EVIDENCE OF PLAINTIFF PRIOR SEXUAL ACTIVITY (9/25/2019)

1. Federal Rule of Evidence 412
   1. General Information
2. Rules 412 and 404(b)

Even if your client welcomed sexual conduct from other co-workers that does not mean that he welcomed it from this person! Your research -- and brief that will ask the judge for reconsideration of this ruling should start with FRE 412 about the presumed inadmissibility of other sexual conduct by the plaintiff. Then look at cases applying FRE 404(b).

Here's an excerpt from an evidence paper I presented at the NELA Seminar in Chicago a couple of months ago -- this is the FRE 412 analysis -- with a cite to a great case from a district court in 1995 -- Sheffield v. Hilltop Sand & Gravel Co.,895 F. Supp. 105 (E.D. Va. 1995).   
  
Rule 412 provides protection for sexual harassment plaintiffs in discovery as well as at trial. As explained by the Advisory Committee:   
  
The rule aims to safeguard 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. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.   
  
Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim. Fed. R. Evid. 412, 154 FRD 526, advisory committee’s notes to 1994 amendment.   
  
The Advisory Committee adopted a balancing test to govern the admissibility of otherwise proscribed evidence in civil cases because it recognized the difficulty of foreseeing future developments in the law – especially noting the fact that claims for sexual harassment are still evolving. 154 FRD at 532. The Committee notes that Rule 412's test for admitting evidence offered to prove sexual behavior or sexual propensity differs in three respects from the general rule governing admissibility set forth in Rule 403:   
  
First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties. Id. (emphasis in original).   
  
Although the Committee noted that discovery of a victim's past sexual conduct or predisposition in civil cases will continue to be governed by FRCP 26, it also advised that courts enter appropriate protective orders under Rule 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality. The Committee further observed that:   
  
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. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. Advisory Committee Notes, Id. at 534 (citing Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962-63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work)).   
  
Finally, the Committee observed, "Confidentiality orders should be presumptively granted as well.

1. Case law not permitting admission
   1. Federal
      1. In Burnsv. McGregor Electronic Industries, Inc., the Eighth Circuit held that “The plaintiff'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. This is not a case where Burns posed in provocative and suggestive ways at work.  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.” Burns v. McGregor Elec. Indust. Inc., 989 F.2d 959, 963 (8th Cir.1993).
      2. In Glemser v. Sugar Creek Realty, LLC, the Central District of Illinois cited Burns in holding that “[a]n individual's private life does not provide ‘lawful acquiescence’ to such conduct at work.” Glemser v. Sugar Creek Realty, LLC, 970 F. Supp. 2d 866, 869 (C.D. Ill. 2013).
      3. Katz v. Dole, 709 F. 2d 251, 254, fn. 3 (4th Cir. 1983).
      4. Ratts v. Board of County Commissioners, 189 F.R.D. 448, 4515 (D. Kan. 1999).
      5. Howard v. Historic Tours of Am., 177 F.R.D. 48 (D.D.C. 1997).
      6. Barta v. City and County of Honolulu, 169 F.R.D 132, 136 (D. Haw. 1996).
      7. Socks-Brunot v. Hirschvogel Inc., 184 F.R.D. 113, 119 (S.D. Ohio 1999).
   2. State-Specific
      1. Ohio
         1. Conti v. Spitzer Auto World Amherst, Inc., 20008 WL 754759 (Ohio Ct. App. 2008)
      2. Missouri
         1. Olinger v. Gen. Heating & Cooling Co., 896 S.W.2d 43, 48 (Mo. App. W.D. 1994).
2. Case law permitting admission
   1. EEOC v. Danka Indust., 990 F. Supp. 1138, 1140 (E.D. Mo. 1997).