscious decision that stereotype based responses are unacceptable.²⁵⁴ Because stereotypes have a longer history and greater frequency of activation than the more recently acquired personal beliefs,²⁵⁵ stereotypes may be "activated automatically in perceivers' memories and can affect subsequent social judgments."²⁵⁶ In essence, the application of stereotypes is like a bad habit—something which can be broken, but only with a conscious effort.²⁵⁷ It is a difficult thing to do because sometimes judges may not even realize they hold these views,²⁵⁸ and thus do not consider the stereotypes when applying Rule 412.²⁵⁹

discussed a "Seinfeld" episode in which Jerry could not remember the name of a woman he was dating, all he could recall is that her name rhymed with a female body part. When MacKenzie's coworker could not figure out the joke, MacKenzie showed her a dictionary page with the word "clitoris" on it. The coworker complained that the dictionary display was sexual harassment. There had also been a previous complaint about MacKenzie sexually harassing a coworker. After the "Seinfeld" episode conversation, MacKenzie was fired for sexual harassment. He sued for wrongful discharge and won a multi-million dollar verdict. His case received a great deal of publicity, the tone of which was that the jury sent a message that men and women should be free to talk to one another at work without fear of someone claiming sexual harassment. See, e.g., *The News*, 1997 WL 11863413 (MSNBC television broadcast, June 27, 1997) (interview and story with Brian Williams); Today Show Interview, July 16, 1997, 1997 WL 11221703; 1997 WL 11221704; see also, Dan Lynch, *Fire First, Ask Questions Only Later*, TIMES UNION ALB. June 27, 1997, at B1 (writing an editorial claiming an innocent man had been discharged for sexual harassment without ever having a chance to give his side of the story and noting that "[w]hite guys under 40 . . . have no legal protection"); Robson, *supra* note 238, at 12A (commenting on how plaintiffs bring sexual harassment claims to make money or simply because they are hypersensitive to normal workplace banter). The media portrayal of the unusual sexual harassment claim, or the claim in which there is a multi-million dollar award, is bound to influence public opinion about the validity of sexual harassment suits in general, just as media coverage of punitive damage awards has influenced public perception about those awards. For a discussion of the influence of media coverage on punitive damage awards, see Marc Galanter, *The Regulatory Function of the Civil Jury*, in VERDICT, ASSESSING THE CIVIL JURY SYSTEM 61, 84-85 (Robert E. Litan ed., 1993); Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT, ASSESSING THE CIVIL JURY SYSTEM 306, 308-14 (Robert E. Litan ed., 1993).

254. See Armour, *supra* note 249, at 755-56.

255. See *id.* at 756.

256. *Id.* at 758.

257. See *id.* at 756-57.

258. As one judge noted, "Until I was on this Gender Bias Task Force, there never was any gender bias in my court." NINTH CIRCUIT REPORT, *supra* note 221, at 949.

259. For example, the judge in *Herchenroeder v. Johns Hopkins University* was concerned about protecting the plaintiff's privacy. 171 F.R.D. 179, 182 (D. Md. 1997). However, the judge assumed that the plaintiff's relationship with her business associate was relevant to her manager's perceptions of whether his overtures were welcome. See *id.* By assuming that the relationship was relevant, the judge accepted the stereotypical idea that a woman who has an intimate relationship with one man welcomes overtures from another. The judge allowed the defendant to inquire about the plaintiff's relationship with her business associate through interrogatories. See *id.*

In *Myer-Dupuis v. Thomson Newspapers, Inc.*, No. 96-2063, 1997 WL 809955 (6th Cir. Dec. 19, 1997), the court applied the stereotypical view that a woman's sexualized bantering with some coworkers was relevant to conduct she found acceptable from her manager. See *id.* at *1-2. Thus the court considered evidence of plaintiff's sexual conversations in "public" work areas, outside the alleged harassing coworker's presence, relevant to whether the plaintiff welcomed the harasser's touching of her arms, shoulders, and breasts, his sexual propositions and other vulgar language, and his uninvited visits to her home. See *id.*

3. How Gender-Biased Views Impact the Admissibility of Evidence in Sexual Harassment Claims

In order to "break the stereotype habit," one must first recognize the stereotype. This section discusses various stereotypes applied in sexual harassment claims and explains why the stereotypical view may be inaccurate in any given case.²⁶⁰

One sexual stereotype is that women who welcome sexual overtures from one coworker may welcome advances or similar interchanges from other coworkers.²⁶¹ As one court recently noted, this view is "premised on three hopelessly illogical propositions:"

(1) [T]hat a woman who has a sexual relationship with one co-employee is so morally degraded that she welcomes a similar relationship with any other employee; (2) that a woman who is sexually attracted to one employee and yields to that attraction is equally attracted to any other employee and would welcome his advances; and (3) that a woman who has a sexual relationship with one employee welcomes the sexual advances of another employee, no matter how gross, crude and boorish.²⁶²

Another stereotype that rests on equally illogical grounds is that women who engage in extramarital affairs or in other sexual activity outside of work will not be offended by sexual actions or a sexual atmosphere at work.²⁶³ The idea that women who accept, or engage in, various kinds of sexual conduct outside the workplace cannot be offended by a highly sexualized work environment ignores the fact that women choose the conduct in which they want to engage, or the conduct they will accept from others, outside the workplace.²⁶⁴

260. Men, as well as women, are harmed by sexual stereotypes. See Cava, *supra* note 248, at 44-45; see also generally Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Custody*, 43 RUTGERS L. REV. 1141 (1991) (discussing use of sexual stereotypes in child custody cases).

261. See Sensibello v. Globe Security Sys. Co., No. 814052, 1984 WL 1118, at *8 (D.C. Pa. Jan. 10, 1984); *Herchenroeder*, 171 F.R.D. 179, 182 (D. Md. 1997). For additional cases applying this stereotype and the stereotypes to be discussed, see Brown, *supra* note 2.

262. *Howard v. Historic Tours of Am.*, 177 F.R.D. 48, 53 (D. D.C. 1997); see also *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 963 (8th Cir. 1993) (arguing that to consider plaintiff's conduct outside of work in determining whether she welcomed sexual advances at work, would allow a complete stranger to kiss or fondle a woman just because she accepts this conduct from her husband or boyfriend); *Juliano*, *supra* note 18, at 1591-92 (stating that to "impute a woman's behavior with one man to all other men . . . would rid women of personal choice, identity and freedom").

263. See, e.g., *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1322 (8th Cir. 1994) (extramarital affair); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 962 (8th Cir. 1993) (posing nude for a magazine).

264. See *Burns*, 989 F.2d at 963.

Choosing to engage in conduct differs from having it forced upon a person because of the power inequities in a workplace situation. What one does in one's free time should have no relevance when judging the kind of conduct one expects from workplace colleagues.

