Unfolding Discovery Issues That Plague Sexual Harassment Suits

Katie M. Patton
Notes

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KATIE M. PATTON*

INTRODUCTION

There is no question that a sexual harassment victim endures pain, humiliation, and suffering as a result of the harassment itself. Unfortunately, the pain and humiliation do not end with the harassment if the victim chooses to bring a lawsuit against her harasser. As early as the discovery stage of the litigation, a victim can suffer from further pain and humiliation if her harasser chooses to subject her to an intrusive discovery process whereby her past sexual activity and conduct is looked at with a fine-tooth comb—a process that can sometimes imply that she invited the harassment through her own promiscuity. However, the shortfalls of this intrusive, humiliating discovery process were eventually recognized, as seen by changes in the federal court system and an amendment to the Federal Rules of Evidence. Federal Rule of Evidence 412 (Rule 412) is commonly known as the “rape shield rule.” Originally, Rule 412 was used in criminal proceedings and was designed to keep out intimate details of a victim’s prior sexual history in a criminal rape or sexual abuse case. In 1994, Congress amended Rule 412 to extend the “shield” to victims involved in civil sexual abuse and harassment cases. The pivotal consequence of amending Rule 412 to apply to civil cases is that it created a “presumption against admissibility at trial of a plaintiff’s sexual history with any person besides the defendant.” However, even

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eleven years after Congress amended Rule 412, judges and practitioners alike are still grappling with the many discovery questions that arise in a sexual harassment suit.

The presumption in Rule 412 is that a sexual harassment victim's sexual history and propensities are inadmissible. As it pertains to civil cases, Rule 412 states, "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." It is important to keep in mind that Rule 412 is to be read as an exception to Federal Rule of Evidence 404, which allows evidence of an alleged victim's character to be admissible if the probative value is not substantially outweighed by the potential harm from its introduction. In essence, for a sexual harassment defendant to use evidence of the victim's past sexual behavior or predisposition, the defendant must overcome the Rule 412 presumption by showing that the evidence's probative value substantially outweighs any danger that would be inflicted on the plaintiff as a result of its admission at trial.

However, because Rule 412 is an evidentiary rule, it is ill-equipped to handle the many questions that arise in the discovery stage, well before the Rule 412 presumption is applied. Some discovery concerns include: whether the plaintiff should be compelled to submit to a mental examination per the Federal Rules of Civil Procedure 35 (Rule 35); what scope of discovery is available to the defendant under Rule 26; whether the plaintiff should be granted a protective order per Rule 26(c) to protect his or her privacy interest; and most recently, what scope of electronic discovery should be available.

An important policy consideration behind Congress' decision to amend Rule 412 and extend the presumed "shield" protection to civil cases was to make sexual harassment victims feel more comfortable in bringing forth a meritorious claim. Fearing credibility attacks in the courtroom, sexual harassment victims are sometimes loath to bring their claims. Further, some suggest that the "attack the victim" strategy that endures in the courtroom is just as distressful as the harassment that has already occurred. The extension of Rule 412 to civil cases is meant to

3. FED. R. EVID. 412(b)(2).
4. See id.; FED. R. EVID. 404.
5. See Howard v. Historic Tours of Am., 177 F.R.D. 48, 51 (D.D.C. 1997) ("The logic behind the note is self-evident: one of the purposes of Fed. R. Evid. 412 was to reduce the inhibition women felt about pressing complaints concerning sex harassment because of the shame and embarrassment of opening the door to an inquiry into the victim's sexual history."); see also FED. R. EVID. 412 advisory committee's note.
protect sexual harassment victims; however much of the intimidation that occurs in a sexual harassment suit occurs during the discovery process where Rule 412 proves useless against abusive, probing discovery techniques.

Although, as a rule of evidence, Rule 412 does not dictate the appropriate scope of discovery in sexual harassment cases, courts will sometimes use Rule 412 as a guiding post to create the line between permissible and impermissible discovery in these suits. However, sexual harassment victims would undoubtedly be better protected from discovery abuses if there was a bright-line discovery rule in place that furthered Rule 412’s goal of encouraging victims to bring forward meritorious sexual harassment claims.

