Evidence Issues in Employment Cases ALI-ABA and Georgetown CLE

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Evidence Issues in Employment Cases
ALI-ABA and Georgetown CLE
Georgetown University Law Center
February 8, 2007

Professor Lynn McLain, University of Baltimore

I. The Purposes Underlying the Rules .............................................. 1
   A. Purposes of the Rules of Evidence Altogether: Fairness, Justice, and Efficiency ................................................. 1
   B. The Most Fundamental Rule: Only Relevant Evidence is Potentially Admissible ................................................. 1
   C. The "Clean-Up Batter," a Final Shot at Exclusion, Being a Summary of the Considerations That Have Led to Other, More Specific Rules of Exclusion of Relevant Evidence .................. 1
   D. Examples of 401/403 Analysis ................................................ 1
      1. When Are an Employer’s Agent’s Remarks “Stray Remarks” that Ought Not Be Considered Against the Employer? ......................... 2
      2. Should the Court Accept Proffered Stipulations Not Agreed to By Proponent of Evidence Stipulated to? ......................... 3

II. Specific Rules Regarding Character Evidence and Evidence of Other Acts ... 3
   A. Character Evidence in General ............................................. 3
      • Character Evidence Road Map ........................................... 4
   B. Rules 404 and 406 .............................................................. 5
      1. The Propensity Rule of Exclusion ....................................... 6
      2. Reasons for the Propensity Rule ....................................... 6
      3. Waiver of Protection: “Sweeping Claims” .......................... 6
4. Why Evidence of Other Acts, Habit or Business Routine May Be Admissible under 404(b) and 406 .......... 7

C. Admissibility under Rule 404(b) of Evidence of Other Acts for a Non-Propensity Purpose .......................... 8

D. When Evidence of “Other Acts” is Offered, What Criteria Must Be Satisfied? ........................................ 8

   1. Relevance to a Contested Issue ................................ 8

   2. Standard of Proof .............................................. 9

   3. Scrutiny under Rule 403 ......................................... 9

   4. Limiting Instruction .............................................. 10

E. Rule 415: Special Rule Tipping toward Admissibility of Evidence of Other Sexual Assaults by Civil Defendant .......................... 11

F. Rule 412: Special Rule of Inadmissibility of Other Sexual Conduct by Plaintiff ........................................ 14

   1. Procedure ........................................................... 15

   2. Manner of Dress, etc. ............................................. 15

   3. Rule 412 Tips Against Admissibility, But Evidence of Plaintiff’s Behavior at the Defendant’s Workplace is Likely to Come In ...................................................... 18

   4. How Does Rule 26 Broad Discovery Work as to Rule 412 Information? ................................................. 19

G. Intent or Mens Rea of Alleged Perpetrator .......................................................... 19

H. When, If Ever, Is Character an “Essential Element” of a Claim or Defense, under Rule 405(b)? ................................. 20

   • Judge Grimm’s Chart regarding Character Evidence .................................................. 21
III. Hypotheticals

IV. Impeachment by Evidence of One Character as to Truthfulness

A. Evidence Regarding a Witness's Character for Truthfulness is Admissible to Prove Propensity to Lie (or to Tell the Truth): Rule 404(a)(3)

B. Whom Can One Impeach?

C. Impeachment by Prior Convictions: Rule 609

1. Universe of Impeachable Crimes

2. Manner of Proof

D. Rule 608(a): Reputation or Opinion Evidence Regarding the Witness's Character for Truthfulness

1. Proof May Be by Only Either Reputation Testimony or Opinion Testimony

2. Reputation Testimony

3. Opinion Testimony

4. Cross-Examination of Character Witness: Inquiry into Specific Instances, Rule 608(b)(2), For a Limited Purpose

E. Prior Bad Acts Not Having Resulted in Conviction: Rule 608(b)

• Judge Grimm's Chart regarding Impeachment

V. Hearsay Issues

A. Is the Proffered Evidence Hearsay?

B. If It is Hearsay, Does It Fall Within an Exception (Rules 801(d), 803, 804, and 807) to the Hearsay Rule?

1. Admission of a Party Opponent
2. Determinations by EEOC: Admissibility Under Rule 803(8)(C)? ............................................. 34

C. Double/Multiple Hearsay ...................................................... 36

VI. Privileges ........................................................................... 36

A. Psychotherapist-Patient Privilege ............................................. 36

B. No Medical Peer Review Committee Privilege at Federal Common Law ........................................ 37

C. No Academic Peer Review Privilege at Federal Law .............. 37

D. Effect in Federal Court of Privileges Recognized Only by State Law? ............................................. 37

E. Waiver by Inadvertent Disclosure When Ordered to Produce Electronically-Stored Information, E-Mail, Etc., Pre-Privilege Review? ................................................................. 38

F. When Does Use of Company Computer Not Waive Employee’s Privilege? ........................................ 38

VII. Spoilation of Evidence: Adverse Inference -- Employer Obligation to Preserve Possible E-Mail Evidence When Facing Litigation .............................. 38
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I. The Purposes Underlying the Rules

A. Purposes of the Rules of Evidence Altogether: Fairness, Justice, and Efficiency

Rule 102 PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

B. The Most Fundamental Rule: Only Relevant Evidence is Potentially Admissible

Rule 402 RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

C. The "Clean-Up Batter," a Final Shot at Exclusion, Being a Summary of the Considerations That Have Led to Other, More Specific Rules of Exclusion of Relevant Evidence

Rule 403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

D. Examples of 401/403 Analysis: How Much Probative Value Does this Evidence Add to the Case? Does It Carry a High Risk of Unfair Prejudice? Is It Worth the Time It Will Take?
1. When Are an Employer’s Agent’s Remarks “Stray Remarks” that Ought Not Be Considered against the Employer?

Generally, the courts consider the following when evaluating the relevancy of “stray remarks” to an allegedly discriminatory employment decision:

(a) Whether the disputed remark was made by the decision-maker (not merely an agent of the employer uninvolved in the challenged decision);

(b) Whether the disputed remark was isolated or part of a pattern of biased comments;

(c) Whether the disputed remark was made close in time to the challenged decision; and

(d) Whether the disputed remark was ambiguous or clearly reflective of discriminatory bias.


*Tooson v. Roadway Express, Inc.*, 47 Fed. Appx. 370, 375 (6th Cir. 2002) (no error in jury instruction: “You are not to consider in your deliberations any remarks, comments, or characterizations of plaintiff or plaintiff’s employment with Roadway Express, Inc. unless plaintiff has shown by a preponderance of the legal evidence that the remarks, comments, or characterizations were made by an employee of Roadway Express, Inc. who had decision-making authority and that the remarks, comments, or characterizations were related to defendants’ decision to discipline or discharge the plaintiff. Unless or until you find that plaintiff has shown this, you are not to consider any stray remarks, comments, or characterizations in your deliberations. Remarks, if any, made by those who played a meaningful role in the decision to discipline or discharge plaintiff, however, are relevant.”).

*McMillan v. Massachusetts SPCA*, 140 F.3d 288, 300 (1st Cir. 1998) (a clear connection between the statement or action and the employment decision is needed to make it relevant even if made by the decision maker, but no abuse of discretion in admitting remarks here; no error, let alone plain error, in following jury instruction: “Take, as an example, an issue in this case that might be relevant to the issue of intent: You heard that Dr. Thornton made one or more remarks that might have been construed as derogatory to women. If you believe that he did so, you might conclude that such remarks reflected a personal attitude on his part about the value of women generally or you might conclude that the
remark was random and completely out of character. If you believe the former, you might decide that a given remark is evidence of a discriminatory mindset and infer from it that Dr. Thornton’s decisions regarding Dr. McMillan’s salary were influenced by discriminatory intent. If you believe the latter, the remark would have no value as evidence of Dr. Thornton’s motivations and you would disregard it in reaching a verdict.”).

