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The Conflicting Mandates of FRE 412 and FRCP 26: Should Courts Allow Discovery of a Sexual Harassment Plaintiff's Sexual History?

Ethan A. Heintz

The expansion of sexual harassment law in recent decades has afforded greater legal rights and remedies to alleged victims, but has also prompted defendants to defend accusations ever more vigorously. In litigating sexual harassment suits, defendants often seek to raise issues involving intimate details from the plaintiff's private life such as her past sexual behavior, the identities of her sexual partners, her use of birth control devices, and prior incidents of molestation. In one recent case, the "[d]efendants continually sought to make an issue of plaintiff's sexual history," portraying her as "sexually insatiable, as engaging in multiple affairs with married men, as a lesbian, and as suffering from a sexually transmitted disease." Perhaps because sexual harassment cases necessarily involve such fundamental aspects of human identity as sexuality and

1 See Parts I A and I B.
2 The vast majority of sexual harassment plaintiffs are women. In 1992, for example, approximately 91 percent of persons filing sexual harassment charges with the Equal Employment Opportunity Commission ("EEOC") were women. Study Finds Sexual Harassment Awards From EEOC Doubled From 1992 to 1993, Daily Lab Rep (BNA) 100, D-9 (May 26, 1994). Accordingly, this Comment will uniformly employ the feminine pronoun to describe the generic sexual harassment plaintiff, and the masculine pronoun to identify her harasser. However, male victims of sexual harassment also have a cause of action under Title VII. Newport News Shipbuilding & Dry Dock Co v EEOC, 462 US 669, 682 (1983). Same-sex sexual harassment is actionable under Title VII. Oncale v Sundowner Offshore Services, Inc, 523 US 75, 82 (1998). Consequently, unless otherwise noted, use of a specific gendered pronoun anywhere in this Comment does not imply that the observation is inapplicable to a person of the opposite sex.
3 See generally Ellen Schultz and Junda Woo, The Bedroom Ploy: Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases, Wall St J A1 (Sept 19, 1994) (describing defense inquiries into plaintiffs' experiences with premarital sex and X-rated videos); Susan Ichinoe, Harassment Redux: Sexual Harassment Litigation From the Plaintiff's Perspective, Hawaii Bar J 11, 11 (May 1996) ("[S]crutiny of the plaintiff's personal life can be intense. . . . [T]he courtroom can then become as hostile an environment to the plaintiff as the workplace ever was.").
personal dignity, aggressive defense of a sexual harassment suit may resemble a second assault on the plaintiff, at least from her perspective. Within the adversarial framework of American jurisprudence, discussion of such issues can be very unpleasant to sexual harassment victims, and may distract or bias the finder of fact.

Aware that the interjection of intimate details into the courtroom may intimidate the plaintiff and distract the jury rather than further the search for truth, Congress restricted the role that a sexual harassment plaintiff's sexual history plays at trial. In 1994, it amended Federal Rule of Evidence ("FRE") 412, commonly known as the rape shield rule, to include civil sexual misconduct. FRE 412 establishes a presumption against admissibility at trial of a plaintiff's sexual history with any person besides the defendant. However, the amended Rule does not clearly resolve whether the defendant may seek discovery of such evidence during the pretrial phase of litigation. Because the Federal Rules of Civil Procedure ("FRCP") allow discovery of evidence that is not itself admissible, a sexual harassment plaintiff may have to accede to discovery of intimate details of her private life that bear scant relation to the case at hand. Accordingly, an aggressive defense attorney may attempt to use discovery to intimidate the sexual harassment plaintiff.

While acknowledging the usefulness of standards rather than bright-line rules in balancing the competing interests of broad discovery with respect for the victim's dignity, this Comment suggests several measures to make those standards more uniform and reduce the potential for abusive discovery. Part I introduces the law of sexual harassment and discovery and explains FRE 412 in greater depth. Part II evaluates the different conclusions courts have reached in attempting to fill this gap in the law. Part III explains the need for a more consistent approach to discovery of sexual history. It demonstrates that defendants normally need not delve into an alleged harassment victim's sexual history in order to mount a complete defense. Part IV examines California practice in search of appropriate analogies and solutions for the gap in federal law. Finally, Part V recommends both procedural and substantive remedies.

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6 FRE 412(a)(1)-(2); see also notes 35–38 and accompanying text.
7 FRCP 26(b)(1); see also note 46.
I. BACKGROUND: SEXUAL HARASSMENT, RULE 412, AND DISCOVERY

A. An Overview of Workplace Sexual Harassment Law

Recognition of sexual harassment as a cause of action derives from Title VII of the Civil Rights Act of 1964. Title VII forbids an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." In 1976, a federal court first accepted the argument that conditioning employment upon submission to sexual advances — now commonly known as quid pro quo sexual harassment — is actionable under Title VII. Four years later, the Equal Employment Opportunity Commission ("EEOC") promulgated regulations affirming that harassment on the basis of sex violated Title VII, whether by quid pro quo or through a sexually hostile work environment.

