Let's Talk About Sex

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Nowadays, sexual harassment lawsuits involving allegations of egregious conduct such as sexual assault or lecherous groping of the plaintiff are rather rare. Blatant "quid pro quo" cases, in which a boss tells a subordinate "have sex with me or lose your job," are uncommon as well. More than a decade of sexual harassment training of managers and employees has largely paid off; most managers and employees now understand that this sort of behavior is career suicide. No amount of training will likely ever induce employees to forget about sex altogether when they go to work, however, so harassment lawsuits continue to proliferate. Today's harassment suits more typically involve complaints of sexually-related talk and horseplay in the workplace - telling off-color jokes, boasting of sexual conquests, making rude (or merely clumsy) sexual advances, displaying sex toys, passing around sexually-oriented cartoons or e-mails, or gossiping about who is sleeping with whom.

A substantial barrier has been erected in the path toward the search for the truth, however, in the form of the revised Rule 412 of the Federal Rules of Evidence. An extension of the "rape shield" rule that prohibits a criminal defendant in a rape case from attacking the sexual history of the accuser, Rule 412 was applied to sexual harassment cases beginning in 1994 and it has produced a confusing and often counterintuitive jurisprudence in the decade that followed. Although courts initially applied the revised rule in a way that often made it impossible for a defendant to make use of the "welcomeness" defense in a sexual harassment case, some courts more recently have taken a more sensible view.

Rule 412 now goes well beyond providing protection to the legitimate sexual privacy interests of plaintiff's in sexual harassment cases. It is too often used by plaintiffs counsel as a heavy thumb on the scales of justice; an attempt to obtain the courts sanction of the presentation of a one-sided version of events to the jury. Some courts seem savvy to Rule 412's potential for abuse. All courts would do well to recognize the very real danger to due process that a careless or overbroad application of this rule presents

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