• *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 633-34 (8th Cir. 1997) (supervisor and principal decision-maker’s statements “that white boy better learn who he’s messing with, he better get his act together” were *more than mere stray remarks*, and “directly suggests the existence of bias; no inference is necessary”).

• *Saffa v. Oklahoma Oncology, Inc.*, 405 F.Supp.2d 1280, 1288-90 (N.D. Okla. 2005) (denying defendant’s motion to exclude alleged harasser’s comments referring to sexual matters; although harasser may also have made such sexual comments in the presence of men, the court cannot find either that they were “not gender based or free from sexual animus”).

2. Should the Court accept Proffered Stipulations Not Agreed to By Proponent of Evidence Stipulated to?

• *Old Chief v. United States*, 519 U.S. 172 (1997) (Souter) (5 to 4) (in prosecution for possession of a firearm by a convicted felon, abuse of discretion to reject defense stipulation to the fact of the prior conviction and instead admit the full record of a prior judgment, when the name or nature of the prior offense [here assault causing serious bodily injury] raises the risk of a verdict tainted by improper considerations). In assessing the probative value of a particular piece of evidence, “evidentiary alternatives” may be compared, 117 S.Ct. at 682, but “with an appreciation of the offering party’s need for evidentiary richness and narrative integrity in presenting a case. . . .” *Id.* at 651.

• In *Briggs v. Dalkon Shield Claimants Trust*, 174 F.R.D. 369 (D.Md. 1997), a thoughtful decision by Judge Grimm, similar factors are set out regarding whether the court should accept a proffered stipulation by the defendant in a civil case.

II. Specific Rules Regarding Character Evidence and Evidence of Other Acts

A. Character Evidence in General

As the following chart illustrates, character evidence may be offered either as *substantive evidence* (Rules 404-406 and 412-415) or only as to *credibility* (impeachment or rehabilitation, Rules 608–609, and 806).
**CHARACTER EVIDENCE ROAD MAP**

<table>
<thead>
<tr>
<th>Substantive Evidence</th>
<th>Credibility Only</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> General rule of exclusion (the “propensity rule”) 404(a) &amp; (b)</td>
<td><strong>Character as to truthfulness &amp; veracity</strong></td>
</tr>
<tr>
<td><strong>2.</strong> Exceptions to propensity rule</td>
<td>1. 608(b) “prior bad acts”</td>
</tr>
<tr>
<td>a. 406 individual’s habit/routine of a business</td>
<td>2. 608(a) character witnesses re: t &amp; v</td>
</tr>
<tr>
<td>b. 404(a)(1) &amp; (2) criminal cases only, when accused opens door</td>
<td>3. 609 prior convictions</td>
</tr>
<tr>
<td>c. 412 sexual offense/ harassment victims’ prior sex with defendant</td>
<td>4. 404(a)(3) merely makes such use legitimate</td>
</tr>
<tr>
<td>d. 413-415 sexual assault defendants’ other acts of sexual assault/child molestation (415 applies in civil cases)</td>
<td>5. 806 hearsay declarants</td>
</tr>
<tr>
<td><strong>3.</strong> Purposes other than proving propensity</td>
<td></td>
</tr>
<tr>
<td>a. 405(b) character an essential element . . . (party must prove not merely an act, but character of a person . . .)</td>
<td></td>
</tr>
<tr>
<td>b. 404(b) limited permissible purpose, subject to 403 (see also 105)</td>
<td></td>
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</tbody>
</table>
B. Rules 404 and 406

Rule 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

[(1) and (2) exceptions in criminal cases only]

(3) Character of witness.

Evidence of the character of a witness [with regard to character for truthfulness, and thus credibility], as provided in Rules 607, 608, and 609.1

(b) Other Crimes, Wrongs, or Acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,2 opportunity, intent,3 preparation, common scheme or plan, knowledge, identity,4 or absence of mistake or accident5 [notice requirement in criminal cases].

1 This cross-reference is to Rule 608(a), which permits reputation or opinion character witnesses' testimony as to character for truthfulness of either a testifying witness or, Rule 806, a hearsay declarant; Rule 608(b), which permits questioning of the witness herself about her prior acts (that did not result in convictions) that are probative of her untruthfulness; and Rule 609, which permits questioning of a witness about certain of her prior convictions.

2 E.g., Johnson v. Hugo's Skateway, 974 F.2d 1408, 1413 (4th Cir. 1992) (en banc) (no abuse of discretion to admit evidence of a 1979 consent order on limited question whether defendant had posted signs or instructed its employers as to nondiscriminatory practices, as required by the order; evidence was relevant to defendant's motive and intent in actions taken against plaintiffs).

3 E.g., Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130 (4th Cir. 1988) (harmless error to exclude evidence of racial slurs, which were relevant to show racial animus); Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69 (4th Cir. 1987) (race discrimination).

4 E.g., Morgan v. Foretich, 846 F.2d 941, 945 (4th Cir. 1988) (in civil suit for injuries caused by alleged sexual abuse of child of third marriage, reversible error to exclude evidence of sexual abuse of defendant's child by second marriage, which tended to identify defendants as abusers since only they had access to both girls).

5 E.g., Westfield Ins. Co. v. Harris, 134 F.3d 608, 613-15 (4th Cir. 1998) (abuse of discretion and reversible error in excluding evidence of seven other fires as to which insured had made claims, which were probative of whether the fire in instant case was accidental; trial court misapplied Fed. R. Evid. 403 in excluding evidence on basis of "unfair prejudice"); Morgan v. Foretich, 846 F.2d 94, 945 (4th Cir. 1988) (in civil suit for injuries caused by alleged sexual abuse of child of third marriage, reversible error to exclude evidence of sexual abuse of defendant's child by second marriage, which negated several defenses, including that child plaintiff's injuries were self-inflicted).
1. Both the First Clause of 404(a) and the First Sentence of 404(b) Codify the “Propensity Rule” of Exclusion

The “propensity rule” generally excludes evidence of a person’s other acts or a person’s character or character trait offered as substantive evidence to show that the person acted “in character” on the occasion at issue in the case. It applies to all character evidence, whether of reputation, opinion, or prior specific conduct.

When proof of character is offered merely to show that a party is a “good” or “bad person, either in general or with regard to a particular trait, and thus as circumstantial evidence that the person acted “in character” and did the “right” or “wrong” thing in the incident at issue at trial, it is inadmissible.

Q: Hypo #1: P v. D-Employer for sexual harassment (including unwanted touching) of P by S-Supervisor. P offers evidence that S had a reputation for being a bullying “womanizer” and that other victims had (months before the incident involving P) reported S’s unwanted sexual touching of them to D. “Objection, propensity rule!” In response, P’s counsel states that the evidence is offered to prove that S also harassed P. Ruling under Rule 404? [Note that Rule 415 might lead to a different ruling, if the incidents qualified as sexual assaults. See pp. 11-13.]

2. The Reasons for the “Propensity Rule” of Exclusion

a. Not a lack of all probative value, but rather a fear that the jury will overvalue the character evidence . . .

The United States Supreme Court has noted:

The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.


b. . . . and a recognition that mini-trials, within the trial on the current claim, as to how a person conducted herself at other times in the past, will devour court time. They will also confuse and distract the fact-finder from the issues at hand.
3. Waiver of Protection of the Propensity Rule: "Sweeping Claims"

a. When a party or witness makes a sweeping claim of innocence, such as by testifying on direct, "I've never touched a woman other than my wife," this claim may open the door to other acts evidence that would not otherwise have been admissible. E.g., Walder v. United States, 347 U.S. 62 (1954); United States v. Johnson, 634 F.2d 735, 737-38 (4th Cir. 1980).

b. Of course, the opposing party's counsel ought not be permitted to open the door by cornering the witness into making such a claim.

c. But that witness's counsel's making such sweeping claim in opening statement will open the door.