The Supreme Court cited those regulations in support of its 1986 decision in Meritor Savings Bank, FSB v Vinson, holding that a hostile work environment suffices to create an actionable claim of sexual harassment, even without proof of economic

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8 Williams v Saxbe, 413 F Supp 654, 657–61 (D DC 1976). The Williams decision did not immediately persuade other federal courts to recognize a cause of action for sexual harassment. See, for example, Ludington v Sambo's Restaurants, Inc, 474 F Supp 480, 483 (E D Wis 1979) (holding that sexual harassment is not actionable unless it is actively or tacitly sanctioned by the employer).
9 29 CFR § 1604.11(a) (1998), which states in full:

Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(footnote omitted). The first and second definitions describe what has come to be known as quid pro quo sexual harassment; the third definition describes the second recognized form of sexual harassment, creation of a hostile work environment. The Supreme Court endorsed the use of such categorization, albeit with some hesitancy, in Burlington Industries, Inc v Ellerth, 118 S Ct 2257, 2264–65 (1998).
11 Id at 73.
harm to the victim. The Court also held that the unwelcomeness of an employer's sexual advances, rather than the voluntariness of the employee's submission to those advances, determined whether the employer's actions constituted sexual harassment. Significantly, the Court suggested that the employee's workplace conduct, speech, and dress were "obviously relevant" in determining whether the employer's advances were welcome or not; no per se rule existed to bar the admission of such evidence.

The Supreme Court has further delineated the law of sexual harassment in the 1990s. In *Harris v Forklift Systems, Inc*, the Court held that a hostile work environment claim did not require proof of serious psychological injury to the plaintiff, but did require a showing that the harassment was both objectively and subjectively viewed as hostile under a totality of the circumstances test. A pair of recent decisions, *Burlington Industries, Inc v Ellerth*, and *Faragher v City of Boca Raton*, substantially clarified the issue of employer liability in sexual harassment cases. In *Ellerth*, the Court held that an employer is vicariously liable for a hostile work environment but has an affirmative defense if the victimized employee suffered no tangible job consequences, the employer exercised reasonable care to prevent and correct sexual harassment, and the employee unreasonably failed to avail herself of opportunities to prevent, correct, or avoid the harm. *Faragher* clarified *Ellerth* by explaining that the strength of the affirmative defense depends on the employer's actions to prevent and correct the harassment, as well as on the extent to which the victim made use of those preventive or corrective measures.

Congressional action has also influenced the development of sexual harassment law. In particular, Congress passed the Civil Rights Act of 1991, which expanded remedies for violations of Title VII to include compensatory and punitive damages, not merely the equitable relief previously available.

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14 Id at 64.
15 Id at 68.
16 477 US at 69.
18 Id at 21–23.
20 118 S Ct 2275 (1998).
21 *Ellerth*, 118 S Ct at 2270.
22 *Faragher*, 118 S Ct at 2292–93.
23 42 USC § 1981a(a)-(b) (1994). The sum of compensatory and punitive damages available for a violation of Title VII is capped at varying levels between $50,000 and $300,000, depending on the number of persons employed by the defendant. 42 USC
B. Problems Facing Sexual Harassment Plaintiffs

Raising the stakes in this fashion sparked a predictable increase in the volume of sexual harassment lawsuits filed, and, to many observers, a further decline in the civility of the proceedings. Shortly before the 1994 amendments to FRE 412 took effect, the Wall Street Journal reported that sexual harassment defendants frequently pursued a "nut or slut" strategy that portrayed plaintiffs either as hypersensitive and overimaginative, or as promiscuous and welcoming of the advances. With the plaintiff captive on the witness stand, defense attorneys "increasingly resort[ed] to harsh tactics, asking about sex lives, childhood molestation, abortions and venereal disease." Their hope, according to plaintiffs' attorneys, was to coerce the plaintiff to drop her suit or to settle for an unfairly low amount. These inquiries threatened not only to intimidate the plaintiff but also to diminish her character in the eyes of the jury. Of course, courts could exclude such evidence as irrelevant or prejudicial under Federal Rules of Evi-

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§ 1981a(b)(3). See also Deters v Equifax Credit Information Services, Inc, 1998 US Dist LEXIS 266, *1 (D Kan) (jury award of $1 million in punitive damages reduced by court to $300,000 to comply with statutory cap). Punitive damages may be awarded only upon a showing that the employer acted "with malice or with reckless indifference." 42 USC § 1981a(bX1).