This Note surveys some of the more common discovery issues that plague sexual harassment suits. Part I provides a brief overview of a sexual harassment claim and the specific elements needed for this cause of action. Part II will examine the struggle between the policies underlying Rule 26 (generally allowing parties to engage in a broad scope of discovery) with the Rule 412 presumption aiming to protect a sexual harassment plaintiff’s right to privacy. Part III examines compelled mental examinations and their underlying worth in determining the scope and amount of distress the victim suffered as quantified in damages the plaintiff should receive. Part IV will focus on the relatively new issues that arise with electronic discovery and specifically how that will come to impact a plaintiff’s ability to bring forth a sexual harassment suit. In conclusion, I will discuss briefly how Rule 412 plays a reactive, rather than proactive role in the discovery process, and the impact of that role on a sexual harassment plaintiff during the discovery process.

I. OVERVIEW OF SEXUAL HARASSMENT

This Note will focus solely on federal cases and will examine Title VII sexual harassment claims. The Civil Rights Act of 1964 states it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .”7 Meritor Savings Bank v. Vinson, the leading United States Supreme Court case, sets out the standard for a sexual harassment claim: “The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”8 As to proving “welcomeness,” the Meritor Court commented: “[I]t 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."

As a result, the notion of "welcomeness" has become central to those defending against sexual harassment claims both for quid pro quo harassment and hostile work environment harassment suits. "Quid pro quo harassment occurs when 'submission to or rejection of [unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature] by an individual is used as the basis for employment decisions affecting such individual.'" Hostile environment harassment occurs when conduct "'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"

Eight years after Meritor was decided, Congress amended Rule 412 to allow the "rape shield" rule to apply to civil cases—namely sexual harassment suits. However, because Rule 412 had no bearing on the scope of allowable discovery, Congressional intent to protect privacy invasions regarding sexual history and propensities was simply not being met by the expansion of Rule 412.

II. THE PERMISSIBLE SCOPE OF DISCOVERY IN SEXUAL HARASSMENT CASES: THE POLICY STRUGGLE BETWEEN RULE 412 AND RULE 26

Evidentiary rules such as Rule 412 generally do not dictate the procedure parties must follow during the discovery stage of litigation. Rather, the Federal Rules of Civil Procedure are designed to provide for a broad scope of discovery to allow parties the opportunity to investigate all information that is relevant to any claim or defense being pressed. As such, Rule 412 is silent on the scope of discovery. However, the Advisory Committee notes to Rule 412 provide courts with some direction on limiting the scope of discovery so as not to contravene the policy behind extending Rule 412 to civil cases. The Advisory Committee suggests courts balance evidence under Rule 412 standards prior to allowing discovery to take place. This balance, in effect, requires the

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1. Id. at 69.
2. Id.
3. See generally FED. R. EVID. 412 advisory committee's note.
5. See Heinz, supra note 2, at 520 (Rule 412 only allows evidence of a sexual harassment plaintiff's prior sexual history and disposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party, with the presumption strongly weighted against admissibility of this kind of evidence.).
party seeking discovery to show the evidence sought to be admitted as relevant, thereby overcoming the presumption of inadmissibility.  

Defendants in sexual harassment suits undoubtedly can argue that evidence of a plaintiff's prior sexual history is relevant. However, with the admission of information regarding the victim's past sexual history comes the potential misuse of that information by the jury. Presumably, the jury can become tainted after hearing about a sexual harassment victim's past sexual experience, and based on that information, assume that the victim somehow "asked for" or "welcomed" the harasser's advances. Like a rape victim, a sexual harassment victim should not have her reputation attacked in the courtroom, and consequently have to risk losing credibility with regards to her harassment claim merely because she has a sexual history. For purposes of the sexual harassment suit, the victim's past sexual history, with anyone other than the defendant, should be irrelevant.

One objective behind amending Rule 412 was to protect against cultural stereotypes and sexual myths. However, because Rule 412 requires the judge to subjectively balance the probative value of the evidence against the danger of harm to any victim and unfair prejudice to any party, the judge's assessment inevitably includes his value judgments along with any stereotypes he or she might hold about the given situation. In order for Rule 412 to work, "judges must be willing and able to stand back from their own beliefs to determine if they are engaging in these stereotypical ideas in assigning the evidence probative

16. FED. R. EVID. 412 advisory committee's note states: "Courts should presumptively issue protective orders barring discovery unless the party seeking discovery... show[s] 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."

17. Jacqueline H. Sloan, Comment, 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, 369–70 (1996). Based on their own moral beliefs, jurors can potentially make judgments of a plaintiff based on the admissibility of information concerning her or his sexual history or predispositions. "There is a danger that jurors will base their decisions on their own general stereotypes of women rather than on the proper issue: the guilt or innocence of the particular defendant." Id.

18. Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000) ("Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication."); accord Socks-Brunot v. Hirschvogel Inc., 184 F.R.D. 113, 117 (S.D. Ohio 1999) ("The fact that an employee entered into a consensual relationship with one co-worker or supervisor does not mean that he or she has invited quid pro quo demands from a supervisor."); Howard v. Historic Tours of Am., 177 F.R.D. 48, 52 (D.D.C. 1997).


20. Aiken, supra note 10, at 570.

21. Sloan, supra note 17, at 395 ("[B]ecause... Rule 412 is a balancing test, the outcome... will depend to a large extent on the beliefs of the judge hearing the arguments.").
value and in assessing prejudice and harm."\textsuperscript{22} This "stand-back" approach judges must undertake when analyzing Rule 412 admissibility should also be done when setting the scope of discovery under Rule 26.

The policy behind Rule 26 is to allow parties to engage in a broad scope of discovery in order to accumulate evidence in support or defense of their cases.\textsuperscript{23} The advisory note to Rule 412 is meant to temper Rule 26's broad discovery range by instructing judges to limit the scope of discovery on a plaintiff's sexual history.\textsuperscript{24} The Advisory Committee suggests judges even go one step further by presumptively granting protective orders to plaintiffs who seek them in order to protect them from the defense delving into their sexual histories.\textsuperscript{25} Although Rule 412's advisory note is meant to guide discovery rulings, it is ultimately not binding and the final determination is left to the judge's discretion.

Some sexual harassment plaintiffs have successfully urged courts to bar discovery on their sexual histories. These plaintiffs have argued that because the sexual history evidence the defendant is seeking would be inadmissible under Rule 412, regardless of the broad discovery permitted by Rule 26, the discovery should not take place at all. This approach not only protects the victim's privacy but also further prevents the plaintiff from suffering additional undue distress and potential intimidation.\textsuperscript{26}

The court in \textit{Herchenroeder v. Johns Hopkins University Applied Physics Laboratory} considered the issue of how much discovery on a sexual harassment plaintiff's past sexual activity was appropriate.\textsuperscript{27} \textit{Herchenroeder} noted that when determining what scope of discovery is appropriate in sexual harassment cases, the court should look to both Rule 26 to determine the proposed discovery's relevance and to Rule 412 before sexual history discovery would be permitted.\textsuperscript{28}

When determining the scope of discovery in sexual harassment suits, the court engages in a very precarious balance in order to ensure justice and fairness to all parties in the litigation. Although the plaintiff's privacy should be protected both during the trial and in the discovery process, there is an obvious need that the defense be allowed ample discovery to fully defend the charges alleged against him.\textsuperscript{29}

\textsuperscript{22} Aiken, \textit{supra} note 10, at 570–71.
\textsuperscript{23} \textit{Fed. R. Civ. P.} 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." (emphasis added)).
\textsuperscript{24} \textit{Fed. R. Evid.} 412 advisory committee's note
\textsuperscript{25} \textit{Id.}
\textsuperscript{28} \textit{Id.} at 182.
\textsuperscript{29} Heinz, \textit{supra} note 2, at 529 (The "purpose of discovery is to promote justice by facilitating the truth-seeking process.").
However, in addition to the balancing problem courts must grapple with, there is also the potential for discovery abuse. Discovery can be used to gain a tactical advantage by increasing the other side’s litigation expenses so high as to force either settlement or dismissal. In sexual harassment suits, discovery abuse not only involves an “increasing the cost” strategy, but additionally can lead to the plaintiff enduring a heightened invasion of privacy in order to see his or her suit through to fruition. When considering the scope of discovery, judges should keep in mind this potential of abuse and how it will affect the plaintiff’s bringing forth the sexual harassment claim.

Prior to the amendment of Rule 412, a defense practitioner’s journal encouraged counsel to bring up a plaintiff’s sexual history in the deposition. The journal noted, “One way to illicit (sic) possible assertions (of chastity, in order to be able to introduce impeaching sexual history evidence) by plaintiff is to accuse her in the deposition of prior ‘questionable’ or ‘loose’ sexual conduct.” The journal added that an attorney cannot bring this accusation up “with no basis, but it is fair game to bring up workplace rumors, particularly if the alleged harasser was aware of them . . . . Plaintiffs sometimes react to such questions before their counsel realizes that even simple denials of certain conduct may permit broader examination.”