4. Why Rule 404(b)'s Second Sentence, the Inapplicability of the Propensity Rule Regarding Evidence of "Other Acts" that Have Special Relevance to a Contested Narrower Issue in the Case?

a. Increased probative value: more narrowly tailored, and to a genuine, not merely formal, issue in the case.

b. Consequently, less "unfair" prejudice.

c. The increase in probative value may make the consumption of time, necessary to hear the evidence, well spent.

Cf. Rule 406: evidence rising to the level of an individual's habit or a business's or other organization's routine practice is admissible to prove action in conformity therewith.6 Again, the evidence has increased probative value as it regards a routine response to a repeated, specific situation. E.g., smoking cigarettes to the filter; putting one's belt on from left to right; routinely optically scanning certain records and destroying paper copies. . . .

6 Rule 406 reads:

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
C. Admissibility under Rule 404(b) of Evidence of Other Acts for a Non-Propensity Purpose

Rule 404(b) is captioned, “Other Crimes, Wrongs, or Acts.” One need not fit the evidence under 404(b) if the evidence is not of “other” acts.

For example, circumstantial evidence that is relevant to placing a criminal accused at the scene of the crime, or as having an instrumentality or fruit of the crime, is admissible (subject to Rule 403) to prove the defendant’s commission of the charged crime, even though it coincidentally proves the defendant’s commission of another crime. It is, under these circumstances, not considered to be evidence of acts “other” than the one charged. See, e.g., United States v. Grimmond, 137 F.3d 831-33 (4th Cir. 1998) (evidence that defendant shot two people was properly admitted to prove he had a firearm).

Q2. In the same case as in Hypo #1, (p. 6), P offers evidence that her sweat pants and sports bra were stolen from her locker in the company gym and found in S’s apartment. “Objection, propensity rule! P is accusing S of another bad act, theft!” Response as attorney for P?

Thus, evidence of the defendant’s acts taken towards the plaintiff, offered to show the defendant’s discriminatory intent or motive, are not “other acts.”

D. When Evidence of “Other Acts” Is Offered, What Criteria Must Be Satisfied?

1. The “Other Acts” Evidence Must Be Relevant to a Contested Issue in the Case.

Rule 404(b)’s use of the nonlimiting term, “such as,” has been construed to mean that evidence of a person’s “other” acts, wrongs, or crimes may be admitted (subject to the court’s exercise of its discretion under Rule 403) as long as it is offered as proof of any issue in the case other than merely that the individual’s conduct in question at trial conformed to his or her past character. E.g., United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978) (“The draftsmen of Rule 404(b) intended it to be construed as one of ‘inclusion,’ and not ‘exclusion.’ They intended to emphasize admissibility of ‘other crime’ evidence. This emerges from the legislative history which saw the ‘exclusionary’ approach of the Supreme Court version of Rule 404(b) notified.”).

See, e.g., United States v. Sovie, 122 F.3d 122, 126 (2d Cir. 1997) (no abuse of discretion for trial court to permit ex-wives to testify about
defendant's abuse of them, to corroborate victim's testimony regarding what he had told her, which supported victim's belief that defendant intended to harm her; Collins v. Straight, Inc., 748 F.2d 916, 920-21 (4th Cir. 1984) (in false imprisonment case, no error to admit evidence of defendant's actions towards other patients at drug treatment facility, seen by plaintiff, with regard to issue of plaintiff's consent to stay there; also no error to admit, on issue of punitive damages, evidence that defendant held others against their will). See also Swentek v. USAIR, Inc., 830 F.2d 552, 561 n.6 (4th Cir. 1987) (evidence of plaintiff flight attendant's past sexual behavior was properly admitted as relevant to her claim that she suffered severe emotional distress from co-employee's sexual harassment by foul language and other conduct).

Q3. In Hypo #1 (p. 6), suppose that in answer to the D's objection, P's counsel responds that the evidence of the other women's complaints of harassment by S is offered to prove notice to D-Employer of S's misconduct?

• See, e.g., Griffin v. City of Opa-Locka, 81 Empl. Pract. Dec. ¶ 40,779 at pp. 17,305, 17,314-15, 2001 U.S. App. LEXIS 18564 (11th Cir. 2001) (evidence of supervisor's sexual harassment of others was properly admitted as relevant to issue of defendant-employer's deliberate indifference to and condonation of his conduct, as well as arguably relevant to one or more 404(b) purposes with regard to defendant-supervisor himself); Deters v. Equifax Credit Information Services, Inc., 77 Empl. Prac. Dec. ¶ 46,286 at 99,272 (10th Cir. 2000) (evidence of perpetrator's sexual harassment of another female employee than plaintiff was properly admitted to show notice to employer).

2. Standard of Proof: Huddleston v. United States, 485 U.S. 681, 689 (1988) held that the proponent of the evidence must present only enough evidence to permit a reasonable jury to find, under Rule 104(b), by a preponderance of the evidence, that the other acts were committed by the person in question. The trial judge need not be persuaded of the truth of the evidence. (The strength of proof, however, may influence the trial court's Rule 403 ruling.)

3. The Evidence Must Survive Scrutiny under Rule 403: In making a determination whether to exclude other acts evidence under Rule 403, a judge should consider questions of the following type:

• How compelling is the proof of the other acts?
If the other events allegedly happened long ago, how probative are they?

Can the alleged perpetrator be expected to adequately defend against them?

How long would hearing the evidence on these matters take?

Of how much help will this evidence likely be to the jury in properly resolving the issue before it?

See, e.g., Rudin v. Lincoln Land Community College, 420 F.3d 712 (7th Cir. 2005) (discussing "direct evidence" of discriminatory intent — an admission that defendant is acting based on prohibited classification — and "circumstantial evidence" of discriminatory motivation).


First, there was evidence that Tyson’s plant manager, who made the disputed hiring decisions, had referred on some occasions to each of the petitioners as “boy.” Petitioners argued this was evidence of discriminatory animus. The Court of Appeals disagreed, holding that “[w]hile the use of ‘boy’ when modified by a racial classification like ‘black’ or ‘white’ is evidence of discriminatory intent, the use of ‘boy’ alone is not evidence of discrimination.” Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court’s decision is erroneous.

4. Limiting Instruction

If the evidence is admitted, a limiting jury instruction under Rule 105 should be given on request. United States v. Cooper, 577 F.2d 1079, 1088-89 (6th Cir. 1978) (in accord with prevailing view, court finds no plain error in trial judge’s failure to sua sponte give limiting instruction regarding evidence properly admitted under Rule 404(b)).

A jury instruction regarding the limited purpose of evidence admitted under Rule 404(b) should not be a mere laundry list of categories under that rule; it should be focused, so as to help the jury to use the evidence only for the proper purpose. See, e.g., United States v. Teague,
Q4. In Fact Pattern #22 on pp. 29-30 of Mr. Fitzgerald’s hypothetical, the plaintiff wants to offer evidence of “other acts.” What is the best argument for admissibility under 404(b)? If it is admitted, should the defense be permitted to rebut as suggested?

E. Rule 415: Special Rule of Admissibility of Other Sexual Assaults by Civil Defendant: Notice Required at Least 15 Days Before Trial

In sexual harassment cases where the alleged misconduct would constitute sexual assault, Rule 415 may apply. See EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001) (EEOC complied with notice requirement under Rule 415 in same-sex sexual harassment case).