However, it is possible for Title VII plaintiffs to join state tort claims in federal court (where federal evidentiary and procedural rules obtain) to exceed the Title VII damages cap. In addition, governmental employees who are victims of sexual harassment may bring suit under 42 USC § 1983 (deprivation of civil rights under color of law) and similar civil rights provisions rather than under Title VII, thereby avoiding the damages cap. For an infamous example, see Neil Lewis, Sex Harassment Suit Based on 1860's Law, NY Times 1-9 (May 7, 1994), and Neil Lewis, Talks Failed to Resolve Clinton Suit, NY Times 1-16 (May 8, 1994) (plaintiff sought $700,000 damages in sexual harassment suit against governor predicated on §§ 1983 and 1985 as well as state law). Although FRE 412 applies to "any . . . civil proceeding involving alleged sexual misconduct," FRE 412, this Comment will focus primarily on discovery in Title VII sexual harassment suits. The Title VII case law is more developed, and potential solutions are more feasible in this context.

It is impossible to state with certainty the extent to which the expansion of remedies has caused or merely correlates with the increase in lawsuits, but logic suggests that increasing the expected gain from filing a sexual harassment suit while keeping steady the costs will prompt an increase in such litigation. Congress expanded the damages remedy to promote private enforcement of the Civil Rights Act, and available numbers illustrate the effect. Requests for right-to-sue notices from the EEOC — a mandatory precursor to filing any Title VII action — increased from 13.3 percent in 1990 to 24.4 percent in 1993. EEOC Study, Daily Lab Rep (BNA) 100 at D-9 (cited in note 2). Similarly, while the EEOC received 5,623 charges of sexual harassment in 1989, in subsequent years the numbers rose sharply: 6,127 in 1990; 11,908 in 1993; and 15,889 in 1997. Id at D-9; Michael Delikat and Whittney R. Bradshaw, Special Litigation Issues in Sexual Harassment Cases: An Employer's Perspective, 587 PLI/Lit 211, 213 (1998).


Id.

Id.
dence 403 and 404, but evidently such tactics succeeded often enough to motivate Congress to create a sexual harassment shield.

C. Creation of a Sexual Harassment Shield

Roughly concurrent with the passage of the Civil Rights Act of 1991, a movement began to build in Congress to extend rape shield protection to civil cases. Fearing preemption of its traditional domain, the Judicial Conference of the United States began work on a similar amendment to Rule 412. Although the Supreme Court objected to the extension of Rule 412 to civil cases, ultimately Congress did adopt the version propounded by the Judicial Conference, enacting it as part of the omnibus Violent Crime and Law Enforcement Act of 1994. In addition, Congress expressed its intent that the Judicial Conference Advisory Committee Notes ("Notes") apply to Rule 412.

FRE 412 creates a strong presumption that evidence of the sexual behavior or predisposition of an alleged victim is inadmis-

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28 "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." FRE 403. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving that action in conformity therewith on a particular occasion." FRE 404.


30 The Rules Enabling Act endows the Supreme Court with the power to set procedural and evidentiary rules for the federal judiciary. 28 USC §§ 2071–2077 (1994). The Judicial Conference of the United States is responsible for studying the practical operation of those rules, 28 USC § 331 (1994), and may appoint special Advisory Committees to recommend the creation of such rules. 28 USC § 2073(a)(2).


32 Wright and Graham, Federal Practice and Procedure § 5381.1 at 172 (cited in note 29).

33 See note 5. There was no Congressional debate of the sexual harassment shield provision, perhaps because it was folded into a much larger bill. See Daniel J. Capra, Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification, 182 FRD 268, 292 (1998). Moreover, there was only minimal debate of the bill that enacted the original Rule 412. Charles Alan Wright and Kenneth W. Graham, Federal Practice and Procedure § 5381 at 485 (West 1980). Thus negligible legislative history exists to guide present-day interpretation of the statute.

34 The Committee of Conference, which bore responsibility for reconciling disparities in the House and Senate versions of the bill, published a joint explanatory statement that provided in part: "The Conference intend that the Advisory Committee Note on Rule 412, as transmitted by the Judicial Conference of the United States . . . applies to Rule 412 as enacted by this section." Violent Crime Control and Law Enforcement Act of 1994, HR Conf Rep No 103-711, 103d Cong, 2d Sess 383 (1994).
sible at trial. Specifically, it bars evidence that any alleged victim of sexual misconduct engaged in other sexual behavior as well as evidence of that victim's sexual predisposition. However, to safeguard the rights of the defendant, the amended Rule does allow the introduction of such evidence where "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." This balancing test is strongly weighted against admissibility, in contrast to the general standard of FRE 403, which adopts a presumption of admissibility.