The discovery process for any litigant can be an arduous experience. But when discovery is not limited in scope by the presiding judge, the process can be particularly unpleasant for sexual harassment victims. As Judge Posner aptly stated, “being deposed is scarcely less unpleasant than being cross-examined—indeed, often it is more unpleasant, because the examining lawyer is not inhibited by the presence of a judge or jury who might resent hectoring tactics.” As Posner notes, discovery takes place in the absence of a judge. With no referee to call the shots, one can only surmise the intrusive abuses and invasions of privacy that occur during discovery. Thus, the presiding judge must be mindful that the underlying purpose behind Rule 412’s “shield” of protection is to

30. Id. at 530.
31. Id. (“[A] sexual harassment suit . . . typically involves hostile, aggressive behavior and sharp questioning of the victim. . . . Many defense attorneys are willing to use the discovery phase of a trial to pressure the complainant.” (footnote omitted)).
32. Id.
33. Id. (quoting Richard G. Moon & Julie Boesky, Discovery Problems and Solutions in Sex Harassment Cases, 463 PLI/Lit 63, 73 (1993)).
34. Id. at 531.
35. Id. (quoting DF Activities Corp. v. Brown, 851 F.2d 920, 923 (7th Cir. 1988)).
36. Aiken, supra note 10, at 566.
37. Howard v. Historic Tours of Am., 177 F.R.D. 48, 51 (D.D.C. 1997) (“[O]ne of the purposes of Fed. R. Evid 412 was to reduce the inhibition women felt about pressing complaints concerning sex harassment because of the shame and embarrassment of opening the door to an inquiry into the victim’s sexual history.”).
encourage sexual harassment victims to come forward with their meritorious claims. The judge should consider applying discovery protections to prevent the above-mentioned types of intimidation tactics from occurring in the first place. The mere fact that the information uncovered in the discovery stage is never presented at trial does not make up for the fact that the victim had to endure invasive, intrusive and intimidating discovery tactics in order to get to the trial stage.\(^{38}\)

Although it is the judge's role to provide discovery protections, plaintiffs' counsel should be mindful that "the procedural safeguards provided by Rule 412 do not automatically apply in the discovery phase of the lawsuit. Accordingly, defense counsel is free to inquire in depositions and interrogatories about the sexual background and sexual predisposition of a plaintiff without concern about maintaining the confidentiality of the relationship."\(^{39}\) Also important is for plaintiffs' counsel to remember that "defendants are borrowing a page from the book of criminal defense attorneys and aggressively using the sexual behavior and attitude of plaintiffs in and out of the workplace to show that the plaintiff welcomed the allegedly offensive conduct."\(^{40}\)

When a judge is asked by plaintiffs' counsel to limit the scope of discovery in sexual harassment cases, the judge must be aware of the policy struggle between Rule 26 and Rule 412. Because there is a history of broad discovery in the ordinary course of litigation,\(^{41}\) most defendants in sexual harassment suits will continue to adhere to this broad discovery unless specifically directed not to. In attempts to obtain unfettered discovery in sexual harassment cases, a defendant will essentially circumvent Rule 412 through invasive and intrusive document requests, depositions and interrogatories.\(^{42}\)

In \textit{Sanchez v. Zabihi}, a district court was asked to consider an interrogatory propounded by the defense which asked plaintiff to provide information regarding "personal, romantic, or sexual advances" that she had made toward other employees over the past ten years.\(^{43}\) The judge found the interrogatory to be overbroad, explicitly noting "the importance of not undermining Rule 412 in discovery and [accordingly] placed limits on the defendant's interrogatories."\(^{44}\)

Although the plaintiff can enable certain discovery protections

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38. Aiken, \textit{supra} note 10, at 560–61 ("As is clear,... civil defendants use the threat of such discovery to intimidate plaintiffs into dropping their cases.");
40. \textit{Id.} at 416.
41. \textit{See Fed. R. Civ. P. 26(b)}.
42. \textit{See Linton, supra note 11, at 190}.
44. \textit{Linton, supra note 11, at 190}.  
under the combined use of Rule 26 and Rule 412, it is not as though sexual harassment defendants are at a complete loss to engage in the necessary discovery to defend themselves from the charges. Defendants have the great weight of Meritor behind them. The Supreme Court's analysis in Meritor provides sexual harassment defendants with a wide array of evidentiary tools, holding that to prove that the plaintiff's workplace conduct was in fact welcoming,⁴⁵ "evidence of sexual behavior and attitudes in the workplace [therefore must be] . . . admissible."⁴⁶ Additionally, defendants can attack the veracity of a plaintiff's claim in order to "weed out false and exaggerated claims."⁴⁷ Further, under Meritor, defendants will always be able to demonstrate the plaintiff's conduct was "welcom[ing]" by introducing evidence such as "sexually provocative speech or dress [or] the giving of an expensive gift."⁴⁸

In the interest of justice, judges must be mindful both of Rule 26 and Rule 412. Defendants have an obvious need to engage in all relevant discovery to defend themselves from the allegations. Plaintiffs have an obvious need to protect their privacy about nonrelevant sexual history and propensities. Courts, in setting the scope of discovery in a sexual harassment suit, must consider the needs of both the plaintiff and the defendant and ultimately keep in mind the policy underlying Rule 412.