Another stereotypical view that has manifested itself in some court decisions is that women who dress in a certain way invite harassment.²⁶⁵ As Professor Susan Estrich notes, the problem with the assumption that dressing in a certain way is an invitation for sexual overtures is that it ignores the fact that some women take pride in their bodies and dress for themselves. It also does not consider that some women dress in a particular way to be attractive to their spouses and boyfriends, or in order to go out directly after work.²⁶⁶

Another gender-biased view often seen in cases is that women who use vulgar language with some colleagues invite, or are not offended by, abusive language and actions from others.²⁶⁷ This view fails to account for the fact that people make choices about to whom they want to talk and in what manner. A person may feel comfortable having a certain level of bantering with one coworker and not with another.²⁶⁸

Another stereotype is that of the hypersensitive plaintiff who overreacts to normal workplace banter.²⁶⁹ Courts must remember that what is harmless and what is an overreaction is in the eyes of the

265. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (noting that the way a woman dresses may be relevant to whether an alleged harasser believed his conduct was welcome); *Reed v. Shepard*, 939 F.2d 484, 487 (7th Cir. 1991) (noting that the plaintiff may have contributed to her harassment because she wore a t-shirt with no bra to work).

266. See Estrich, *supra* note 7, at 828-29.

267. See, e.g., *Myer-Dupuis v. Thomson Newspapers, Inc.*, No. 96-2063, 1997 WL 809955 (6th Cir. Dec. 19, 1997) (finding plaintiff's sexually provocative conversations with coworkers, other than the alleged harasser, occurring in "public" work areas relevant to alleged harasser's perception of welcomeness); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994) (disagreeing with the district court's assessment that because the plaintiff was "legendary for talking like a drunken sailor" she welcomed her manager's abusive comments and conduct); *Reed*, 939 F.2d at 486-88 (plaintiff's use of vulgar language and participation in sexualized practical jokes precluded a finding of a hostile work environment, despite the fact that the plaintiff was hit and punched in the kidneys, had a cattle prod with an electrical shock placed between her legs, was handcuffed to the toilet and had her face pushed into the water, and was maced).

268. See *supra* notes 261-62 and accompanying text (discussing why it is wrong to find that a woman who has sex with one colleague welcomes overtures from other colleagues). Additionally, this view does not account for the fact that often, women try to fit in to a workplace by adopting norms set by male coworkers. See *Monnin*, *supra* note 14, at 1192-94. It is also a back door way of getting in character evidence to show that a plaintiff has a propensity to act in a certain manner and thus her character does not lend itself to offense. See *id.* at 1182.

269. See Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207 (1990) (noting that many men tend to view "milder" forms of harassment, "such as suggestive looks, repeated requests for dates, and sexist jokes as harmless social interactions to which only overly sensitive women would object"); see also *Andrews v. City of Phila.*, 895 F.2d 1469, 1483 (3rd Cir. 1990) (noting that sexual harassment defendants must be protected from hypersensitive plaintiffs); accord *Zabkovicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984).

beholder. When a court dismisses a plaintiff's claim because she was hypersensitive or overreacted, it often marginalizes the woman's experience or discounts her perception of the event²⁷⁰ simply because the judge would have perceived the event differently.

Rule 412 aims to raise judicial awareness of the dangers of injecting sex-based stereotypes into the decision-making process. However, because application of stereotypical views often occurs almost automatically,²⁷¹ unless judges make a conscious effort to educate themselves about gender bias issues and to be aware of any proclivity to apply stereotypical views, Rule 412 has a limited ability to affect the decision-making process.

IV. POTENTIAL SOLUTIONS

Existing sexual harassment law requires a plaintiff to prove that the defendant's conduct was unwelcome and that she found this conduct created a hostile work environment.²⁷² Many scholars have written about the need to change the substantive law and have advanced various proposals on how to do so.²⁷³ Changing the substantive law might alter what evidence would be considered relevant.²⁷⁴ This section examines whether, without a change in the substantive law, more can be done to protect plaintiffs' privacy while not impinging on defendants' right to pursue and develop a meaningful defense to sexual harassment claims. This section also examines the feasibility of further constraints on judicial discretion through the enactment of a more restrictive evidentiary rule and a parallel discovery rule.

A. A More Restrictive Evidentiary Rule

As discussed thus far, in many cases, Rule 412 has had little, if any, effect on some defendants' ability to delve into a plaintiff's personal life and sexual history. One way to ensure that Rule 412 guards against

270. See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 502 (1997) (discussing how feminist scholars have found that the hypersensitivity argument marginalizes the plaintiff's perspective).

271. See *supra* notes 249-51 and accompanying text (discussing Professor Armour's work).

272. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993).

273. See, e.g., Estrich, *supra* note 7; Radford, *supra* note 12; Vhay, *supra* note 17.

274. For example, Professor Susan Estrich argues that the welcomeness prong of the substantive law be eliminated. See Estrich, *supra* note 7, at 858. If this were done, and if the law did not require proof of "subjective hostility," evidence of a woman's sexual history or predisposition would be irrelevant except in cases with emotional distress damages issues.

“unwarranted intrusion into the victim’s private life,”²⁷⁵ is to amend the Rule so that it bars evidence of plaintiff’s conduct with any person other than the alleged harasser.²⁷⁶ For instance, a manager may believe that the plaintiff’s conduct with coworkers means that she would welcome overtures from him.²⁷⁷ Even with the amended Rule, many courts still consider the defendant’s knowledge of the plaintiff’s conduct with others relevant to the defendant’s claim that he thought his conduct was welcome.²⁷⁸ If the evidence was limited to a plaintiff’s interactions with her alleged harasser, a defendant’s ability to present evidence on which he based his assumption that his overtures were welcome would be limited to evidence of the plaintiff’s interactions with the defendant. Is it fair to a defendant to keep him from presenting evidence that he assumed, albeit mistakenly, that if the plaintiff welcomed overtures from a coworker she was open to overtures from the defendant?

In the criminal context, by enacting the original rape shield statute, Congress made it clear that a perpetrator’s perception of consent, based upon the woman’s consensual sex with others, should not play a role in the decision-making process.²⁷⁹ In our legal system, criminal defendants are given great leeway in introducing evidence in their defense, in some cases, much greater leeway than civil parties.²⁸⁰ Yet in sexual misconduct cases, the tables are turned and it is the civil defendant, rather than the criminal defendant, who is given much greater leeway in introducing evidence of a woman’s past and her conduct with others. If we find the evidentiary restrictions sufficient to protect the rights of criminal defendants, should similar restrictions not be sufficient to protect civil defendants? A civil defendant’s incorrect perception of welcomeness, based upon the sexually stereotypical view that a woman who welcomes

275. FED. R. EVID. 412 advisory committee’s note.

276. See generally Juliano, *supra* note 18, at 1590-91; Radford, *supra* note 12, at 532-33 (arguing that to prove welcomeness only actions directed to the alleged harasser by the target should be considered); see also B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 30 (1993) (suggesting that the fact that plaintiff told crude jokes is relevant only if the defendant allegedly was making crude jokes to the plaintiff).