The Judicial Conference's Advisory Committee, which drafted FRE 412 in coordination with Congress, cited several closely related purposes for the amendment. First, the amended FRE 412 protects against "the infusion of sexual innuendo into the factfinding process," thus "safeguarding the victim against stereotypical thinking" by a jury inflamed or prejudiced by sexual history evidence of dubious relevance. Second, "the rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details." In this fashion, FRE 412 promotes social policy by increasing the likelihood that victims of sexual harassment will not be deterred from seeking judicial relief.

D. Rule 412's Silence on the Issue of Discovery

FRE 412 establishes clear standards regulating the admission of evidence of the victim's sexual history, but is ambiguous as to whether it permits the defendant to discover such evidence. The Rule itself is silent, but the Advisory Committee Notes to Rule 412 admonish that Rule 412's civil protections "do not ap-
ply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued [sic] to be governed by Fed. R. Civ. P. 26 — a rule that mandates broad discovery even of evidence that is not itself admissible. At the same time, the Notes advise that:

authority in federal courts. On occasion, the Supreme Court has declined to follow them. See Libretti v United States, 516 US 29, 41 (1995) (declining to follow a portion of Advisory Committee's Notes on FRCrP 31, because "[t]he Committee's assumption runs counter to . . . weighty authority"); Hohn v United States, 118 S Ct 1969, 1974 (1998) (rejecting a "suggestion contained in the Advisory Committee Notes on Federal Rule of Appellate Procedure 22(b) . . . [as] inconsistent with the Federal Rules and the uniform practice of the courts of appeals"); but see id at 1979 (Scalia dissenting) (citing with approval the Notes as virtually an "anticipatory refutation of the Court's countertextual holding"). More often, federal courts, including the Supreme Court, treat Advisory Committee Notes as highly persuasive authority. See Old Chief v United States, 519 US 172, 184-85 (1997) (citing with approval Advisory Committee's Notes to FRE 401 and FRE 403); Williamson v United States, 512 US 594, 614 (1994) (Kennedy concurring) ("When . . . the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and where Congress enacted the relevant Rule with the interpretation expressed in the Advisory Committee Notes. See Tome v United States, 513 US 150, 160 (1995) ("We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules. Where . . . Congress did not amend the Advisory Committee's draft in any way . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.") (citations and internal quotation marks omitted) (second alteration in original).

Congress explicitly stated its intent that the Advisory Committee Notes to FRE 412 apply to FRE 412. See note 34. Numerous decisions considering the discoverability of sexual history evidence — both those that allow such discovery and those that restrict it — have cited the Notes. See, for example, Howard v Historic Tours of America, 177 FRD 48, 50-51 (DC 1997); Sanchez v Zabiti, 166 FRD 500, 501-02 (NM 1996). No court has challenged the authority or reasoning of the Notes to FRE 412. In light of Congressional endorsement of the Notes, as well as their repeated reference by federal courts, it is clear that the position of the Notes concerning discovery of sexual history testimony is exceptionally persuasive authority.

FRE 412 Advisory Committee Notes.

Federal Rule of Civil Procedure 26(b)(1) states that "[p]arties may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." FRCP 26(b)(1). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 401.

The Supreme Court long ago accorded a liberal interpretation to the relevancy requirement. See Oppenheimer Fund, Inc v Sanders, 437 US 340, 351 (1978) ("The key phrase in this definition — 'relevant to the subject matter involved in the pending action' — has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.") (emphasis added). See also Hickman v Taylor, 329 US 495 (1947), wherein the Court acknowledged that "[d]isclosure concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. . . . [D]iscovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." Id
In order not to undermine the rationale of Rule 412, courts should enter appropriate orders to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively bar discovery unless the party seeking discovery shows 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.\textsuperscript{47}

Juxtaposed against each other in the Notes, these two imperatives seem contradictory almost to the point of being incoherent. One states flatly that FRE 412 is inapplicable to discovery, but the other establishes a rebuttable presumption that FRE 412’s protections trump the broad discovery mandate of FRCP 26(b)(1). Essentially, the Notes suggest that courts should balance principles of broad discovery with protection of the victim’s dignity and privacy, within the framework of a very vague standard.

Taken at face value, the Notes’ recommendation that courts allow discovery of sexual history evidence that is relevant and not otherwise obtainable\textsuperscript{48} seriously weakens the protection of Rule at 507. However, the Court in Hickman did recognize that “discovery, like all matters of procedure, has ultimate and necessary boundaries.” Id.

Thus, on its own initiative or upon the motion of a party, the court may restrict discovery that is “unreasonably cumulative or duplicative” or that is more conveniently available from some other source. FRCP 26(b)(2). Upon the motion either of a party to the suit or of the individual subject to discovery, the court may restrict or prohibit discovery in a number of ways “to protect a party or person from annoyance, embarrassment, oppression, or undue burden.” FRCP 26(c). An attorney making a discovery request must certify that it is not made for purposes of harassment. FRCP 26(g)(2).