Under Federal Rule of Civil Procedure 35, when the mental condition of a party "is in controversy," a court can order the party to submit to a mental examination after a showing of good cause has been made by the party requesting the examination.⁴⁹ Mental examinations, like other methods of discovery, have the potential to be abused by sexual harassment defendants. These compelled mental examinations can ultimately be used to intimidate a sexual harassment victim from either bringing a meritorious claim forward, or if a claim has been brought, from forging ahead with the lawsuit.⁵⁰ Without the court stepping in to provide protections, there is potential for sexual harassment plaintiffs to endure an unfettered psychological and sexual history inquiry that would otherwise be barred by the underlying policy

⁴⁵. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) ("[T]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'").
⁴⁶. Springer, supra note 39, at 431.
⁴⁸. Id. at 34.
⁴⁹. FED R. CIV. P. 35(a).
of Rule 412. Additionally, because the majority of sexual harassment plaintiffs undergo a compelled mental examination alone—without the presence of their attorney, a third party, or even a recording device—these examinations often go unchecked and can be much more invasive than would otherwise be permitted pursuant to the policy underlying Rule 412.

There is little consensus among courts as to when a sexual harassment plaintiff should be compelled to submit to a Rule 35 mental examination. However, this is not to suggest that compelled Rule 35 mental examinations occur as a matter of right. In order for a party to obtain a compelled mental examination of another litigant, it must first demonstrate to the presiding judge that the condition it wishes to examine is in fact “in controversy” per Rule 35’s requirements and additionally must show “good cause” for compelling the mental examination. Once a defendant has made a showing of “in controversy” and “good cause,” presumably a plaintiff will assert that the mental examination is invasive, intrusive on his or her privacy rights and unnecessary; the decision is left to the judge’s discretion whether or not to compel the mental examination.

There is a growing concern that allowing Rule 35’s compelled mental examinations to proceed undermines the policy considerations behind Rule 412. Rule 412 seeks to protect sexual harassment plaintiffs by limiting evidence about their sexual history and propensities. This protection was offered to sexual harassment plaintiffs to encourage them to bring meritorious claims forward. However, allowing defendants to circumvent the Rule 412 shield by allowing the mental examination to move forward without any limits or protections runs afoul of the rule’s very purpose. When a judge considers a motion to compel examination, the judge should determine what value the examination results will add to a factfinder’s decisionmaking. Additionally, the judge should consider protecting the plaintiff’s privacy against what value the defendant claims the examination will yield. Finally, the judge should consider the scope of the proposed examination.

What purpose should a compelled mental examination serve? One

51. See generally id.
52. Id. at 1320.
53. Id. at 1275.
54. FED. R. CIV. P. 35; see Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964) (stating that the party bringing forth the motion to compel must make an “affirmative showing” that the issue is “genuinely in controversy” and “good cause” truly exists).
55. FED. R. EVID. 412 advisory committee's note.
56. See generally Stressman, supra note 50.
57. See id. at 1306–09.
58. Id. at 1309–12.
59. Id. at 1309–13.
purpose in a sexual harassment suit should be to gauge the emotional
distress the plaintiff claims. However, there are multiple purposes for
which the compelled mental examination is used, and some are not
always legitimate. Some defense attorneys use the mental examination as
an opportunity to assess the credibility of the plaintiff and of the specific
claim the plaintiff is asserting. Mental examinations that assess the
plaintiff's credibility are "consistently denied" by courts."  

Mental examinations might give the defendant more information
about the plaintiff's psychological state than he otherwise would have
been able to access or uncover. For instance, if during the examination
the defendant uncovers information that the plaintiff has previously been
sexually abused, the defendant "may choose to use [this] discovered
information... to undermine both the plaintiff's claims of [sexual
harassment] discrimination... and [plaintiff's] claims for emotional
damages."  