277. See *Sheffield v. Hilltop Sand & Gravel Co.*, 895 F. Supp. 105, 109 (E.D. Va. 1995) (noting evidence of employee’s sexually explicit conversations with coworkers may be relevant to show plaintiff welcomed sexual antics of her manager; evidence was excluded because defendants failed to comply with Rule 412(c) notice requirements).

278. See *id.*; see also *Herchenroeder v. John Hopkins Univ.*, 171 F.R.D. 179 (D. Md. 1997); *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Myer-Dupuis v. Thomson Newspapers, Inc.*, No. 96-2063, 1997 WL 809955 (6th Cir. Dec. 19, 1997).

279. Rule 412 eliminated the ability of criminal defendants to use evidence of the plaintiff’s sexual relationships with others to argue that the plaintiff consented to sex with the defendant. See FED. R. EVID. 412.

280. See, e.g., FED. R. EVID. 404 (permitting a criminal defendant to introduce evidence of the defendant’s good character but prohibiting a civil party from doing so except in very limited circumstances).

overtures from one man welcomes them from all men, is no more probative in a determination of whether the plaintiff welcomed the conduct than a criminal defendant's incorrect perception of consent in a rape case. An evidentiary rule limiting evidence of sexual interactions to those between the plaintiff and alleged harasser would eliminate the application of this sexual stereotype.

However, a more stringent evidentiary rule has some potential problems. First, if Rule 412 limits evidence of a woman's sexual history or predisposition to situations involving the alleged harasser, the Rule would not encompass all potential sexual misconduct claims. For example, a rule limiting evidence of a plaintiff's sexual conduct to behavior that occurred only between the complainant and harasser would not account for a case like *Judd v. Rodman*,²⁸¹ in which the plaintiff alleged that the defendant, basketball star Dennis Rodman, gave her herpes. In *Judd*, a critical part of Rodman's defense was to prove that the plaintiff had sexual relations with many other men. A rule which would not have allowed admission of evidence of the plaintiff's other sexual relationships would have left Rodman with no defense.

To solve this kind of problem, the rule could be limited to sexual harassment suits. However, then the rule would be written to deal with one very particular subset of cases, something which the rules seldom do because they are not designed to cover each particular category of case, but rather are designed to be broad enough to cover all actions.²⁸² Of course, evidentiary rules do exist which cover specific subsets of cases. For example, there are specific evidentiary rules for child molestation²⁸³ and sexual assault²⁸⁴ cases. When Rule 403 fails to adequately advance social policies, Congress creates categorical limitations to further certain public policies.²⁸⁵ When it amended Rule 412, Congress noted that there is a strong public policy interest in encouraging victims of workplace sexual harassment to report and pursue their claims.²⁸⁶ Certainly, creating a rule of evidence that better advances this policy than the current Rule would not be uncharacteristic Congressional action.

Another problem with drafting a more restrictive evidentiary rule is that the rule would be addressing the law as it exists today. Sexual harassment law largely has been created by judicial interpretation of the

281. 105 F.3d 1339 (11th Cir. 1997).

282. See J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 551 (1980).

283. See FED. R. EVID. 414.

284. See FED. R. EVID. 413-415.

285. See Monnin, *supra* note 14, at 1184-85.

286. See FED. R. EVID. 412 advisory committee's note.

broad mandate of Title VII. It has evolved greatly in the past thirty years and it will continue to evolve. This was an issue confronted by the Advisory Committee as it strived to fashion a rule that would account for changes in this rapidly developing area of law.²⁸⁷ However, this problem is not insurmountable. Although it is not ideal to change evidentiary laws frequently, if the substantive law changed, the rule could be amended.

Even if a more restrictive evidentiary rule could be justified in a liability context, a rule limiting evidence of a plaintiff's sexual history or conduct to that which occurred between the plaintiff and her alleged harasser may severely, and unfairly, hamper a defendant's ability to present a defense to plaintiff's claimed damages. If the plaintiff claims extraordinary emotional distress damages²⁸⁸ and extraordinary medical expenses, it would be unfair, unprecedented, and perhaps a due process violation to prohibit the defendant from attempting to prove those damages are attributable to some other exclusive cause.²⁸⁹ A potential solution to this dilemma is to write the rule providing for a damages issue exception. For example, the rule could permit evidence of a plaintiff's sexual history or conduct if necessary to defend against an extraordinary damages claim.²⁹⁰

Another problem with a more stringent version of Rule 412 is that it may be of limited utility if a case involves expert testimony. If evidence of a plaintiff's sexual history or predisposition or conduct with others in the workplace is the kind of evidence reasonably relied upon by experts in the field, it may be discoverable, and it may be admissible as the basis of an expert opinion at trial.²⁹¹ However, courts have

287. See FED. R. EVID. 412 advisory committee's note (noting that subdivision (b)(2) of Rule 412 employs a balancing test rather than the specific exceptions set forth in the criminal rape shield law because of the difficulty in foreseeing future developments in the law and the need for greater flexibility to accommodate evolving causes of action such as sexual harassment).

288. Extraordinary damages are those that go beyond what one would expect to be the normal emotional trauma that a sexually harassed plaintiff would suffer. See *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993) (noting that Title VII does not require a plaintiff to suffer concrete psychological harm). For example, if a plaintiff claimed that the harassment caused hospitalization or that she was permanently disabled because of the emotional trauma, those would be extraordinary damages. However, a single claim that she suffered emotional distress as a result of the defendant's conduct would not be considered extraordinary damages. See *infra* notes 296-330 and accompanying text (discussing California evidentiary rule).

289. See, e.g., *McClelland v. Montgomery Ward & Co.*, No. 95-C-23, 1995 WL 571324 (N.D. Ill. Sept. 25, 1995).

290. For a discussion of what might constitute an extraordinary damages claim, see *supra* note 288.

291. See *Bottomly v. Leucadia Nat'l*, 163 F.R.D. 617 (D. Utah 1995) (noting that under Rule 703 discovery must be allowed as to all material evidence that plaintiffs' experts could reasonably rely on to address the relevant issues in the case and that defendants may also obtain information needed by their experts to form a basis for any counter opinion); see also *supra* Part III.B (discussing experts' opinions).

discretion to limit the manner in which experts may disclose this information.²⁹² Such evidence would not automatically be admissible through expert testimony, and in fact, a stricter evidentiary rule would provide additional authority for courts seeking to limit an expert's testimony to prevent disclosure of a plaintiff's sexual history.

Finally, in most cases, a rule restricted to behavior between the plaintiff and alleged harasser would adequately protect the defendant's right to a fair trial; however, there may be situations in which it does not. One way for the rule to ensure protection of the defendant would be to include the same language that exists in the criminal rule. The criminal rule permits courts to admit evidence when the exclusion of the evidence would violate the defendant's constitutional rights.²⁹³

B. A Restrictive Discovery Rule

A more stringent evidentiary rule may better protect the privacy rights of plaintiffs whose cases go to trial. However, it may afford only an incremental benefit to the vast majority of plaintiffs whose claims settle before trial.²⁹⁴ One of the significant limitations to Rule 412's effectiveness is that it does not encompass discovery. To truly achieve Rule 412's goals of protecting a plaintiff's privacy and protecting her from the embarrassment that is associated with public disclosure of intimate sexual details, Congress²⁹⁵ could enact a rule designed to curtail discovery in sexual harassment claims. California has enacted such a rule. The California rule states:

In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the

292. For example, see Federal Rule of Evidence 611 which allows the court to control the mode and order of interrogation.