Since July 9, 1995, Rules 413-415 have governed the admissibility of other crimes evidence in federal sexual assault and child molestation cases. Rule 413 applies in criminal cases of sexual assault; Rule 414 applies in criminal cases of child molestation; Rule 415 applies in civil cases of either type. Adopted in response to public perception that recidivist child molesters and rapists are often going free because the jury does not hear this evidence, the Rules greatly liberalize the admission of evidence of the accused offender’s prior sexual offenses.

Rule 415 provides:

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party’s commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of
witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

Rule 413 provides:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

* * *

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved –

(1) any conduct proscribed by chapter 109A of title 18, United States Code;
(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

18 U.S.C. ch. 109A includes §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse, including causing a person to engage in a sexual act by placing that person "in fear"), 2243 (sexual abuse of a minor or ward), 2244 (abusive sexual contact rather than sexual "acts," when "acts" would have been covered by §§ 2241-43, and 2245 (definitions).

The supporting Congressional analysis explained that such evidence could be considered as evidence that the defendant has the motivation or disposition to commit sexual assaults, and a lack of effective inhibitions against acting on such impulses, and as evidence bearing on the probability or improbability that the defendant was falsely implicated in the offense of which he or she is presently accused.


Rule 415 tips toward admissibility, but the evidence may be excluded under Rule 403, when its probative value is substantially outweighed by the risks
of unfair prejudice, confusion or distraction of the jury, or by undue consumption
of trial time. See United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998).

- Johnson v. Elk Lake School Dist., 283 F.3d 138, 149-59 (3d Cir. 2002)
  (no abuse of discretion in exclusion of evidence, in sexual harassment suit,
  regarding touching of another female by defendant, when second female’s
  testimony was equivocal as to whether touching seemed intentional).

- Cleveland v. KFC National Management Co., 948 F. Supp. 62, 66 (N.D.
  Ga. 1996) (in a Title VII sexual harassment suit against a corporate employer, in
  order for evidence of defendant’s agent’s prior sexual misconduct to be
  admissible under Fed. R. Evid. 415, the “evidence of defendant’s agent’s
  misconduct must be both probative in that it proves corporate knowledge of
  similar misconduct and it must corroborate plaintiff’s story; otherwise, the
  prejudicial effect on the jury is not substantially outweighed”) (emphasis in
  original).

  magistrate did not abuse his discretion in granting a protective order, in this sexual
  harassment action in which sexual assault of adult plaintiffs was alleged,
  protecting the defendant employer from use of his stepdaughter’s statement that
  he had sexually abused her for ten years, beginning when she was in the fifth
  grade. The court pointed out, however, that “Plaintiffs are free to question [co-
  defendant superiors] . . . regarding their knowledge of [defendant’s] prior
  actions.” The trial judge explained:

  The drafters [of FRE 413–415] justified their sharp departure from the ordinary
  presumption against propensity evidence largely because of the inherent
difficulties of proving sexual offenses where the trial devolves into a swearing
contest between defendant and alleged victim because there are no other
witnesses. FRE 415 was designed in large part to help the victims of sexual
assault prevail in such swearing contests by allowing them to rebut defendants’
arguments of consent or lack of intent with evidence that they have been accused
before.

  Here, by contrast, each plaintiff’s claims are supported by the
allegations of at least the other five. Moreover, since the alleged conduct took
place in an office setting, it is likely that plaintiffs will be able to locate
additional witnesses to the alleged conduct. Accordingly, their need for the
statement of an alleged victim of [defendant’s] sexual offenses at least ten years
ago is slight compared with the harm that disclosure of the statement would
certainly work upon [defendant].

Id. at 627.
In Fact Pattern #18 on p. 25 of Mr. Fitzgerald’s hypothetical, may the plaintiff introduce evidence of the earlier alleged assault?

F. **Rule 412: Special Rule of Inadmissibility of Other Sexual Conduct by Plaintiff**

In 1994 Congress amended Rule 412, the “rape shield” law, to extend it to civil cases. The Rule applies to protect alleged victims in civil sexual harassment cases. *E.g.*, *Wilson v. City of Des Moines*, 442 F.3d 637, 643 (8th Cir. 2006). Rule 412 provides:

**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.\(^7\)

(2) Evidence offered to prove any alleged victim’s sexual predisposition.

(b) **Exceptions.**

(1) [criminal cases]

(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.

(c) **Procedure to Determine Admissibility.**

(1) **A party intending to offer evidence under subdivision (b) must** —

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and

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\(^7\) *See Warren v. Prejean*, 301 F.3d 893, 906 (8th Cir. 2002) (plaintiff properly permitted to testify about a male co-worker’s sexual history and preferences in order to rebut defense allegation that she had sexually harassed him; court relied on ground that this was not evidence of “other” sexual behavior).
(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim’s guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

1. Procedure

• See Wilson v. City of Des Moines, 442 F.3d 637, 642-44 (8th Cir. 2006) (failure to file motion or hold a hearing was harmless error under circumstances); S.M. v. J.K., 262 F.3d 914 (9th Cir. 2003) (upholding sanction of exclusion of evidence for failure of defendant to file proffered evidence under seal, and holding that plaintiff had not opened door at trial); Sheffield v. Hilltop Sand & Gravel Co., 895 F.Supp. 105 (E.D. Va. 1995) (sanctioning defendant for failing to follow procedural requirement of submitting matters under seal by excluding evidence of co-workers’ testimony regarding plaintiff’s sexual conversations at workplace other than with alleged harasser).

2. Manner of Dress, etc.

The Rule’s references to “sexual behavior” and “sexual predisposition” are explained as follows in the accompanying Advisory Committee note:

Subdivision (a). As amended, Rule 412 bars evidence offered to prove the victim’s sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word “other” is used to suggest some flexibility in admitting evidence “intrinsic” to the alleged sexual misconduct. Cf. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. See, e.g., United States v. Galloway, 937 F.2d 542 (10th Cir. 1991), cert. denied, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); State v. Carmichael, 727 F.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word “behavior” should be construed to include activities of the mind, such as fantasies or
dreams. See C. Wright & K. Graham, Jr., Federal Practice and Procedure § 5384 at p. 548 (1980) (“While there may be some doubt under statutes that require ‘conduct,’ it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.”).

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412’s objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim’s mode of dress, speech, or lifestyle will not be admissible.9

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The reason for extending Rule 412 to civil cases is equally obvious. 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 prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

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Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence “substantially outweighs

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9 See Jaros v. Lodgenet Entertainment Corp., 294 F.3d 960, 965 (8th Cir. 2002) (evidence of harassment plaintiff’s “suggestive clothes” was excluded). Rule 412 thus overrules the holding in Meritor Savings Bank v. Vinson, 477 U.S. 57, 69 (1986), that plaintiff’s dress and speech were relevant to whether advances, sex, etc. were “unwelcome.”
the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases 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 tests puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. Cf. Fed. R. Civ. P. 35(a).

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The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, 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. Cf. 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). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial

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10 E.g., Wolak v. Spucci, 217 F.3d 157, 160-61 (2d Cir. 2000) (harmless error to admit evidence, on issue whether plaintiff was injured by display of pornography at work, that she had voluntarily viewed pornography outside the workplace). See note 8 supra.
judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge’s belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. See 1 S. Saltzburg & M. Martin, Federal Rules of Evidence Manual, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.