The judge needs to assess the examination's purpose while also
keeping in mind that emotional distress and pain are intangible and
difficult to quantify. One should question how the examination will aid
the factfinder, since assessment of a plaintiff's "amount" of emotional
damages, as diagnosed by an expert, is extremely subjective. One
should further consider just how valuable this information is in the
factfinder's determination of the amount the plaintiff should receive as
compensatory damages for his or her emotional distress.  

Typically in sexual harassment suits, a judge will only grant a
compelled mental examination when the plaintiff has put his or her
emotional or mental health at issue. However, there is no apparent
bright-line rule for when and under what circumstances a plaintiff has
put her mental or emotional health at issue. Research findings indicate
that it is normal for plaintiffs to be "distressed by sexual harassment, and
thus, claims of pain and suffering should not necessarily place a plaintiff's
mental health at issue.

60. Id. at 1317 (citation omitted).
61. Id.
62. Margaret Bull Kovera & Stacie A. Cass, Compelled Mental Health Examinations, Liability
Decisions, and Damage Awards in Sexual Harassment Cases: Issues for Jury Research, 8 PSYCH. PUB.
63. Id.
64. Stressman, supra note 50, at 1313.
65. Id.
66. See id. at 1315 ("[M]ental examinations of plaintiffs claiming mental anguish are unlikely to
aid the factfinder in calculating monetary damages. Emotional damages are inherently intangible.").
67. Id. at 1301-02 ("Generally, plaintiffs who seek equitable remedies under Title VII do not
place their mental condition in sufficient controversy to warrant an examination; those seeking tort
remedies generally do." (citations omitted)).
Although there is no bright-line rule on whether compelled mental examinations are appropriate and warranted in a given sexual harassment discovery proceeding, it should be noted that protections and limits can be imposed on the examination that would uphold the policy behind Rule 412. California, for example, has procedures in place that are designed to protect sexual harassment plaintiffs during mental examinations. California courts have given presiding judges authority to allow a plaintiff to bring a tape recorder into the examination. The plaintiff's attorney can object later to the admissibility of impermissible discovery at the trial stage, based on the recording. In contrast, federal rules do not provide plaintiffs with any such protective measures during the mental examination.

Another avenue to protect plaintiffs during a compelled mental examination is to have the examination conducted by a court-appointed, independent psychologist. If the defendant is, in fact, truly interested in getting an accurate psychological assessment of the plaintiff's emotional distress damages, then arguably there should be no objection to a court-appointed psychologist conducting the examination. By contrast, the defendant's psychologist or psychiatrist hired to examine the plaintiff is hardly neutral; he is a "hired gun" conducting an exam that "can often amount to a 'de facto deposition." By appointing a neutral and independent psychologist, the court (and plaintiff) can be assured that the plaintiff will not be subjected to a credibility assessment via the mental examination. This would also ensure that the jury will not be subjected to a "battle of the experts" in assessing the amount of the plaintiff's damages for emotional distress.

Three reasons have been asserted for denying, or at least limiting the scope of, a compelled mental health examination in sexual harassment suits. Vinson v. Superior Court provided two reasons: 1) mental examinations, by their nature, are invasive of a person's "thoughts and thought process"; and 2) allowing unrestricted mental examinations potentially discourages sexual harassment victims from reporting and pursuing meritorious claims because of the fear of further intrusion as a result of the discovery. The court in Vinson also asserted that an unrestricted mental examination may in fact "exacerbate a plaintiff's
emotional distress, thereby contributing to the very problem which the plaintiff seeks to remedy by filing a [sexual harassment] claim." 77

Accordingly, when the judge is presented with a Rule 35 motion to compel a psychological assessment of a sexual harassment plaintiff, there are many factors to consider in making the final determination. The judge should again be guided by the policy considerations of protecting a plaintiff’s sexual history and propensities that underlie the amendment to Rule 412. If the judge finds either that the plaintiff’s emotional distress is genuinely “in controversy” or that the plaintiff has put her emotional health at issue, the judge should then consider whether the compelled examination warrants any protections or limitations to preserve the plaintiff’s privacy interests.