293. See FED. R. EVID. 412(b)(1)(C). The problem with this suggestion is that if lower courts believe that *Meritor* requires courts to admit evidence of a plaintiff's sexual history, then courts may find that exclusion of this evidence violates the defendant's constitutional right to a fair trial. However, given the language of the Advisory Committee Notes accompanying Rule 412 and Rule 412's legislative history, it is clear Congress intended legislatively to overrule the dicta in *Meritor* concerning the relevance of a sexual harassment plaintiff's sexual history. For a full discussion of this issue, see *supra* Part II.C.

294. Approximately 95% of all sexual harassment claims settle before trial. Robert J. Alberts & Lorne Seidman, *Seeking a "Safe Harbor,"* 20 S. ILL. U. L.J. 223, 240 (1996).

295. Normally evidentiary and procedural rule changes go through the Rules Advisory Committee before going to the Supreme Court. The Supreme Court then changes and forwards the revised rule to Congress. See 28 U.S.C. § 2072 (1994). However, because the Court may believe that restrictive discovery rules, like amended Rule 412, potentially abridge defendants' substantive rights, they may decline to enact such rules. See *supra* notes 76-85 and accompanying text (discussing Rules Enabling Act issues arising with Rule 412). Thus changes may have to be enacted directly by Congress.

alleged perpetrator is required to establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be made by noticed motion and shall not be made or considered by the court at an ex parte hearing. This motion shall be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion.²⁹⁶

California enacted section 2017(d), the discovery rule, along with evidentiary rules limiting the admissibility of evidence of a plaintiff's sexual conduct.²⁹⁷ The legislative history underlying the California statutes sounds much like the Advisory Committee Notes to Rule 412. Like the drafters of Rule 412, the California legislature wanted to ensure that sexual harassment victims were not discouraged from seeking a legal remedy by fear of discovery of intimate details of their lives.²⁹⁸

California courts have used the discovery rule and California's explicit constitutionally recognized right to privacy²⁹⁹ to bar discovery of alleged childhood sexual abuse,³⁰⁰ plaintiffs' sexual relationships with coworkers,³⁰¹ and other information about plaintiffs' sexual history.³⁰² In many cases relying upon the discovery rule, the California courts faced issues which have arisen in trial courts deciding discovery issues under Rule 412. For example, in *Knoettgen v. Superior Court*,³⁰³ an employment discrimination action, the plaintiff's employer sought discovery about the plaintiff's childhood sexual abuse. The defendant argued that the information about childhood sexual abuse was important because it may have "affected her [the plaintiff's] perception of what transpired, her response thereto, and the nature and extent of

296. CAL. EVID. CODE § 2017(d) (West 1996).

297. See CAL. EVID. CODE §§ 783, 1106 (West 1997); CAL. GOV'T CODE § 11440.40 (West 1998).

298. See CAL. EVID. CODE § 783, Historical and Statutory Notes. This view parallels that stated by the Advisory Committee Notes to Rule 412:

The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal protection to a claim for damages or injunctive relief. There is strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim.

FED. R. EVID. 412 advisory committee's note.

299. See CAL. CONST. art. I, § 1 (recognizing that the right to privacy extends to a person's sexual conduct); see also generally *Fults v. Superior Ct.*, 152 Cal. Rptr. 210 (Ct. App. 1979); *Morales v. Superior Ct.*, 160 Cal. Rptr. 194 (Ct. App. 1979).

300. See *Knoettgen v. Superior Ct.*, 273 Cal. Rptr. 636, 638 (Ct. App. 1990).

301. See *Mendez v. Superior Ct.*, 753 Cal. Rptr. 731, 744 (Ct. App. 1988).

302. See *id.* at 739-40; see also *Vinson v. Superior Ct.*, 239 Cal. Rptr. 292 (1987).

303. 273 Cal. Rptr. at 638.

emotional distress she may have suffered."³⁰⁴ The defendant further asserted that the plaintiff waived any claim to privacy about this issue when she filed suit. Finally, it produced a declaration from a forensic psychiatrist which stated that inquiry into childhood sexual assaults was important to a meaningful evaluation of a plaintiff's emotional distress damages and to her perception of the defendant's conduct.³⁰⁵

The court found that the affidavit did not rise to the level of "good cause" anticipated by the statute. It reasoned that if the defendant's justification constituted good cause, "then this type of discovery is automatically available in every case, and section 2017(d) [the discovery rule] is meaningless."³⁰⁶ It noted that the discovery the employer demanded was exactly the "offensive, harassing, intimidating, unnecessary, unjustifiable and deplorable" conduct that the legislature intended to prevent.³⁰⁷ The court concluded that a "case based on the conduct of a plaintiff's coworkers should not be turned into an investigation of plaintiff's childhood."³⁰⁸ The court denied the defendant's discovery motion, stating that, "when an employee seeks vindication of legal rights, the courts must not be party to the unnecessary infliction of further humiliation."³⁰⁹

In another case, a California court denied a discovery request because of the defendant's failure to produce an expert affidavit. In *Mendez v. Superior Court*,³¹⁰ the plaintiff alleged a coworker accosted her, locked her in a room, and forced her to orally copulate him on four occasions, with each assault culminating in threats to the plaintiff or her family if she divulged the assaults.³¹¹ The plaintiff eventually reported the assaults to her employer and no action was taken against her alleged assailant. She then filed suit against her employer alleging intentional and negligent assault and battery and intentional and negligent infliction of emotional distress.³¹²

In her deposition, the plaintiff denied having any extramarital affairs; however, other deponents indicated that the plaintiff had had extramarital affairs, at least one of her alleged lovers being a coworker. The defendant sought discovery of plaintiff's sexual history with others at her workplace on the grounds that the possible connection between

304. *Id.*

305. *See id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. 253 Cal. Rptr. 731 (Ct. App. 1988).

311. *See id.* at 732-33.

312. *See id.* at 733.

plaintiff's arguably unstable marriage, her own infidelity, and her alleged emotional distress was significant.³¹³ The defendant argued that if the plaintiff was engaging in sexual activities with men other than her husband, those sexual activities could be relevant as to whether the defendant's conduct was the sole cause of plaintiff's emotional distress or just one of many causes.³¹⁴ Defendants also argued that their causation argument established the specific facts and relevance to allow discovery.

