



Evidence of Plaintiff's Prior Conduct in Sexual Harassment Cases

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OGLETREE DEAKINS (HOUSTON)

#MeToo Evidence

- ▶ Asia Argento accuses Harvey Weinstein of sexual harassment and assault.
- ▶ Should she be allowed to *discover* evidence of:
 - ▶ Prior accusers?
 - ▶ Prior complaints?
 - ▶ Prior settlements?
- ▶ Should she be allowed to introduce this evidence?



What About #SheToo?

- ▶ October 2017: Asia Argento alleges that Harvey Weinstein raped her at Cannes Film Festival in 1997.
- ▶ Late 2017: Argento privately settles her own sexual assault claims.
- ▶ May 2018: Argento gives speech at Cannes Film Festival regarding Weinstein and sexual assault in the industry.
- ▶ August 21, 2018:
 - ▶ Story breaks of Argento's \$380,000 settlement with Jimmy Bennett.
 - ▶ Argento denies accusation:
 - ▶ "I have never had a sexual relationship with Bennett."
 - ▶ "[D]eeply shocked and hurt having read the news that is absolutely false."



What About #SheToo?

▶ August 22, 2018:

TMZ NEWS SPORTS VIDEOS PHOTOS CELEBS TOURS W

Asia Argento and 17-Year-Old Boy in Bed in Sexual Encounter

ASIA ARGENTO IN BED WITH 17-YEAR-OLD BOY ... In Sexual Encounter

16.9K 4,658 8/22/2018 1:00 AM PDT

EXCLUSIVE



Asia Argento says she did not have sex with then 17-year-old Jimmy Bennett, but a photo and various text messages between Argento and a friend tell a very different story ... she flat-out says she had sex with him.

Verizon LTE 4:37 PM 27%

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Like which things are facts or not facts? It's an annoying question but I need to have a clear vision of what angles we have to send some folks to get good intel for us
MON 4:32 AM

The public knows nothing, only what NYT wrote. Which is one sided. The shakedown letter. The horny kid jumped me
MON 4:32 AM

So it was rape? Or an attempted sexual action?
MON 4:33 AM

I had sex with him it felt weird. I didn't know he was a minor until the shakedown letter.
MON 4:33 AM

Verizon LTE 4:36 PM 27%

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It's beyond me. It's unfathomable
8 HR AGO

You worked with him previously how did the age thing escape?

I mean 16 is the age of consent in most countries around the world

So I was actually shocked about the 17 thing
8 HR AGO

15 in France and Italy
8 HR AGO

Oh whoa
8 HR AGO

When I was 17 I was with a 33 year old man for years

I had just turned 17

Verizon LTE 4:37 PM 27%

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Either one is good enough to show You actively frowned upon his advances
MON 4:41 AM

No it was all on Snapchat. Disappeared

I didn't report because I always felt bad for this Hollywood failed child actor, a casualty of the machine, of his parents

I have 80 pages on him by a PI that Anthony hired
MON 4:44 AM

Yeah we don't always think of ourselves in those time periods.
MON 4:44 AM

All of Anthony's emails pushing me to accept to pay. My emails with Carrie where we disagreed with that

What's Relevant, Anyway?

▶ Harassment Elements:

1. Employee is a member of a protected class;
2. Employee subject to unwelcome harassment;
3. Harassment based on membership in a protected class;
4. Harassment affected a term or condition of employment; and
5. The employer know or should have known of the harassment and failed to take prompt remedial action.

▶ Elements typically challenged:

- ▶ Unwelcome.
- ▶ Did not affect a term or condition because conduct was not severe or pervasive (e.g., not subjectively offensive).



What's Relevant, Anyway?

- ▶ *Meritor Savings Bank v. Vinson*, 457 U.S. 57 (1986).
 - ▶ “Gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.”
 - ▶ “While ‘voluntariness’ in the sense of consent is not a defense to such a claim [of sexual harassment], it does not follow that a complainant’s sexually provocative speech or dress is not relevant as a matter of law in determining whether he or she found particular sexual advances welcome. To the contrary, such evidence is obviously relevant.”
 - ▶ “While the District Court must carefully weigh the applicable consideration in deciding whether to admit evidence of this kind, there is no per se rule against its admissibility.”
 - ▶ Correct inquiry is whether a plaintiff “by her [or his] conduct” indicated that the alleged sexual advances were unwelcome.
- ▶ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).
 - ▶ “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”
 - ▶ Review the alleged victim’s past conduct in determining whether the accused’s behavior constitutes sexual harassment.