3. **Rule 412 Tips Against Admissibility**, *e.g.*, Socks-Brunot v. Hirschigel, Inc., 184 F.R.D. 113 (S.D. Ohio 1999), **But Evidence of Plaintiff’s Behavior at the Defendant’s Workplace is Likely to Come In**

- *E.g.*, Wilson v. City of Des Moines, 492 F.3d 637, 643-47 (8th Cir. 2006) (district court’s admission of plaintiff’s workplace behavior and her statements made there while she worked with alleged harassers was proper); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855-56 (1st Cir. 1998) (Rule 412 “was designed to prevent misuse of a complainant’s sexual history in cases involving ‘alleged sexual misconduct.’ . . . Rule 412 . . . reverses the usual approach of the Federal Rules of Evidence on admissibility by requiring that the evidence’s probative value ‘substantially outweigh’ its prejudicial effect.” Under facts of the case, district court did not abuse its discretion in excluding evidence of plaintiff’s alleged promiscuity and the marital status of her boyfriend, but admitting evidence that her relationship distracted her from work and, on issue whether advances were unwelcome, evidence that she flirted with allegedly harassing customer).

- Saffa v. Oklahoma Oncology, Inc., 405 F.Supp.2d 1280, 1285-86, 1290-91 (D. Utah 2005) (pretrial ruling excluding evidence of sexual harassment plaintiff’s consensual sexual relationship with another doctor five years earlier, before plaintiff was employed by defendant, when doctor was separated from his wife; there was no evidence that alleged harasser knew of this relationship, but ruling that if plaintiff called the earlier doctor to testify, their relationship would be relevant to credibility; similarly, or if plaintiff testified at trial that “she never thinks in terms of affairs,” as she has in deposition testimony, the testimony [will be] relevant for impeachment”); further, evidence of plaintiff’s conduct, and
statements regarding the alleged harasser at the employer's Christmas party, will be admissible with regard to whether his remarks had offended her and with regard to her claim of emotional distress).

As to a plaintiff’s having previously made similar but false allegations, cf. Note, The Girl Who Cried Wolf: Missouri’s New Approach to Evidence of Prior False Allegations, 70 Mo. L. Rev. 813 (2005) (suggesting balancing test that would have been appropriate for the court to have adopted in State v. Long, 140 S.W.3d 27 (Mo. 2004) (en banc)).

4. How Does Rule 26 Broad Discovery Work as to Rule 412 Information?


Q6. In Fact Pattern #17 on pp. 23-24 of Mr. Fitzgerald’s hypothetical, if the plaintiff’s conduct was all outside the workplace, the answer may turn on (1) whether the alleged harasser knew of these matters and therefore believed his initial advances or comments were welcome; or (2) whether the plaintiff opens the door by testifying, for example, that she would never have an extramarital affair. See Saffa, p. 18.

G. Intent or Mens Rea of Alleged Perpetrator

May the defense circumvent the protections of Rule 412 by offering evidence of what the alleged perpetrator had heard about the plaintiff, to show the alleged harasser’s absence of invidious intent when, say, making a sexually explicit remark?

Compare Doe v. United States, 666 F.2d 43 (4th Cir. 1981) (rape defendant could properly offer evidence of all of his knowledge of the victim’s past sexual behavior, which knowledge he had acquired before the alleged crime, including hearsay conversations he had had with other men about the victim and about a love letter, that he had read, from the victim to another man, to show not the victim’s consent but the defendant’s state of mind at the time of the alleged crime, which was relevant with regard to his intent) with United States v. Saunders, 943 F.2d 388, 391 & 392 n. 1 (4th Cir. 1991) (Rule 412 plainly “manifests the policy that it is unreasonable for a defendant to base his belief of consent on the victim’s past sexual experiences with third persons. . . ”).
H. When, if Ever, is a Person’s “Character” an “Essential Element” of a Claim or Defense, Under Rule 405(b)?

Rule 405(b) provides that reputation testimony, opinion testimony, and evidence of specific instances are all admissible to prove a person's character or character trait, when that person's character is an "essential element of a [criminal] charge, [civil] claim, or defense..." N.B. Character is not an "essential element" just because only persons "of a certain character" might do an act of the kind charged. See Gibson v. Mayor & Council, 355 F.3d 215, 232-33 (3d Cir. 2004). If proof that the party did the alleged act would suffice to prove the case, then character is not an essential element.

Rather, for 405(b) to apply, the substantive law requires that someone's character must be proven, as an element of the charge, claim, or defense. In the very rare situation that character is such an essential element, the most probative — and the most time-consuming — method of proof is permitted: proof by specific instances. You might wonder why Rule 404 says nothing on this topic and instead it is hidden away in 405(b). This is a fair question! The simple answer is that Rule 404 does not exclude such “essential element” evidence, because it is not offered to prove action in conformity with character, but to prove character itself.

Q7. In a negligent hiring or retention case, whose character is an essential element of the claim? How so? Consider for example, a civil suit against a nursery school for negligently hiring a convicted pedophile, or against a bus company for hiring a driver with a bad driving record.

In negligent hiring or retention cases, the plaintiff must show that the employer knew or should have known of the employee’s bad character for the pertinent trait. In such cases, the plaintiff may prove the employer’s character by reputation or opinion evidence or by evidence of specific acts by the employee, or any combination of the three.
Character evidence [404, 405, 608 / 5-404, 5-405, 5-608]

* Evidence of a person's gen'l character or a character trait not admissible to prove action in conformity therewith.

B Exceptions

404.a.1: Criminal cases, D introduces proof of D's character, state/govt rebuts (i.e. character trait of peacefulness).
* How proven: Opinion or reputation evidence (Rule 405).

404.a.2: Criminal case, D introduces proof of V's character, state/govt rebuts (character trait of aggressiveness)
* How proven: Opinion or reputation evidence (Rule 405).

404.a.3: Use of character to impeach [507, 608, 609]
* How proven: Opinion or reputation evidence (Rule 405).

405: Direct proof of character when it is "at issue" in a case (seduction cases, negligent entrustment, defense of truth in defamation case)
* How proven: Opinion, reputation, evidence, or specific acts (Rule 405).

406: Habit or business routine (Rule 406) 

412 - 415: Special rules in rape and other sexual assault cases 

C Use of evidence of prior acts/wrongs/crimes for some purpose other than proving propensity [404.b]

- Motive
- Absence of mistake
- Intent
- Preparation
- Knowledge
- Common scheme / plan
- Opportunity
- Identity

D How to prove character in cases when it is admissible [405].
1. Opinion testimony (compliance w/ 701, 702 req'd)
2. Reputation testimony (Hearsay, but R03(21) allows it).
3. Specific acts – only if character is at issue, and direct proof is permissible. (Otherwise, only on cross to impeach reputation or opinion witness. LMCL.)

Analysis of Diagram.

The Hon. Paul W. Grimm

A → Is the proposed use of evidence to prove propensity / circumstantial proof of character, as described in A?

IF YES → Then it is NOT admissible unless one of the exceptions in B applies. If one of the exceptions in B applies, character may only be proved in one of the ways permitted in D.

IF NO → Then is use of proposed evidence relevant for some non-propensity purpose as described in C?

IF NO → Evidence is not admissible.

IF YES → Evidence is admissible for non-propensity purpose subject to 403 balancing, and a limiting instruction under Rule 105. And any otherwise admissible evidence of the prior crime, wrong, or act may be admitted.
III. Hypotheticals

**Hypo #1**

Suzy, an investment banker, has sued her former employer, Hi & Lo, LLC, for gender-based discrimination violating Title VII: disparate treatment by manager Matt, including her exclusion from client outings, retaliation for complaining about the discrimination, and wrongful termination.