IV. NEW DISCOVERY QUESTIONS POSED BY ELECTRONIC DISCOVERY UNDER RULE 34

Over the past two decades, virtually all companies have gone from paper file cabinets to electronic file cabinets as a result of computers, email and other electronic storage devices. As a result of this transformation into a paperless society, there has been a shift in the way discovery is conducted. Federal Rule of Civil Procedure 34 (Rule 34) governs document production requests. Rule 34 has been construed broadly enough that a “document” also includes electronic information. 78 Thus, parties are entitled to seek electronic discovery (“e-discovery”) the same way they would be able to request a particular document out of a file cabinet under Rule 34. 79

E-discovery can potentially be a “gold mine or a minefield” for sexual harassment plaintiffs. 80 E-discovery requests appear as if they could be infinite, but just as with paper-based discovery, there are still limitations on what parties can seek under Rule 34, specifically pertaining to reasonableness, convenience and expense. 81 However, even with these limitations, there is still a massive amount of potential e-discovery because of the large volume of information now stored on computers, networks, back-up systems and in emails. Requests for e-discovery can quickly become costly because of the large amount of information stored electronically. 82

77. Bales & Ray, supra note 75, at 6.
78. FED. R. CIV. P. 34(a) advisory committee’s note.
82. See Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 570 (N.D. Ill. 2004) (noting the e-discovery request could cost nearly $250,000 to retrieve).
As a result of this high production cost, some courts have devised a cost-shifting scheme whereby the party seeking the e-discovery pays for the production. While the cost-shifting scheme has merit, a problem arises where private parties (e.g., sexual harassment victims) are engaged in litigation with large corporations, and these large corporations seek to shift the cost of e-discovery requests to the plaintiffs. Shifting the cost of e-discovery production could effectively prohibit plaintiffs from bringing forward meritorious claims, simply because the plaintiffs do not have the financial resources to engage in the necessary discovery. In effect, this cost-shifting scheme can be used as a form of discovery abuse or as a way to intimidate plaintiffs from either bringing their claims forward or moving ahead with the litigation.

A leading case on e-discovery, Zubulake v. UBS Warburg, LLC, noted that “[a]s large companies increasingly move to entirely paper-free environments, the frequent use of cost shifting will have the effect of crippling discovery in discrimination and retaliation cases.” The Zubulake decision suggests that cost shifting is only applicable to discovery of documents stored in “inaccessible” electronic formats. However, the cost of restoring and searching such documents can exceed $200,000 when the defendant is a large corporation, as in Wiginton v. CB Richard Ellis, Inc. This large amount has the potential to impede a sexual harassment plaintiff’s suit from moving forward.

Attorneys can be particularly aggressive about going after e-discovery in hopes of finding a smoking gun. Because e-mails tend to be more candid, spontaneous, and informal, there is a hope that vital information can be found within them. E-mails additionally tend to hold “valuable” evidence because: “(1) e-mail users generally produce a large quantity of messages...; (2) the content of e-mail messages tends to be less formal and more likely to contain sentiments unavailable from other sources; and (3) an e-mail is extremely difficult to permanently destroy.” While there is considerable potential to acquire what

83. See Fed. R. Civ. P. 34 (the party providing the requested information typically pays for the cost of production).
85. Id. at 318, 324.
86. Wiginton, 229 F.R.D. at 570.
87. Hon. Shira A. Scheindlin & Jeffrey Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?, 41 B.C. L. Rev. 327, 329 (2000) (After discovery of an email which referred to terminating the plaintiff with the words, “[g]et rid of that tight-assed bitch,” plaintiff’s sexual harassment was settled.).
88. Carey Sirota Meyer & Kari L. Wraspir, E-Discovery: Preparing Clients for (and Protecting Them Against) Discovery in the Electronic Information Age, 26 WM. MITCHELL L. REV. 939, 940 (2000); Marron, supra note 80, at 906-08 (“[I]t is possible that e-mail users may tend to be more open in their correspondence because they are under the mistaken impression that they can simply delete a message that might later seem to be inappropriate or an inaccurate portrayal of their true thoughts.”).
89. Marron, supra note 80, at 906.
UNFOLDING DISCOVERY ISSUES

attorneys hope will be vital information through e-discovery, they most often get thwarted on undue burden and expense objections.90

There are three alternative approaches courts use in determining whether the costs of an e-discovery request will be borne by the requesting party. The first approach was laid out in McPeek v. Ashcroft and is referred to as the "marginal utility approach."91 The marginal utility approach dictates that the more likely it is that a search will turn up critical information, the more fair it is that the responding party should search at its own expense.92 The second approach, as described in Rowe Entertainment, Inc. v. William Morris Agency, Inc., identifies eight factors for the court to consider in the cost-shifting analysis, one of which incorporates the marginal utility test.93 The third approach, emphasized in Zubulake, modifies the Rowe approach to the extent that it interprets the Rowe test as generally favoring cost shifting, which in effect ignores the normal presumption that the responding party should bear the costs of production requests.94