Discovery may take several forms including interrogatories (written questions), FRCP 33, or depositions (questions posed in person). FRCP 30. Other forms include requests for production of documents, FRCP 34; court-ordered mental and physical examinations, FRCP 35; and requests for admission, FRCP 36. Depositions are generally regarded as a superior means of fact-finding to interrogatories because they allow for follow-up questions and limit the opportunity for lawyer-controlled answers. Any person may be deposed, FRCP 30(a)(1), whereas only a party to the suit may be served with interrogatories. FRCP 33(a). Because opposing sides meet face-to-face, depositions are a more adversarial and confrontational means of obtaining discovery. The Rules prohibit depositions from being conducted for purposes of annoyance or harassment, FRCP 30(d)(3), although anecdotal evidence suggests that reality does not always conform to this requirement. See, for example, William H. Fortune, Richard H. Underwood, and Edward J. Imwinkelried, Modern Litigation and Professional Responsibility Handbook: The Limits of Zealous Advocacy § 6.7.1 at 259–60 (Little, Brown 1996); Jean M. Cary, Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation, 25 Hofstra L Rev 561, 565–72 (1996) (citing examples of abusive conduct by attorneys in depositions). If one party fails to comply with discovery, the requesting party may submit a motion to compel discovery. FRCP 37(a). Incomplete disclosure or failure to comply with a discovery order are grounds for sanctions. FRCP 37(a)(3); FRCP 37(b).

\textsuperscript{47} FRE 412 Advisory Committee Notes.

\textsuperscript{48} See note 45 and accompanying text.
412, because the standard of relevancy in federal courts is lenient.\textsuperscript{49} However, the Notes go on to suggest that in the context of a sexual harassment suit, although "some evidence" of the victim's at-work sexual behavior may be relevant, "non-work place conduct will usually be irrelevant."\textsuperscript{50} The Notes thus establish a simple at-work/not-at-work paradigm as a principal method of determining whether evidence is discoverable, but the looseness of this standard leaves courts — and defense lawyers — substantial room to maneuver.

Discovery practices prior to the amendment of FRE 412 do little to clarify this uncertainty. Few reported criminal cases discuss the effect of the rape shield rule on discovery.\textsuperscript{61} Cases resolving discovery disputes in civil sexual harassment suits prior to the amendment of FRE 412 are also surprisingly rare.\textsuperscript{62}

\textsuperscript{49} Under the Federal Rules of Evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 401; see also note 46.

\textsuperscript{50} FRE 412 Advisory Committee Notes.

\textsuperscript{61} A comprehensive online database search revealed no such cases at the federal level and only a handful of state cases, which do not admit any generic conclusion because states' rape shield rules and their judicial interpretations differ from each other and from FRE 412. For example, contrast \textit{State v Miskell}, 451 A2d 383, 385–86 (NH 1982) (extending state rape shield rule, which by its plain terms applied only to admissibility, to discovery), with \textit{State v Gonzalez}, 757 P2d 925, 931 (Wash 1988) (holding that state rape shield did not apply to discovery, but that defendant could not discover names of alleged rape victim's previous sexual partners anyway because he failed to show that the information was material).

The paucity of discovery conflicts under the old rape shield is probably due in part to the relative scarcity of rape cases in federal courts. See Wright and Graham, \textit{Federal Practice and Procedure} § 5381 at 484 (cited in note 33). Equally significant are the fundamental differences between discovery in the criminal and civil contexts. For example, in a criminal case depositions may be taken only upon the order of a court, and only to preserve evidence, not to discover information. Charles Alan Wright, \textit{Federal Practice and Procedure} § 241 at 4 (West 1980 & Supp 1999). For more on evidentiary considerations in criminal sexual misconduct cases, see generally Clifford S. Fishman, \textit{Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior}, 44 Cath U L Rev 709 (1995).