Scope of Discovery

- ▶ FRCP 26

- (b) Discovery Scope and Limits.

- (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is **relevant to any party's claim or defense and proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

- ▶ Removed “reasonably calculated.”

- ▶ Proportionality – whether discovery has reached a point of diminishing returns.



Rape Shield Rule

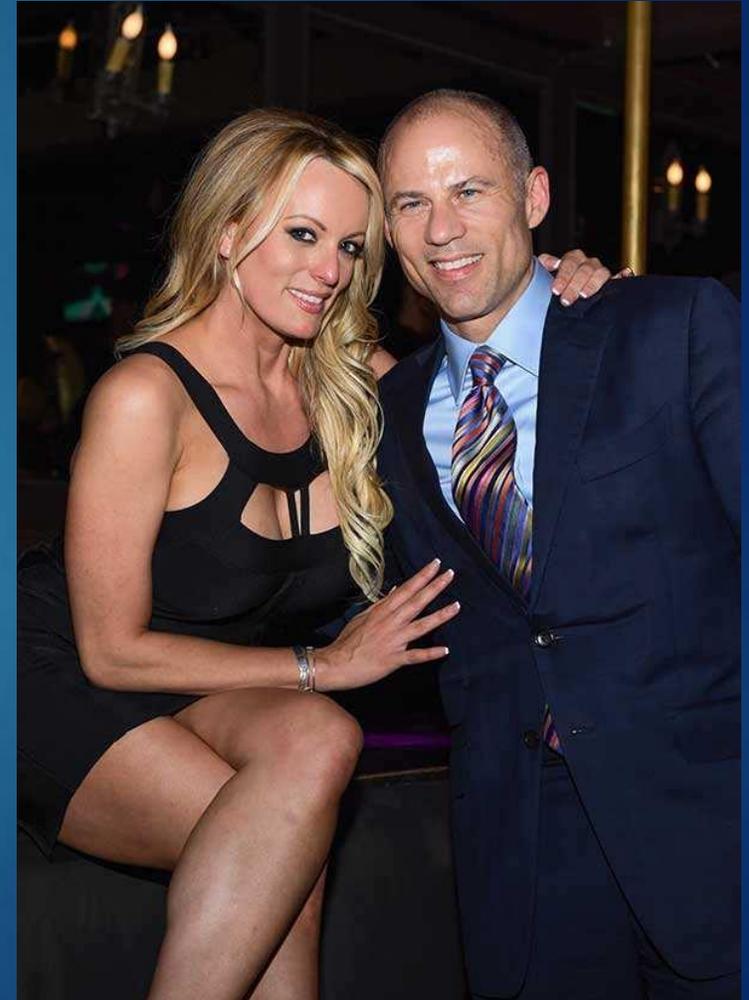
► FRE 412

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

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

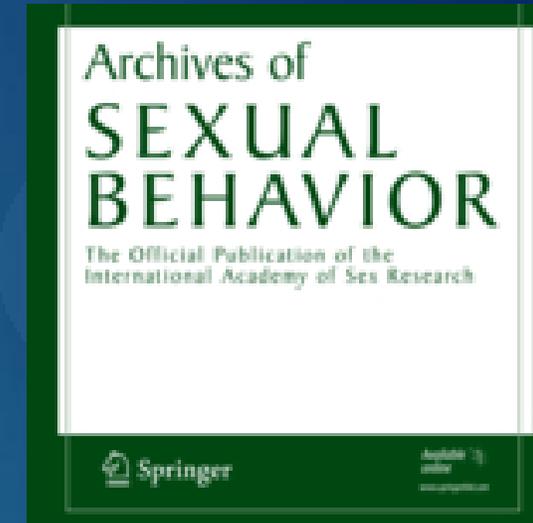
(b) Exceptions.

- (1) In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.



Is Past Sexual Behavior Discoverable?

- ▶ Yes, and is broader than what is admissible at trial but still generally confined to workplace conduct.
 - ▶ Plaintiff can open door to private conduct if discussed in the workplace.
- ▶ Still needs to be relevant to claims and defenses in the lawsuit.
- ▶ FRE 412 provides boundaries for discovery, Advisory Committee Notes:
 - ▶ In order **not to undermine the rationale of Rule 412** ... courts should enter appropriate orders pursuant to Fed.R.Civ.P. 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. **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-workplace conduct will usually be irrelevant.**



Is Past Sexual Behavior Discoverable?