In Wiginton, the court further modified the Zubulake approach "by adding a factor that considers the importance of the requested discovery in resolving the issues of the litigation."95 In Wiginton, plaintiffs filed a class action suit against defendant, CB Richard Ellis, Inc., alleging a "nationwide pattern and practice of sexual harassment."96 The Wiginton plaintiffs sought e-discovery in the form of e-mails and information stored on CB Richard Ellis computers nationwide. Because the cost of complying with this discovery request was estimated to cost CB Richard Ellis close to $250,000, the court entertained a cost-shifting analysis to determine which party should bear the costs of the e-discovery request.97

In keeping with the three alternate approaches outlined above, the Wiginton court ultimately looked at eight factors in determining whether to shift the e-discovery production costs to the requesting party, the plaintiffs.98

90. Meyer & Wraspir, supra note 88, at 944. Just like other discovery, electronic data is discoverable only if "the request satisfies the requirements of Rule 26.... [T]he information must be relevant to the subject matter of the lawsuit, not unnecessarily cumulative or duplicative; the burden or expense must not outweigh its benefit; and it must not be subject to a claim of privilege nor protected by the work product doctrine." Id.
92. Id.
96. Id. at 569.
97. Id. at 570.
98. Id. at 573–74. The eight factors the court considered were:
(1) the likelihood of discovering critical information; (2) the availability of such information from other sources; (3) the amount in controversy as compared to the total cost of
As noted by the Wiginton court, because the presumption is that the responding party pays for the discovery requests, be it paper or electronic information being sought, the responding party is the one who has the burden to demonstrate that the costs should in fact be shifted to the requesting party. In evaluating the eight factors, the court noted that the plaintiffs, who were former employees of CB Richard Ellis, were clearly at a disadvantage compared to the large corporation in terms of financial resources. However, the Wiginton court ultimately concluded that the plaintiffs should bear a portion of the discovery costs in restoring the electronic storage information tapes and transferring the data on the tapes to an electronic data viewer.

Wiginton is a prime example of the problems sexual harassment plaintiffs will likely face in the future as our society moves toward electronic storage systems and away from tangible paper storage. While the cost-shifting scheme has merit, particularly in cases like Wiginton where document production costs can be upwards of $250,000, it must be noted that this will likely have a crippling impact on sexual harassment claims being brought forward in the first place. Additionally, the potential for discovery abuse and intimidation increases if the defendant threatens or pursues a cost-shifting motion for e-discovery requests.

CONCLUSION

Rule 412 is an evidentiary rule that is not designed to protect parties from discovery abuses. Although the Advisory Committee note to Rule 412 suggests that judges should keep in mind the rule's underlying purpose when deciding discovery limits, judges by no means are bound to protect plaintiffs through these limitations. Further, because the scope of discovery is quite liberal, allowing parties to obtain discovery regarding any matter relevant to the claim or defense of any party, parties are able to engage in broad discovery which may not ultimately be admissible at trial. In the context of a sexual harassment suit, this broad discovery may subject the plaintiff to a grueling experience that some suggest is as

production; (4) the parties' resources as compared to the total cost of production; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; (7) the importance of the requested discovery in resolving the issues at stake in the litigation; and (8) the relative benefits to the parties of obtaining the information.

Id. at 573.

100. Id. at 576; accord Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 317-18 (S.D.N.Y. 2003) (noting that cost-shifting might lead to a crippling effects on plaintiffs bringing forward meritorious claims and thus undermine "the strong public policy favoring resolving disputes on their merits"); see also Williger & Wilson, supra note 81, at 61.

101. Wiginton, 229 F.R.D. at 577 (requiring plaintiffs to pay seventy-five percent of the discovery costs and defendants to bear the remaining twenty-five percent).

emotionally distressing as the harassment itself.\textsuperscript{103}

If, as a form of protection to sexual harassment plaintiffs, Rule 412 is only going to come in after the invasive discovery has already occurred, sexual harassment victims might hesitate to come forward with their claims in the first place, thereby contravening the policy underlying Rule 412's expansion to civil suits. Rule 412 is a reactive rather than proactive form of protection for sexual harassment plaintiffs. Thus, while the plaintiff's privacy regarding his or her sexual history has already been invaded during the discovery process, Rule 412 as a reaction will step in and bar that information from being admitted at trial. Judges must be mindful that, "[a]lthough Rule 412 is a rule controlling the admissibility of evidence rather than its discoverability, Rule 412 must inform the proper scope of discovery in [a] case."\textsuperscript{104}

\textsuperscript{103} See Bell, \textit{supra} note 6, at 294.