\textsuperscript{62} The best-known case is \textit{Priest v Rotary}, 98 FRD 755 (N D Cal 1983), in which the court applied FRE 403 and FRE 404 in denying the defendant's request to discover the sexual harassment plaintiff's sexual history, finding "the annoyance and discomfort which the plaintiff obviously suffered as a result of defendant's inquiries unnecessary and deplorable." Id at 761. Accord \textit{Mitchell v Hutchings}, 116 FRD 481, 485 (D Utah 1987). See also \textit{Cook v Greyhound Lines, Inc}, 847 F Supp 725, 737 (D Minn 1994) (denying civil sexual assault defendant's motion to compel answer to interrogatory concerning alleged prior date rape on the grounds that "although . . . Rule 412 applies only in criminal cases, the policies it embraces logically extend to actions involving sexual assault which are prosecuted in a civil forum"); \textit{Weiss v Amoco Oil Co}, 142 FRD 311, 316–17 (S D Iowa 1992) (permitting discovery of nonparty witness's sexual history by plaintiff who brought wrongful discharge suit after being terminated for sexual harassment).
E. The Significance of Discovery in Sexual Harassment Suits

The Advisory Committee Notes thus establish only very general standards to guide judges managing discovery in sexual harassment cases. Broad standards are often useful because they promote flexibility.  However, because discovery is among the most powerful weapons in the litigator’s arsenal, the laxity of standards facilitates abuse. When such a volatile issue as sex is central to a case, the danger is especially great.

The purpose of discovery is to promote justice by facilitating the truth-seeking process. But observers distinguish between two types of discovery: informational discovery and impositional discovery. Informational discovery properly serves to flesh out

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53 Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv L Rev 22, 66 (1992) (“Standards . . . are flexible and permit decisionmakers to adapt them to changing circumstances over time.”). The antithesis of standards are rules, which some commentators endorse as promoting consistency, predictability, and judicial restraint, among other virtues. See, for example, Antonin Scalia, The Rule of Law as a Law of Rules, 56 U Chi L Rev 1175, 1178–81 (1989). Perhaps it is more accurate to describe existing sexual history discovery practice as based on neither standards nor rules, but on guidelines, which “establish firm boundaries beyond which no one may go, and [which] may require reasons to be given publicly for any departure from the norm.” Cass Sunstein, Problems With Rules, 83 Cal L Rev 953, 966 (1995).

The purpose of this Comment is not to take sides in the ongoing debate about rules and standards, but merely to suggest that in the context of sexual harassment cases consistency is an important goal. Other commentators have advocated the creation of new Federal Rules of Evidence or of Procedure to reconcile the apparent tension between FRE 412 and FRCP 26. See Note, Shielding Parties to Title VII Actions for Sexual Harassment From the Discovery of Their Sexual History — Should Rule 412 of the Federal Rules of Evidence Be Applicable to Discovery?, 12 Notre Dame J L, Ethics & Pub Pol 285, 335–41 (1998) (advocating the adoption of a Federal Rule of Civil Procedure governing the discoverability of sexual history); Andrea A. Curcio, Rule 412 Laid Bare: A Procedural Rule That Cannot Adequately Protect Sexual Harassment Plaintiffs From Embarrassing Exposure, 67 U Cin L Rev 125, 166–78 (1998) (suggesting more restrictive evidentiary and discovery rules for sexual harassment cases). Rather than propose new Rules that are unlikely to be adopted, this author advocates instead that courts should clarify and harmonize the existing Rules with current sexual harassment law.

54 One commentator went so far as to analogize the array of methods of discovery to nuclear weapons. John K. Setear, The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse, 69 BU L Rev 569, 569 (1989). In response, Judge Easterbrook wrote that discovery is more akin to “trench warfare . . . the war of attrition.” Frank H. Easterbrook, Discovery as Abuse, 69 BU L Rev 635, 635 (1989).

55 Roger S. Haydock and David F. Herr, Discovery Practice § 1.1 at 1:4 (Little, Brown 3d ed Supp 1998). The authors identify ten major purposes of discovery, including supplementing the pleadings; promoting efficiency through the early disclosure of information; partially equalizing investigative resources; allowing limited exploration of the other party’s perception of the case; documenting evidence; determining which facts are in dispute and isolating the issues; prompting negotiated settlements; promoting fair and accurate trial presentations rather than “surmise and surprise”; providing an economical means of resolving disputes; and promoting the use of alternative dispute resolution. Id at 1:3–4. See also Joe K. Longley and Mark L. Kincaid, Discovery and Sanctions For Discovery Abuse, 18 St Mary’s L J 163, 165 (1986).

56 See, for example, Easterbrook, 69 BU L Rev at 637–39 (cited in note 54).
the factual context of the legal dispute. However, impositional discovery — more commonly called discovery abuse — is no more than a tactical means to inflict high costs on one’s adversary in order to force an unfair settlement or withdrawal from the suit.\textsuperscript{57} Although discovery abuse can take many forms,\textsuperscript{58} in the context of a sexual harassment suit it typically involves hostile, aggressive behavior\textsuperscript{59} and sharp questioning of the victim. As commentators have noted, many defense attorneys are willing to use the discovery phase of a trial to pressure the complainant.\textsuperscript{60}