- ▶ *Kroontje v. CKE Restaurants, Inc.*, 2014 WL 1513895 (D.S.D. 2014).
 - ▶ Court granted motion to compel interrogatory answers to the following: “State whether, prior to you being 16 years old, you have communicated with any individuals over the age of eighteen for the purpose of beginning or continuing a dating or sexual relationship. If so, state the names, dates of birth, and current contact information, including addresses and telephone numbers, for each individual with whom you have such communications as well as the dates of each such communication.”
 - ▶ Plaintiff objected based on FRE 412, but court found FRCP 26 applied because of discovery stage and required plaintiff’s answer.
 - ▶ Employer argued it went to plaintiff’s ability to conceal relationships.

Is Past Sexual Behavior Admissible?

- ▶ Common Issues:
 - ▶ Past behavior in the workplace
 - ▶ Past behavior outside the workplace
 - ▶ Viewing porn at work
 - ▶ Dress
 - ▶ Electronic messaging



Past Behavior in Workplace

- ▶ *Savage v. City of Lewisburg, Tenn.*, 2014 WL 5089940 (M.D. Tenn. 2014)
 - ▶ Allowed admission of plaintiff's prior sexual behavior involving a co-worker (and which took place in the workplace for purposes of "welcomeness" determination. Did not allow admission of private sexual conduct. Proper inquiry is, "What was the workplace conduct?" Not, "What is the private sexual relationship?"
- ▶ *Staples v. Delavan Inc.*, 2008 WL 5215130 (N.D. Iowa 2008)
 - ▶ Allowed admission of plaintiff's frustration that alleged harasser was paying attention to another female employee and not her, plaintiff's sitting in alleged harasser's lap at a company event, plaintiff's comments about her husband's inadequacy in bed, her use of sex toys, and having a "cauliflower crotch."



Past Behavior Outside of Workplace

- ▶ *Dufresne v. J.D. Fields and Co., Inc.*, 2001 WL 30671 (E.D. La. 2001).
 - ▶ Outside-of-work sexual relationship was admissible to show that employee's true reason for resigning was to return to California to maintain her relationship.
- ▶ *E.E.O.C. v. New Breed Logistics*, 2013 WL 10129293 (W.D. Tenn. 2013).
 - ▶ Court did not allow social media posting by plaintiff in which plaintiff used sexually-charged language because "private" use of such language has no bearing on whether such language would be offensive in the workplace.
- ▶ *Wolak v. Spucci*, 217 F.3d 157, (2d Cir. 2000).
 - ▶ Out of work sexual experiences (e.g., presence at two parties where porn was shown and "two or three" occasions where plaintiff watched others having sex) of plaintiff should not have been admitted because they were unfairly prejudicial.

Viewing Porn at Work

- ▶ *Dufresne v. J.D. Fields and Co., Inc.*, 2001 WL 30671 (E.D. La. 2001).
 - ▶ Plaintiff's viewing of sex on the internet on her office computer and her email of a sex scene to her manager was admissible because it took place at work and was similar to other alleged harassing conduct.
 - ▶ Defendant contended that plaintiff participated in the behavior she claimed was harassing.



Dress

- ▶ *Jaros v. LodgeNet Entertainment Corp.*, 171 F. Supp. 2d 992 (D.S.D. 2001).
 - ▶ Evidence of plaintiff's manner of work-place dress that accentuated her figure was not admissible because it was outweighed by the danger of unfair prejudice.
 - ▶ Alleged harassing comments by supervisor had nothing to do with plaintiff's dress.



Electronic Messaging

- ▶ *Ogden v. All-State Career School*, 299 F.R.D. 446 (W.D. Pa. 2014).
 - ▶ Employer is entitled to limited discovery of electronic communications, but not total access to social media communications.
 - ▶ Plaintiff ordered to produce electronic communications which: (1) discuss or relate to the underlying workplace conduct and/or (2) his emotional state of mind during and after the time of employment and any cause(s) attributable to that emotional state of mind.
- ▶ *Mackelprang v. Fid. Nat. Title Agency of Nevada, Inc., et al.*, 2:06-CV-00788-JCM, 2007 WL 119149 (D.Nev. Jan. 9, 2007).
 - ▶ Plaintiff compelled to produce MySpace communications which contained statements made by the plaintiff and witnesses relating to the subject matter of the case (e.g., workplace conduct).





Questions?

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