The court disagreed, finding that the defendant had failed to provide an affidavit from a mental health professional that plaintiff's infidelities led to emotional distress, or that there was any preexisting emotional distress.³¹⁵ The court found that the request was "based solely on the speculative presumption that infidelity may lead to emotional distress; nowhere [did the] defendants [demonstrate] any factual support for this presumption."³¹⁶ It also rejected the defendant's "apportionment" argument on the ground that the case involved emotional distress distinctly related to:

[C]onduct separate and apart from the turmoil created by life in general. Were we to accept defendants' proposition, arguably a defendant might pry not only into the sexual affairs of the plaintiff and her spouse but into her financial affairs, her health, the health of her spouse, children, parents and siblings. Problems in any of these areas might have caused preexisting emotional upset.³¹⁷

The court observed that the legislature clearly envisioned inquiry into the sexual privacy of a plaintiff "only under circumstances or facts of an extraordinary nature."³¹⁸ It defined extraordinary as "going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable."³¹⁹ It noted that, because an essential aspect of damage in any sexual harassment case is the "outrage, shock and humiliation of the individual abused, all cases will involve emotional distress."³²⁰ The court held that to justify inquiry into the plaintiff's private sexual life, either the plaintiff must claim some special damage, or the defendant

313. *See id.* at 739.

314. *See id.*

315. *See id.*

316. *Id.* at 739.

317. *Id.*

318. *Id.* at 740.

319. *Id.* (quoting WEBSTER'S NEW WORLD DICTIONARY 497 (2d ed. 1982)).

320. *Id.*

must demonstrate some extraordinary circumstance attendant to the plaintiff's claim.³²¹

As interpreted by the California courts, good cause is not an easy standard to meet. In *Knoettgen*, the court found that an expert affidavit asserting that childhood sexual abuse was relevant to the plaintiff's claimed damages, and perhaps was relevant to her perception of the defendant's conduct, did not rise to the level of good cause contemplated by the statute. In *Mendez*, the court found that the failure to provide an expert affidavit to support the claim that plaintiff's infidelity was a cause of her emotional distress indicated the defendant did not have good cause for discovery of this information. The court's reasoning in both cases makes sense; if an expert affidavit was all that was needed to show good cause, then the discovery rule would be meaningless. Likewise, to allow discovery of the plaintiff's sexual history based upon the argument that it may result in the defendant finding another cause for the plaintiff's emotional distress damages renders the rule meaningless.³²²

As these cases illustrate, the California rule has been strictly interpreted. In part, this is due to the California courts' reliance upon the specific California constitutional guarantee of a right to privacy.³²³ This raises a potential problem with a federal discovery provision modeled on the California statute. There is an ongoing debate as to whether there is a constitutional right to privacy.³²⁴ Without an explicit constitutional privacy right, would a federal rule be interpreted as strictly as the California rule?

321. *See id.* at 741. The court also addressed the issue of the necessity of discovery in order to show witness bias. *See id.* It would not sanction the wholesale questioning of numerous people about the most intimate aspects of their lives without showing that these people might appear as witnesses. *See id.* But it left open the possibility of this line of impeachment if the witness appeared at trial, as long as the defendant complied with the procedural requirements. *See id.* Finally, addressing the impeachment issue based upon plaintiff's deposition testimony, the court found that the defendants already had impeaching witnesses and thus needed no further discovery. *See id.* at 744.

322. *See also* *Vinson v. Superior Ct.*, 239 Cal. Rptr. 292 (1987). In *Vinson*, the court permitted the defendants to obtain a mental examination of the plaintiff. *See id.* at 300. However, it forbade the examiner to question the plaintiff about her sexual history. *See id.* at 300. The court noted that the legislative history of the statute, which stated that "absent extraordinary circumstances" inquiry into sexual history should not be permitted, suggests that a "stronger showing of good cause must be made to justify inquiry into this topic than is needed for a general examination." *Id.* at 300 n.8. It found that a defendant in a sexual harassment case, desiring to ask questions relating to a plaintiff's sexual relations must show specific facts justifying that particular inquiry. *See id.* at 300.

323. *See id.* (noting that to overcome the constitutional right, even when the information is directly relevant, there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy).

324. *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965). The majority finds a right to privacy in the "penumbra" of the constitution. *See id.* The dissent takes issue with finding unenumerated constitutional rights. *See id.* at 529-30 (Stewart, J., dissenting).

Some may argue that a special federal discovery provision is unnecessary. The discovery rules already have a provision that should protect a plaintiff from unjustified or unduly intrusive discovery—Federal Rule of Civil Procedure 26(c).³²⁵ Even before the enactment of Evidence Rule 412, Rule 26(c) was used to limit discovery of sensitive and personal information in sexual harassment cases.³²⁶ Some may contend that the combination of Rule 412 and Rule 26(c)'s protective order provisions should adequately protect plaintiffs from unduly intrusive discovery if the rules are properly applied, without enacting a special discovery rule.

Another potential argument against a special discovery rule is that it selects one particular subset of cases—sexual misconduct cases—and for these cases, changes the underlying principles of discovery. No longer is discovery available to help parties find the true facts and narrow the issues. Instead, it is used as a way to shield the plaintiff from having to disclose potentially relevant information from a defendant and thus hamper the defendant's ability to mount a legitimate defense.

These arguments are not as persuasive as they appear at first glance. First, Congress may decide that plaintiffs in workplace sexual harassment cases should have more protection than other plaintiffs. To force women to expose intimate personal details of their lives in order to take advantage of a legal remedy makes the remedy come at so great a cost that many victims may choose not to pursue it.³²⁷ Thus, as a matter of policy, Congress may choose to shift the normal balance of discovery in workplace sexual harassment cases.

Furthermore, a rule such as the California one does not close the door to discovery. Because of the highly sensitive and personal nature of discovery requests and the potential for abuse, the California rule requires the defendant to show good cause before allowing exploration of the plaintiff's personal life.³²⁸

What constitutes "good cause?" One California court noted that to justify inquiry into a plaintiff's private sexual life, either the plaintiff must claim some special damages or the defendant must demonstrate some extraordinary circumstances.³²⁹ Special damages include claims for

325. Rule 26(c) of the Federal Rules of Civil Procedure permits a party to move for a protective order to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. PRO. 26(c). Under Rule 26, a party may ask the court to limit both the method and amount of discovery.

326. *See, e.g.,* *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983); *Mitchell v. Hutchings*, 116 F.R.D. 481 (D. Utah 1987).

327. *See* *Howard v. Historic Tours of Am.*, 177 F.R.D. 48, 51 (D.D.C. 1997).

328. *See supra* text accompanying note 296.

329. *See* *Mendez v. Superior Ct.*, 253 Cal. Rptr. 731, 741 (Ct. App. 1988).

more than ordinary emotional distress; for example, claims that the plaintiff was hospitalized, suffered a diagnosable psychiatric disorder caused by the harassment, or suffered some other extraordinary damage. Of course, the irony is that the more injured the plaintiff, the more her entire life is exposed. However, if the rule is clear, then plaintiffs may choose, from the outset, whether to claim the extraordinary damages, and will know that if they do, they may open the door to inquiry into their private lives.