Even informational discovery may not be appropriate for all issues in a sexual harassment suit. Litigators are trained to “ask anything and everything,” in order to generate as much information as possible.\textsuperscript{61} Even when framed without malice, such questions may intrude unreasonably on the plaintiff’s privacy. Sometimes the line between hectoring the victim and merely posing aggressive questions is very thin. For example, shortly before the amendment of FRE 412 one article in a practitioner’s journal suggested ways for defense attorneys to bring up a harassment plaintiff’s sexual history in a deposition:

One way to illicit [sic] possible assertions [of chastity, in order to be able to introduce impeaching sexual history evidence] by plaintiff is to accuse her in the deposition of

\textsuperscript{57} “An impositional (excessive, abusive) discovery request is one ‘justified’ from the demander’s perspective not by its contribution to an anticipated judgment but by its contribution to an anticipated settlement.” Id at 637.

\textsuperscript{58} Examples include hiding or destroying documents, supplying excessive documents in response to a discovery request or otherwise burying relevant documents among a mass of irrelevant ones, and stonewalling or delaying.

\textsuperscript{59} See, for example, Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 FRD 371, 386 (1991) (reporting that of lawyers who indicated that incivility is a problem in litigation, 97 percent noted that such incivility occurs in discovery proceedings).

\textsuperscript{60} Discovery abuse in general is very well documented, at least anecdotally. Stories of discovery abuse are so widespread that they have risen almost to the level of cliché in the law. See generally John D. Shugrue, Identifying and Combating Discovery Abuse, 23 No 2 Litigation 10 (1997); Charles Yablon, Stupid Lawyer Tricks: An Essay on Discovery Abuse, 96 Colum L Rev 1618 (1996); Longley and Kincaid, 18 St Mary’s L J 163 (cited in note 55). Although many allegations of discovery abuse concern practices such as unnecessarily burdensome requests or document dumping, other commentators have focused on the antagonism and lack of civility that sometimes characterizes depositions. See, for example, Fortune, Underwood, and Imwinkelried, Modern Litigation Handbook § 6.71 (cited in note 46); Cary, 25 Hofstra L Rev at 565–71 (cited in note 46). But see Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan L Rev 1393, 1396 (1994) (disputing allegations of widespread discovery abuse); Jack B. Weinstein, What Discovery Abuse?: A Comment on John Setear’s The Barrister and the Bomb, 69 BU L Rev 649, 653–54 (1989).

\textsuperscript{61} Haydock and Herr, Discovery Practice § 3.6.2 at 3:85 (cited in note 55).
prior "questionable" or "loose" sexual conduct. One cannot do that with no basis, but it is fair game to bring up workplace rumors, particularly if the alleged harasser was aware of them .... Plaintiffs sometimes react to such questions before their counsel realizes that even simple denials of certain conduct may permit broader examination. 62

Revealing personal details during discovery may be just as unpleasant as revealing such secrets during the trial. As Judge Posner noted, "being deposed is scarcely less unpleasant than being cross-examined — indeed, often it is more unpleasant, because the examining lawyer is not inhibited by the presence of a judge or jury who might resent hectoring tactics. The transcripts of depositions are often very ugly documents." 63 If discovery is an ugly and unpleasant process for sexual harassment plaintiffs, it may discourage persons with legitimate sexual harassment claims from pursuing a legal remedy. Congress amended FRE 412 to encourage victims to pursue private remedies by making the process safer for them; 64 the failure to do so in discovery suggests a gap in the law.

II. THE FEDERAL COURTS AND RULE 412

The crucial question is whether federal courts are properly balancing the conflicting mandates of broad discovery and respect for the privacy of sexual harassment plaintiffs, as prescribed in the Notes. To do so is no easy task. As one court confronting a sexual history discovery dispute declared, "However difficult this balancing of interests may be at the time of trial, it is substantially more difficult when made at the time of discovery and before the facts, issues, and positions of the parties have crystallized." 65 Similarly, as Judge Easterbrook has noted, "Discovery presents intractable problems because it may be tagged 'excessive' only in retrospect. 66

63 DF Activities Corp v Brown, 851 F2d 920, 923 (7th Cir 1988).
64 See note 43 and accompanying text.
66 Easterbrook, 69 BU L Rev at 636 (cited in note 54).
A. Federal Court Opinions Balancing FRE 412 and FRCP 26

Confronted with the difficulty of preventing excessive discovery before it happens, many courts have sought refuge in a straightforward rule that determines the discoverability of sexual history according to whether it occurred or was known within the workplace. Other courts, however, have criticized this rule as overinclusive.