**Defendant wants to offer**, and plaintiff has moved to preclude, the following evidence:

1. Suzy has worked for 10 different securities firms in a period of less than 20 years. Asserted relevance: on issue of mitigation of damages, her ability to find subsequent employment. **Ruling?**

2. Suzy’s poor performance appraisal by her supervisor at the firm where Suzy worked prior to Hi & Lo. Asserted relevance:

   (a) Suzy’s character for poor work, failure to meet deadlines, lack of cooperation, and insubordination is an element of the defense and therefore provable under Rule 405(b);

   (b) This evidence of Suzy’s work habits is admissible as habit evidence under Rule 406. **Rulings?**

   (c) This evidence will be admissible to impeach Suzy if she testifies, in effect, that her Hi & Lo supervisor simply had it in for her; or

   (d) If Suzy testifies that she has “never missed a deadline” and “has always gotten along well with others.” **Rulings?**

3. Prior similar complaints by Suzy filed against other employers. **Ruling?**

**Plaintiff wants to offer**, and defendant has moved to preclude, the following evidence:

1. Manager Matt’s acts toward Suzy’s co-worker Anna (who, unlike Suzy, is Asian American), (1) use of the expression “chicks” and “yellow fever” when referring to Asian women; (2) asking whether Anna planned to wear a one-piece or two-piece bathing suit on vacation; (3) asking whether Anna had any “weekend exploits;” (4) stating his belief that extra-marital affairs between consenting adults were acceptable; (5) his suggestion that Anna use her feminine charms to improve client relationships; and (6) Anna’s exit interview at Hi & Lo, in which Anna allegedly described discriminatory comments and conduct by Matt and a co-
worker. Asserted relevance: Matt’s motive, intent, plan, and common scheme, in
his acts toward Suzy. Defendant is likely to offer evidence that Matt hired and
promoted four women (all Asian . . .). Ruling?

2. Manager Matt’s discriminatory acts against women at his prior places of
employment. Ruling?

3. Manager Matt’s arrest for disorderly conduct when out with a client – if
defendants raise the issue of Suzy’s perceived “lack of respect” for Matt.
Asserted relevance: his motive and intent. Ruling?

4. Co-workers’ organizing client trips to strip clubs. Asserted relevance: organizing
outings which women would not want to attend. Ruling?

5. Co-worker Andrew’s e-mail stating that Suzy and co-worker Lisa were engaging
in a “mutual bitch session.” Suzy did not allege that Andrew discriminated
against her, and he had no decision-making authority as to her.


Hypo #2

P v. D-Employer for sexual harassment (including unwanted touching) of P by S-
Supervisor in violation of Title VII and for negligent retention under state law.

D offers evidence that P has a reputation for being “loose.” Asserted relevance:

(a) P was not really offended by S’s actions. Ruling?

(b) S had heard of the reputation and therefore believed P “wanted it.”
Ruling?

(c) D also wants to offer eyewitness testimony that P frequently used explicit
curse words and told sexual jokes in the workplace. Ruling?

(d) D further wants to offer testimony that P wore a low-cut tank top to work
more than once. Ruling?

IV. Impeachment by Evidence of One’s Character as to Truthfulness

A. Evidence Regarding a Witness’s Character for Truthfulness is Admissible to
Prove Propensity to Lie (or to Tell the Truth): Rule 404(a)(3)
Evidence of a witness’s prior convictions (Rule 609), prior bad acts not having resulted in conviction (Rule 608(b)), and opinion or reputation evidence regarding that witness’s bad character trait for truthfulness and veracity (Rule 608(a)(1)), are admissible to impeach that witness. The evidence is offered to prove that the witness acted "in character" and lied in the testimony or statement admitted into evidence at trial (Rule 404(a)(3)). This principle also applies to impeachment of a hearsay declarant (Rule 806).

A witness whose credibility has been impeached in such a way as to constitute an attack on the witness’s character for truthfulness may be rehabilitated by reputation or opinion evidence as to the witness’s good character trait for truthfulness and veracity (Rule 608(a)(2)). Again, this evidence is offered to show that the witness acted “in character” at trial, by telling the truth.

Therefore, in order simply to “dot all i’s and cross all t’s,” Rule 404(a)(3) provides for an exception to the propensity rule that permits such impeachment and rehabilitation.

B. Whom Can One Impeach?

Rule 607 provides that one can impeach any witness, including one’s own (and, under Rule 806, any hearsay declarant whose out-of-court statement is admitted as substantive evidence).

For a very helpful opinion on all methods of impeachment, see Behler v. Hanlon, 199 F.R.D. 553 (D.Md. 2001) (Grimm, J.).

C. Impeachment by Prior Convictions: Rule 609

Rule 609 governs impeachment of a witness by certain of his or her prior criminal convictions (not juvenile delinquency adjudications) that have not been reversed.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the
court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

1. Universe of Impeachable Crimes

a. First, Determine Whether FRE 609(b) or 609(a) Governs

If the witness’s conviction is recent enough, you will look to Rule 609(a) to determine admissibility. Rule 609(b) will apply “if a period of more than ten years has elapsed since the date of the conviction or of the release from prison, whichever is the later date....”
What is the applicable date and which subsection of 609 governs when:

1. W convicted 8/5/69. Released from prison 12/24/89. [Answer: 12/24/89]

2. W convicted 8/6/01. Released on time served. [Answer: 8/06/01]

3. W convicted 1/13/86. Released from prison 7/13/01. [Answer: 7/13/01]

b. If 609(b) Applies

Prior convictions are the most difficult to get in under 609(b).

c. If 609(a) Applies, Next Determine Whether 609(a)(2) Applies

If Rule 609(a) is applicable, look first to see whether 609(a)(2) applies, which is the easiest route of admissibility. 609(a)(2) will apply only if the crime involved “dishonesty or false statement.” These are crimen falsi [crimes of untruth] crimes, where the factfinder must have found falsehood in order to convict. The court has no discretion to exclude a 609(a)(2) conviction. The majority rule under the federal case law is that crimes merely of theft, etc., are not crimes of “dishonesty” under 609(a)(2). The 2006 amendment adds to 609(a)(2) that it embraces crimes that readily can be determined to have been a crime of dishonesty, i.e., by reference to the legal definition of the crime or a source such as the indictment, a statement of admitted facts, or jury instructions.

d. If 609(a)(2) Does Not Fit, Apply 609(a)(1)

If 609(a) applies but 609(a)(2) does not fit, go to 609(a)(1). Here only crimes that meet the federal definition of felony, i.e., are “punishable by death or imprisonment in excess of one year” are eligible.

- The Rule speaks not of the witness’s sentence but of the possible maximum sentence.

- Note that the balancing test with regard to impeaching “a witness other than the accused” is merely the 403 test.
e. Factors Relevant to the Rule 609 Balancing Tests

- The nature of the prior crime: its relevance to truthfulness under oath.
- Has the witness been “good” or “bad” since the prior conviction?
- How long ago was the prior conviction? (and how old was the witness then?)
- How similar is the prior to the charged crime? (potential for unfairly prejudicial use)
- How important is the witness’s credibility to the case?

2. Manner of Proof

An earlier version of Rule 609(a) addressed the manner of proof of prior convictions for impeachment. You may ask the witness to admit having been so convicted (“Are you the same X who was convicted of Y crime in Baltimore City, Maryland, on Z date, when you were over 18 years of age and represented by counsel?”).

- You cannot go into the details of the crime.
- But many courts allow you to prove the sentence received.

If the witness denies the conviction, you then may offer a certified copy of the public record of the conviction into evidence.

- You are required to have this record before you can ask the question.

D. Rule 608(a): Reputation or Opinion Evidence Regarding the Witness’s Character for Truthfulness

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

1. Proof May Be by Only Either Reputation Testimony or Opinion Testimony

Once a witness (referred to as “the principal witness”), has testified, Rule 608(a) permits counsel to call character witnesses to testify as to either:

(1) The principal witness’s bad reputation, in the community which they share, for truthfulness (this used to be the only permissible method of proof, under the common law); or

(2) The character witness’s bad opinion, based on the character witness’s sufficient first-hand knowledge, of the principal witness’s character for truthfulness.