The same court defined "extraordinary circumstances" as "going far beyond the ordinary degree, measure, limit; . . . very unusual; exceptional; remarkable."³³⁰ The term extraordinary circumstances, just like the term good cause, is a matter each judge decides based on the case before the court. For example, if the defendant had a good faith reason to believe the plaintiff had a pattern of filing sexual harassment suits to extort money, or if there was some evidence the plaintiff routinely used sex in exchange for advancement and then "cried foul" when this tactic did not work, that would constitute an extraordinary circumstance justifying the plaintiff's sexual relationships with past employers.

Even if discovery were limited, some might argue that the proposed discovery rule may be meaningless because it applies only to sexual misconduct or sexual harassment claims. However, these claims usually are not brought alone, but instead, generally are brought in conjunction with claims for intentional or negligent infliction of emotional distress,³³¹ or other civil state law claims.³³² Even if discovery of a plaintiff's personal life or sexual history may not be permissible with respect to the federal sexual harassment claim, it still may be discoverable with respect to the other claims.³³³ However, if the rule was in place, plaintiffs could make a tactical decision when filing their claims to file only a Title VII claim, thereby limiting the discovery of sexual history evidence.

330. *Id.* at 573.

331. See *Mitchell v. Hutchings*, 116 F.R.D. 481 (D. Utah 1987) (plaintiff brought Title VII and an intentional infliction of emotional distress claim); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1343 (10th Cir. 1990); *Huffman v. City of Prairie Village*, 980 F. Supp. 1192 (D. Kan. 1997); *Hartsell v. Duplex Prod., Inc.*, 123 F.3d 766 (4th Cir. 1997).

332. See *Jenson v. Eveleth Taconite Co.*, 130 F.2d 1287 (8th Cir. 1997) (Title VII and the equivalent state law claim under Minnesota Human Rights Act); *Howard v. Historic Tours of Am.*, 177 F.R.D. 48, 48 (D.D.C. 1997) (Title VII and the D.C. Human Rights Act).

333. For example, in *Jones v. Clinton*, the defense lawyers justified their requests for Ms. Jones' sexual history because of her defamation claim. See *Paula Jones Allowed To Narrow Suit; Defamation Claim Dropped by Judge*, WASH. POST, Nov. 25, 1997, at A7 (noting that Paula Jones's amending her complaint to drop her defamation claim was a "move widely viewed as an attempt to prevent an examination of her personal history"); see also *Mitchell v. Hutchings*, 116 F.R.D. 481 (D. Utah 1987) (permitting discovery of all workplace sexual conduct, including that unknown to the harasser, on the grounds that the conduct was relevant to the plaintiff's intentional infliction of emotional distress claim).

Defendants may also argue that a restrictive discovery rule potentially deprives them of the ability to present a defense to which they are entitled under Title VII law. They may contend that they are entitled to discover information about the plaintiff's sexual history or predisposition to prove that the plaintiff welcomed the conduct or that she was not offended by it. However, assuming that the evidence the defendant seeks does not fit within the good cause or extraordinary circumstances exceptions, it is most likely evidence whose probative value relies upon the application of a sexual stereotypical view.³³⁴ Because the law should not indulge the use of sexual stereotypes in presenting defenses, defendants' argument about their liability defense being hampered by this discovery rule should not prevail.

Defendants may also contend that they are entitled to discover whether a woman's past is the sole cause of her emotional distress damages. For example, in *McClelland v. Montgomery Ward*,³³⁵ the plaintiffs originally claimed that the emotional distress resulting from their workplace harassment resulted in hospitalization for depression and other emotional problems. During discovery, the defendants found that the plaintiffs never mentioned the workplace harassment to their mental health care workers or physicians. Instead, the plaintiffs told the doctors that the cause of their emotional distress was childhood sexual abuse. A rule barring a defendant from discovering information such as this—information which goes to the crux of the defendant's causation and damages defense—may deprive a defendant of his due process rights.³³⁶ Although this argument has some merit, as a practical matter, it seldom will be applicable because in situations such as the one in *McClelland*, the plaintiffs usually are seeking extraordinary damages.³³⁷ Thus the information would be discoverable even under the proposed discovery rule.³³⁸

Finally, opponents of a discovery rule may contend that there is a difference between disclosures during discovery and disclosures at a

334. See *supra* Part III.C (discussing commonly applied sexual stereotypes in sexual harassment claims).

335. No. 95-C-23, 1995 WL 571324 (N.D. Ill. Sept. 25, 1995).

336. Once discovered, courts may limit use of the evidence at trial. For example, in *McClelland*, rather than allow the defendant to cross-examine the plaintiffs about their childhood sexual abuse, the court could have ordered the defendant to ask the plaintiffs if they told their health care workers the damages were caused by something other than the defendant's conduct, without asking about the specific cause of the plaintiff's damages.

337. The plaintiffs originally sought compensation for their hospitalizations; thus, their medical records were discoverable. See *McClelland*, 1995 WL 571324, at *2.

338. Without the claim for extraordinary damages, the only reason the plaintiff's childhood sexual abuse might be relevant is if the defendants sought to prove that a pre-existing mental condition was the cause of any emotional distress the plaintiffs experienced. For a discussion of this issue, see *supra* notes 211-14 and accompanying text.

public trial. Unlike public trials, much can be done to shield discovery from outside eyes. For example, all documents may be sealed and the attorneys, parties and witnesses may be instructed not to disclose this information.³³⁹ Likewise, at least in some instances, being cross-examined in a public courtroom about one's sex life is much worse than having to answer questions on the same topic in the more informal and somewhat more relaxed forum of a deposition. However, for some plaintiffs, the act of disclosure, to anyone, in any situation, is truly traumatic. In those situations, no protective order can cure the harm. Furthermore, if the evidence is unlikely to be admissible, allowing discovery only serves to embarrass the plaintiff and discourage her from pursuing her legal remedies.³⁴⁰

C. Other Procedural Protections

Even if a rule limiting discovery of the plaintiff's sexual history and predisposition were enacted, it would not completely eliminate the invasion of the plaintiff's privacy interests that often occurs during discovery. Perhaps even more intrusive than deposition or interrogatory questions about a woman's sexual life are requests for her psychological records, questions about her psychological history, and requests for psychological exams under Rule 35 of the Federal Rules of Civil Procedure. In order to protect a sexual harassment plaintiff from "undue invasions of her privacy" the manner in which some courts handle requests for Rule 35 examinations and requests for the plaintiff's psychological records also must be reformed.

Defendants seeking to discover whether their conduct caused the plaintiff's alleged emotional distress often request the plaintiff's previous therapy records as well as a Rule 35 psychological examination. Exactly where courts draw the line on discovery of a plaintiff's therapy records, or a request that the plaintiff submit to a Rule 35 psychiatric examination, varies widely. Some courts have found that a mere allegation of emotional distress damages is sufficient to satisfy the good cause requirement for a Rule 35 mental examination and is enough to permit discovery of the plaintiff's psychological records.³⁴¹ While other courts, holding that an allegation of ordinary mental distress does not place a

339. *See, e.g., Sanchez v. Zabihi*, 166 F.R.D. 503 (D.N.M. 1996) (instructing attorney not to disclose to the client the plaintiff's sexual history information obtained during discovery).