2. Reputation Testimony

Elicitation of reputation testimony (from what is called a “community mouth” witness) is short and sweet. It will vary slightly depending on whether the reputation witness personally knows the principal witness or merely knows that witness’s reputation:

Q: Do you know X? (or, Have you heard of X?)

A: Yes, we go to the same school [or live in the same neighborhood, etc.] (or “Not personally, but we go to the same school,” etc.).

Q: Does X have a reputation in that [community] regarding his truthfulness?

A: Yes.
Q: What is that reputation?
A: It is bad.

3. Opinion Testimony

Elicitation of opinion testimony is similarly short and sweet. The proponent will obtain answers to the following questions:

Does the character witness (W) know the principal witness (X)?

How does she know X (they work together, go to the same school, church, etc.)?

Over the period of time W has known X, has W formed an opinion as to X’s character for truthfulness?

What is that opinion? Answer: “X is a liar.”

Specific acts that led to W’s opinion, e.g., “X regularly steals from the vending machine,” cannot be brought out on direct. The basis for such opinion testimony on direct is simply where and how long W has known X, e.g., “We’ve worked together in a small office for 10 years.”

4. Cross-Examination of Character Witness: Inquiry into Specific Instances, Rule 608(b)(2), For a Limited Purpose

On cross-examination, Rule 608(b)(2) permits a 608(a) character witness to be asked about specific instances of the principal witness’s conduct inconsistent with the accuracy of the unfavorable reputation or opinion to which the witness has testified. For example, the cross-examiner might ask, “Did you know that in X’s law school class the professor made an arithmetic error in X’s favor, and X voluntarily came forward to tell the professor, so that the professor could lower X’s grade?”

This inquiry is permitted only for the limited purpose of impeaching the character witness’s testimony. The questioner may not provide extrinsic evidence of this specific instance, and a limiting instruction may be given, on request.

Counsel may not ask a character witness a “guilt-assuming” hypothetical, regarding the alleged facts in the case at bar.
Rule 608(b) permits the court in its discretion to permit witnesses to be asked about their own prior acts, probative of untruthfulness, that did not result in a conviction. Michael Jackson’s accuser’s mother, for example, was impeached by her earlier welfare fraud and her having fabricated evidence to win a settlement in an unrelated case. (Counsel must have a reasonable factual basis for the inquiry!)

If the witness denies these bad acts, counsel may try to refresh the witness’s memory, but, having failed that, may not prove the acts by extrinsic evidence (evidence other than through the witness’s own testimony).
### Methods of Impeachment

<table>
<thead>
<tr>
<th>Method</th>
<th>Examination of Impeached Witness*</th>
<th>Extrinsic Proof</th>
<th>Substantive vs. Impeachment</th>
</tr>
</thead>
<tbody>
<tr>
<td>I Interest, Motive Bias</td>
<td>At option of impeaching party</td>
<td>At option of impeaching party</td>
<td>Impeachment Only</td>
</tr>
<tr>
<td>I Prior Inconsistent</td>
<td>1st</td>
<td>Yes, federal but MD state only if not admitted* after opportunity to explain/deny</td>
<td>Impeachment only unless: (a) 801(d)(1)(a)/5-802.1(a) inconsistent statement; (b) 801(d)(2)/5-803(1) admission; (c) any other hearsay exception</td>
</tr>
<tr>
<td>I Statement (613/5-613)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C Contradiction (Non Collateral)</td>
<td>At option of impeaching party</td>
<td>At option of impeaching party</td>
<td>Substantively admissible (including learned treatises, 803(18), at option of impeaching party)*</td>
</tr>
<tr>
<td>C Capacity (ability to perceive, remember, relate, personal knowledge)</td>
<td>1st</td>
<td>2nd if denied or evasive</td>
<td>Impeachment only</td>
</tr>
<tr>
<td>C Character (608/5-608)</td>
<td>608(b)/5-608(b) Bad acts not resulting in conviction*</td>
<td>608(a)/5-608(a) Character impeachment by reputation or opinion witness*</td>
<td>Impeachment only</td>
</tr>
<tr>
<td>C Conviction (609/5-609)</td>
<td>1st</td>
<td>2nd only if denied or evasive</td>
<td>Impeachment only</td>
</tr>
</tbody>
</table>

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* L. McLain

I²C⁴
V. Hearsay Issues

A. Is the Proffered Evidence Hearsay?

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A “declarant” is a person who makes a statement.

(c) Hearsay. “Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

* * *

1. Hearsay = an out-of-court statement (by the “hearsay declarant”) + offered today at trial to prove that what the declarant said at another time was factually accurate. OCS + TOMA = HS

2. “Out-of-court” thus means that the evidence offered today at trial is of a statement made by any person somewhere else at another time. The other place may even have been another court proceeding. It is still “out-of-court” EVEN IF THE DECLARANT IS AT TRIAL TESTIFYING TO HIS OR HER OWN EARLIER STATEMENT.

3. If the evidence offered includes an “OCS” of a person, it is hearsay only if it is offered at trial to prove “TOMA.” TOMA = the truth of the matter that was being asserted by the declarant before trial, at the time the declarant made the out-of-court statement.

4. “Statement” may include an implied assertion from an utterance in words (if the utterance appears to have been intended by the declarant as an assertion of that fact at the time the declarant made the utterances).

5. Steps in Analysis:

- Who was each out-of-court declarant?
- What was each declarant asserting at the time s/he made the OCS?
• For what purpose, to help to prove what relevant fact, is the proponent offering the evidence at trial?

• It’s TOMA only if the proponent is asking the jury to rely on what the declarant said in his/her OCS as true, accurate, correct.

• Evidence of an OCS is hearsay if it will help to prove what it is offered to prove, only if our thought process to make the OCS relevant must be “Declarant wouldn’t have said this, unless it was true.”

6. On the other hand, if it is relevant simply that the OCS was made, regardless whether the OCS was true, it is nonhearsay.\(^1\) In this event, the person testifying to the OCS can be fully cross-examined as to whether the OCS was made as s/he has testified.

7. Another way of looking at this process is as a bus ride:

<table>
<thead>
<tr>
<th>Metrobus</th>
<th>Metrobus</th>
<th>Metrobus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doesn’t matter whether Decl. believed what s/he said or not.</td>
<td>EVI. will help to prove fact it’s offered to prove, as long as Decl. believed what s/he said, even if Decl. was factually wrong.</td>
<td>Decl.’s belief alone is insufficient: we need for Decl. to have been both sincere and factually correct, in order for fact-finder to rely on the Evi. to help to prove that the Mat. Fact.</td>
</tr>
<tr>
<td>Get off at BUS STOP #1: Nonhearsay</td>
<td>Get off at BUS STOP #2: Nonhearsay</td>
<td>TERMINUS: Hearsay</td>
</tr>
<tr>
<td>(Verbal act or legally operative fact; statement offered to prove effect on its hearer or reader; or statement offered as circumstantial evidence of declarant’s being alive, consciousness, ability to speak, etc.)</td>
<td>(Statement offered as circumstantial — not direct — evidence of declarant’s emotion, state of mind, knowledge, belief, intent, sanity, or insanity.)</td>
<td></td>
</tr>
</tbody>
</table>

\(^1\) E.g., Wilson v. City of Des Moines, 442 F.3d 637, 641 (8th Cir. 2006) (co-worker’s references to plaintiff as a “bitch,” etc., were not offered for their truth); Mack v. ST Mobile Aerospace Engineering, Inc., 195 Fed. Appx. 829, 842 (11th Cir. 2006) (plaintiff’s testimony that supervisor did not tell him he was required to see someone else about harassment policy was not hearsay, as he did not testify to a statement).
8. If a hearsay objection is made, and the evidence appears to contain an OCS of a person, the burden falls to the proponent of the evidence to explain to the court how the evidence either (1) is nonhearsay or (2) falls within a hearsay exception.

Q9. Constructive discharge case: plaintiff offers her statements, "You all are so vicious to me. Working here is like working in hell!!" and "I can't stand it around here!" See, e.g., Pennsylvania State Police v. Suders, 542 U.S. 129 (2004).

B. If It is Hearsay, Does It Fall Within an Exception (Rules 801(d), 803, 804, and 807) to the Hearsay Rule?

1. Rule 801(d)(2): "Nonhearsay": Admission of a Party Opponent

   (d) Statements Which Are Not Hearsay. A statement is not hearsay if —
   
   ***

   (2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

2. Determinations by EEOC: Admissibility Under Rule 803(8)(C)?

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

***

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
Reports appearing to be unreliable may be excluded under the final clause at the end of Rule 803(8)(C) if the opponent shows that they are unreliable, e.g., Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994), or, in the court's discretion, under Fed. R. Evid. 403. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 (1988). As set out in the Advisory Committee Note, factors to be considered by the courts under Rule 104(a) that are relevant to trustworthiness include the timeliness of the investigation; the degree of skill of the official; whether a hearing was held and, if so, at what level; and possible motivation problems of the out-of-court declarants.

The investigator's factually based opinions and evaluations may be admitted as factual findings, if they are not shown to lack trustworthiness. Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988). Compare, e.g., Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980) (harmless error to exclude EEOC investigative reports and determinations) with Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 263-64 (4th Cir. 2005) (no abuse of discretion in excluding Department of Energy's draft assessment of employer's EEO program); Young v. James Green Management, Inc., 327 F.3d 616, 623-25 (7th Cir. 2003) (no abuse of discretion in excluding EEOC determination of discrimination, when court found EEOC's determinations unreliable, and evidence on which they were based was repeated at trial); Denny v. Hutchinson Sales Corp., 649 F.2d 816, 820-22 (10th Cir. 1981) (no error to exclude Colorado Civil Rights Commission's finding of probable cause, which was made without a hearing); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1176 (3d Cir. 1977) (no abuse of discretion in excluding "determination" letter issued by EEOC that there was reasonable cause to believe that defendant had violated Equal Pay Act). See also Chandler v. Roudebusch, 425 U.S. 840, 863 n.39 (1976) ("Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo."); Lovejoy-Wilson v. Noco Motor Fuels, Inc., 242 F.Supp.2d 236, 242-43 (W.D.N.Y. 2003) (reserving ruling on whether EEOC determination of violation would be admissible).

The term "factual findings" in subsection (C) has been interpreted not to embrace hearsay that was the basis for such findings. E.g., Federal Deposit Ins. Corp. v. Mmahat, 907 F.2d 546, 551 n.6 (5th Cir. 1990) ("Though factual findings are admitted by Fed. R. Evid. 803(8)(C), hearsay statements contained in the report are not."). To admit such other hearsay, another hearsay exception or a nonhearsay purpose must be cited. Rule 805.
Queries:

• If the EEOC report quotes a supervisor’s letter of resignation protesting discriminatory practices, may the plaintiff prove that quotation, as substantive evidence? See Young, 327 F.3d at 622-23 (7th Cir. 2003) (Rule 801(d)(2)(D) not applicable to statements made by defendant’s employee in letter of resignation).

• Are EEOC personnel experts, so that hearsay that they “reasonably relied on” may be admitted, in their reports, for a limited purpose under Rule 703? See Coleman v. Home Depot, Inc., 306 F.3d 1333, 1345 (3d Cir. 2002) (EEOC reports are not “expert opinion evidence”; no abuse of discretion in excluding report).

• If the hearsay is substantively inadmissible and self-serving, is it a reasonable basis for the EEOC determination?

• How should juries be instructed about what weight to give to EEOC determinations?

C. Double/Multiple Hearsay

If the statement offered is that of one out-of-court declarant who was repeating another out-of-court statement, a hearsay exception (or nonhearsay category) must be shown to apply for each statement in order to admit both. Rule 805.

• E.g., Nyack v. Southern Connecticut State Univ., 424 F.Supp.2d 370, 374-76 (D. Conn. 2006) (three proffered “double hearsay” statements were admissible against defendant as statements by its agent, under Rule 801(d)(2)(D), because both declarants exercised supervisory authority over the plaintiff; a fourth was excluded, because the employee who repeated the supervisor’s statement was “outside the personnel decisionmaking hierarchy governing [plaintiff’s] conduct”).

VI. Privileges

A. Psychotherapist-Patient Privilege

F.3d 1154 (9th Cir. 2001) (affirming denial of plaintiff's discovery request).

2. Waiver by Putting Mental Condition in Issue. Most lower courts hold that a plaintiff who alleges that illegal discrimination against her resulted in extreme emotional distress waives her psychotherapist-patient privilege. E.g., Schoffstall v. Henderson, 223 F.3d 818 (8th Cir. 2000) (finding no abuse of discretion in dismissal with prejudice of plaintiff's claims alleging emotional distress due to plaintiff's willful noncompliance with discovery order).

B. No Medical Peer Review Committee Privilege at Federal Common Law


Note that Congress has created such a privilege for reviews by or for the Department of Defense and the Department of Veterans Affairs. 10 U.S.C. § 1102(a); 38 U.S.C. § 5705(a).

C. No Academic Peer Review Privilege at Federal Law


D. Effect in Federal Court of Privileges Recognized Only by State Law?

1. Federal question cases: only federal law of privilege applies

2. Diversity cases: state law, Fed. R. Evid. 501

3. Federal question cases with pendent state law claims:

Only the federal law of privilege applies to the federal question — or does it? See, e.g., Virmani v. Novant Health, Inc., 259 F.3d 284, 287 n.3 (4th Cir. 2001) (declining to recognize a federal medical peer review privilege like that applicable under North Carolina law).
E. Waiver by Inadvertent Disclosure When Ordered to Produce Electronically-Stored Information, E-Mail, Etc., Pre-Privilege Review?


F. When Does Use of Company Computer Not Waive Employee’s Privilege?

See Curto v. Med. World Commc’n, Inc., 99 Fair Empl. Prac. Cas. 298, 2006 WL 131 8367, 2006 U.S. Dist. LEXIS 29387 (E.D.N.Y. May 15, 2006) (use of a company laptop at home, to access employee’s personal AOL account, but she then deleted personal e-mail – including e-mails to her attorney – before returning laptop to work; her attorney-client privilege held not waived).

VII. Spoliation of Evidence: Adverse Inference -- Employer Obligation to Preserve Possible E-Mail Evidence When Facing Litigation

See new Fed. R. Civ. P. 37(f) (became effective December 1, 2006) precluding adverse inference when loss of evidence was “a result of the routine, good-faith operation of an electronic information system.”


• Zubulake v. UBS Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004), subsequent proceeding, 382 F.Supp.2d 536 (S.D.N.Y. 2005). Defendant’s personnel deleted e-mails after a gender discrimination lawsuit had been filed, “even though they had received at least two directions from counsel not to.” The court imposed an adverse inference instruction, awarded reimbursement of costs of redeposing individuals, and awarded attorneys’ fees for a sanctions motion. Counsel has a duty “to effectively communicate” discovery obligations to their client, and “once the duty to preserve attaches, counsel must identify sources of discoverable information.” Counsel “must put in place a litigation hold, and make that known to all relevant employees by communicating with them directly.” This includes stopping any routine e-mail deletion, as well as routine destruction of “back up tapes.”