340. *See Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983); *Howard v. Historic Tours of Am.*, 177 F.R.D. 48, 51 (D.D.C. 1997).

341. *See Shepherd v. American Broad. Co.*, 151 F.R.D. 194, 212 (D.D.C. 1993); *Lowe v. Philadelphia Newspapers*, 101 F.R.D. 296, 299 (E.D. Pa. 1983).

plaintiff's mental condition in controversy, have not allowed defendants to invoke Rule 35 and to have access to the plaintiff's psychological records,³⁴² others have only permitted Rule 35 examinations when the plaintiff alleges ongoing emotional distress³⁴³ or intends to introduce expert testimony at trial on her emotional distress,³⁴⁴ or when the plaintiff alleges a specific psychiatric disorder³⁴⁵ or raises issues for which expert psychiatric examination and testimony may be necessary.³⁴⁶

Those courts limiting Rule 35 examinations rely on the policies underlying Title VII to support their decisions. These courts express a reluctance to allow defendants to employ discovery techniques that will discourage plaintiffs from pursuing their right to be free from sexual harassment. As one court noted, if a court were to require every sexual harassment victim claiming emotional distress to submit to a Rule 35 psychological examination, plaintiffs would face further denigration to secure their statutory right to be free from sexual denigration.³⁴⁷ However, there is no clear standard for when a court will allow a defendant to subject a plaintiff to a Rule 35 psychological examination. Likewise, a clear directive does not exist regarding the discovery of a plaintiff's psychiatric history and therapy records.

In *Jaffee v. Redmond*,³⁴⁸ in which the plaintiff sought discovery of a civil defendant's mental health records, the United States Supreme Court recognized a federal therapist-patient privilege. The Court noted that there is a strong societal interest in "facilitating the provision of

342. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1988); *Cody v. Marriott Corp.*, 103 F.R.D. 421 (D. Mass. 1984).

343. See *O'Quinn v. New York Univ. Med. Ctr.*, 163 F.R.D. 226, 228 (S.D.N.Y. 1995) (denying a Rule 35 examination when plaintiff withdrew her claim that she suffered ongoing emotional distress); *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216, 222 (S.D.N.Y. 1994) (denying a Rule 35 examination when there was no continuing emotional distress allegation); accord *Curtis v. Express, Inc.*, 868 F. Supp. 467, 469 (N.D.N.Y. 1994). The rationale here is that a mental examination is not likely to be as useful in ascertaining past pain and suffering as it is in assessing ongoing psychological problems. At least one commentator disagrees with this reasoning, arguing that psychiatrists are capable of diagnosing past conditions. See Richard A. Bales & Pricilla Ray, M.D., *The Availability of Rule 35 Mental Examinations in Employment Discrimination Cases*, 16 REV. LITIG. 1, 15-16 (1997).

344. *Shepherd v. American Broad. Co.*, 151 F.R.D. 194 (D.D.C. 1993); *Lowc v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296 (1993).

345. See Bales & Ray, *supra* note 343, at 20 (discussing how some courts will not grant a Rule 35 mental examination absent an allegation that the defendant's conduct caused the plaintiff to suffer a specific psychiatric disorder).

346. See *id.* at 12. Professor Bales and Dr. Ray argue that there are three issues on which a psychiatrist may be needed to testify: (1) whether the plaintiff is suffering from or has suffered a diagnosable psychiatric disorder; (2) the extent to which the symptomology or disorder is causally related to the defendant; and (3) the severity of the damages (*i.e.*, is the condition treatable, and if so, how and at what cost.).

347. *Robinson*, 760 F. Supp. at 1486.

348. 581 U.S. 1, 9-10 (1996).

appropriate treatment for individuals suffering the effects of a mental or emotional problem."³⁴⁹ The Court concluded that without strong protection of the sanctity and privacy of a therapist-patient relationship, "confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation."³⁵⁰

The recognition of a federal therapist-patient privilege was grounded, in part, on the fact that virtually all states had some form of the privilege and the states' promise of confidentiality "would have little value if the patient were aware that the privilege would not be honored in a federal court."³⁵¹ However, many states do not allow the plaintiff the protection of the privilege when she seeks emotional distress damages.³⁵² Like the state courts, federal courts are divided on the effect an emotional distress claim has on a plaintiff's psychotherapist-patient privilege. After *Jaffee*, some courts have held that, by seeking emotional distress damages, the plaintiff has put her mental or emotional state at issue and has thus waived her psychotherapist-patient privilege.³⁵³ Others have found that a plaintiff does not automatically waive the privilege when she seeks damages for emotional distress.³⁵⁴ Thus, it is not clear how far the protections set forth in *Jaffee* extend.

In sum, in sexual harassment claims, there is no clearly defined course for courts to follow when looking at the application of the good cause standard of Rule 35. Nor have the parameters of the federal therapist-

349. *Id.* at 11.

350. *Id.* at 11-12.

351. *Id.* at 13.

352. In some states, the waiver of the privilege is automatic, while in others, the plaintiff must allege more than "ordinary emotional distress" before the privilege is waived. *See, e.g.,* *Yoho v. Lindsley*, 248 So. 2d 187, 191 (Fla. Dist. Ct. App. 1971) (patient who institutes claim for any physical or mental suffering does not invite "automatic inquiry and intrusion into all past communications with psychiatrist"); *LeVien v. LaCorte*, 640 N.Y.S.2d 728, 731 (Sup. Ct. Suffolk Co. 1996) (mere commencement of action in which party's mental condition is placed in controversy is not enough to automatically permit implied waiver of psychologist-patient privilege). *Cf. Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. Ct. App. 1991) (physician-patient privilege is waived if the patient-litigant places his or her mental condition at issue as a basis of a legal claim or affirmative defense); *Sagmiller v. Carlsen*, 219 N.W.2d 885, 897 (N.D. 1974) (whenever a patient brings her mental condition into issue as an element of a claim or defense, the privilege no longer applies); *Wiggins v. Fairfax Park Ltd. Partnership*, 470 S.E.2d 591, 596 (Va. Ct. App. 1996) (medical reports of a civil plaintiff are not protected if the plaintiff's physical or mental condition is at issue).

353. *See* *Lanning v. Southeastern Pa. Transp. Auth.*, Nos. CIV.A.97-593 & CIV.A.97-1161, 1997 WL 597905, at *2 (E.D. Pa. Sept. 17, 1997) (emotional state at issue by claiming emotional distress damages; therefore psychotherapist-patient privilege waived); *Doolittle v. Ruffo*, No. 88 CV 1175, 1997 WL 151799, at *2 (N.D.N.Y. Mar. 31, 1997) (plaintiff waived privilege by placing mental and emotional condition at issue and by intention to call a psychotherapist as an expert at trial); *Sarko v. Penn-Del Dir'y Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997).

354. *See* *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997).

patient privilege been delineated. Therefore, in addition to the suggestions for a more restrictive evidentiary rule and discovery rule,³⁵⁵ to protect fully a sexual harassment plaintiff's privacy, courts must exercise caution when granting a request for a Rule 35 examination or for a plaintiff's therapy records.

As one commentator has noted, one way to ensure a plaintiff's privacy is protected while also protecting a defendant's right to a fair trial is to limit Rule 35 examinations and accessibility to plaintiffs' psychiatric records to those times when a plaintiff seeks extraordinary damages, intends to introduce her own psychiatric experts, or when there are other extraordinary circumstances which merit this extremely invasive discovery.³⁵⁶ A mere claim for emotional distress damages should not open the door to a plaintiff's entire psychological history.

D. Continued Education About Gender Bias

Although the evidentiary and discovery rule changes discussed herein may help to better protect a sexual harassment plaintiff's privacy, no procedural rules will adequately protect plaintiffs unless judges and lawyers educate themselves about sexual stereotypes and gender bias. The first step in the educative process is recognition of the problem. As Professor Martha Minow notes, "only by admitting our partiality can we strive for impartiality."³⁵⁷ To do this, she suggests that we must explore our own stereotypes and our own attitudes toward people we treat differently—we should apply "strict scrutiny to ourselves."³⁵⁸ To explore our stereotypes and attitudes, we must also be educated about what stereotypical views are and how we unconsciously hold them.³⁵⁹ Thus, if Congress is committed to protecting sexual harassment plaintiffs from "invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process," Congress should continue to fund initiatives that help the judiciary

355. See *supra* Part IV. A-B.

356. See Susan R. Klein, *A Survey of Evidence and Discovery Rules in Civil Sexual Harassment Suits With Special Emphasis on California Law*, 11 INDUS. REL. L.J. 540, 569-70 (1989) (making similar suggestions).

357. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 75 (1987).

358. *Id.* at 79.

359. One way to start the educative process is through reviewing social science literature which explains sexual and occupational stereotypes and the impact they have on decision making. See, e.g., Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491 (1996); Richard L. Wiener et al., *Perceptions of Sexual Harassment: The Effects of Gender, Legal Standard, and Ambivalent Sexism*, 21 LAW & HUM. BEHAV. 71, 73-90 (1997).

to examine this issue and to educate itself instead of cutting funding for the study of gender, racial, and ethnic fairness.³⁶⁰

A judge's awareness of his or her attitude, and the stereotypes and biases underlying it, may cause a judge to examine more carefully the requested discovery or evidence. Awareness of internal biases may produce a different outcome, or at least a more conscious one. By recognizing and articulating sexual stereotypes,³⁶¹ judges not only raise their own awareness and the awareness of other litigants and colleagues, they also let the community know that their decisions are not based upon improper considerations.³⁶² Even without additional rules or changes in the substantive law, further education about and awareness of gender bias will help judges better apply existing Rule 412.³⁶³

V. CONCLUSION

For sexual harassment cases to be fairly administered and litigated, we must develop evidentiary and discovery rules which affirmatively attempt, at all stages of the litigation process, to uphold the dignity of the litigants, reflect societal moral values, and neutralize sexual stereotyping. If the process is to be viewed as fair, we must attempt to account for different perspectives, social attitudes, and cultural stereotypes throughout the process. Although Rule 412 is a good start in reforming the judicial process in sexual harassment claims, its ability to protect a sexual harassment plaintiff from "invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process" has been limited. The Rule's failure is not unexpected for a number of reasons. First, the procedural rule exists in the context

360. See Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 186 (1996) (noting that the Senate Appropriations Committee eliminated funding for ongoing work of bias task forces). Professor Peterson also noted that a few Senators called for an outright ban on future funding for gender, race, and ethnic bias task forces. See *id.* at 186-188, citing 141 CONG. REC. § 14,691-92 (daily ed. Sept. 29, 1995).

361. See, e.g., *Howard v. Historic Tours of Am.*, 177 F.R.D. 48, 51-53 (D.D.C. 1997) (explaining the fallacy of defendant's argument that plaintiffs' sexual relationships with coworkers were relevant to the defendant's perception that physical overtures and crude sexual invitations were welcome).

362. "It is not enough for the courts to be just; they must also be perceived to be just." Peterson, *supra* note 360, at 176.

363. For other solutions on eliminating gender bias in the courts, see Stern, *supra* note 222; Rizzolo, *supra* note 220, at 288; NINTH CIRCUIT REPORT, *supra* note 221, at 975-77. Additionally, parties should continue to raise gender bias issues at all levels of the trial and appellate court proceedings. See, e.g., *Catchpole v. Brannon*, 42 Cal. Rptr. 2d 440 (Ct. App. 1995) (overturning trial court decision because of judicial gender bias); see also *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1292 n.8 (8th Cir. 1997) (NOW Legal Defense and Education Fund raised the gender bias issue in its amicus brief; however, because the plaintiffs did not raise a claim of gender bias, the appellate court did not address it).

of substantive law which encourages defendants to use evidence of a plaintiff's sexual history and predisposition.³⁶⁴ Second, the Rule fails to account for discovery, which is when most plaintiffs suffer exposure of their sexual history and consensual sexual activities. Third, legal rules have only limited effect as long as those applying the rules hold gender-biased attitudes and apply sexually stereotypical views during the decision-making process.

There are many ways plaintiffs' privacy could be better protected. For example, Congress or the Supreme Court could revise the substantive law of sexual harassment³⁶⁵ or Congress could enact additional procedural rules, covering everything from discovery to Rule 35 examinations, and it explicitly could state that Rule 412 encompasses incidences of childhood sexual abuse. These actions would further constrain judicial discretion. However, constraints on discretion must also be accompanied by educative efforts. Additional procedural rules cannot completely fix the problem. Judges and lawyers must engage in a concerted effort to identify our gender-biased attitudes and account for those attitudes in the decision-making process. Until we do so, all procedural rules will have only a limited effect on eliminating unwarranted invasions into a workplace sexual harassment plaintiff's personal life.

364. As long as unwelcomeness and subjective hostility remain part of a hostile work environment claim, defendants must be allowed to present a defense which indicates that the conduct was welcome, or that the plaintiff did not find the environment hostile. These elements invite courts to apply sexual stereotypes and gender-biased views to evidence of plaintiff's sexual history and predisposition.

365. For suggestions on how this could be done, see Estrich, *supra* note 7 (suggesting eliminating the welcomeness requirement and revising the objective standard); Radford, *supra* note 12 (suggesting shifting the burden of proof on unwelcomeness); Vhay, *supra* note 17 (suggesting changes in the prima facie elements of a sexual harassment claim); Bernstein, *supra* note 270 (suggesting changing the reasonable person standard).