1. The At-Work/Not-At-Work Rule.

Most courts resort to the comparatively simple at-work/not-at-work paradigm suggested by the Advisory Committee Notes, and hold that the only discoverable evidence of the plaintiff's sexual behavior or predisposition is behavior that occurred in the workplace. In one case, for example, a policewoman sued her employer and several employees for sexual harassment. The court allowed the defendants “reasonable leeway,” ordering the plaintiff to respond to discovery requests concerning her sexual conduct at work or on duty, or with the named individual defendants. However, the court barred the defendants from seeking discovery, from either the plaintiff or any other witness, of any information concerning the plaintiff's sexual conduct outside those parameters.

Another court refused a Title VII plaintiff's request to quash discovery of pictures of her at a party attended by a “male exotic dancer,” on the grounds that, because the pictures had been taken to work and showed to other employees, they were probative of the plaintiff's willingness to accept a more sexualized atmosphere at work. The court was unreceptive to the notion that what is embarrassing at trial may be just as humiliating when revealed through discovery: “[P]laintiffs are confusing what is admissible at trial ... and what is discoverable .... Plaintiffs have [ ] overstated the protections of Rule 412.”

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See note 50 and accompanying text. This distinction did not originate with the Notes, at least not as a factor for determining admissibility. See, for example, Burns v McGregor Electronic Industries, Inc, 989 F2d 959, 963 (8th Cir 1993) (holding that sexual harassment plaintiff’s nude appearance in a magazine distributed among her co-workers was irrelevant to the issue of welcomeness of her employer's sexual advances).

Barta v City and County of Honolulu, 169 FRD 132 (D Hawaii 1996).

Id at 135–36.

Id at 136.


Id at *22. The court did note that the plaintiffs were free to seek a confidentiality order with regard to the photograph. Id at *23 n 2.
By amending their original pleadings to portray the plaintiff as the sexual aggressor, the defendants in *Sanchez v Zabihi* by amending their original pleadings to portray the plaintiff as the sexual aggressor, the defendants in *Sanchez v Zabihi* forced the plaintiff to answer an interrogatory concerning her entire romantic and sexual history with any and all co-workers (other than her husband) in the preceding three years — a length of time that the court considered to be "narrowly tailored" from the defendants' requested ten years. However, the court did issue explicit orders sua sponte restricting the dissemination of the discovered information.

2. Rejection of the At-Work/Not-At-Work Distinction.

Some courts are more circumspect and treat the at-work rule as merely the first of several hurdles to be cleared before discovery of the plaintiff's sexual history may proceed. In *Herchenroeder v The Johns Hopkins University Applied Physics Laboratory*, the court allowed the defendant to pose (only) “two precise questions” about the existence of the plaintiff's alleged sexual relationship with a co-worker, who was also a crucial witness for the plaintiff. The court displayed sensitivity to the precepts of Rule 412 by mandating that the defendants pursue discovery through written interrogatories, the “least intrusive means possible,” and by requiring that the parties first implement a confidentiality agreement.

At least one court has flatly rejected the simplicity of the at-work test. In sharp contrast to the *Sanchez* decision, a federal district court held in *Howard v Historic Tours of America* that the plaintiffs need answer only those interrogatories that concerned their sexual history with co-workers who were named defendants, and not with any other co-workers. The decision turned in part on the defendants’ apparent inability to narrow the inquiry to specific non-defendant co-workers. The court intuited that if the defendants were unaware of specific other sexual

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73 166 FRD 500 (D NM 1996).
74 Id at 502.
75 Id at 503. The court prohibited the defense attorney from divulging any of the plaintiff's responses to anyone, including his client, without a further motion, a hearing on the matter, and an order from the court. Id.
76 171 FRD 179 (D Md 1997).
77 Id at 182.
78 Id.
79 Id at 182-83.
80 177 FRD 48 (D DC 1997).
81 Id at 51–53. Although the suit was predicated on District of Columbia law, rather than Title VII, federal rules of procedure and evidence applied because the plaintiff filed the suit in federal court.
relationships in the workplace, no such tacit relationship could have colored their perception of the plaintiff's receptivity to sexual advances.\textsuperscript{82}

More radically, the court in \textit{Howard} refuted the defendant's argument that the "unwelcomeness" test in \textit{Meritor Savings Bank, FSB v Vinson},\textsuperscript{83} compelled disclosure of the plaintiff's sexual conduct with any and all fellow employees.\textsuperscript{84} The court reasoned that even if the defendants had known of other liaisons, such knowledge would not necessarily exculpate their behavior, since welcoming the sexual advances of one person does not connotate receptivity to those of another.\textsuperscript{85} Undermining this seemingly progressive stance, however, the \textit{Howard} court permitted the defendants to pursue the same line of inquiry through other means. Although the court refused to compel the plaintiffs to discuss alleged relationships with non-defendant co-workers, it did permit the defendants to depose directly those same co-workers to glean the same information, because it considered this method of discovery less embarrassing to the plaintiff.\textsuperscript{86}

\textsuperscript{82} Id at 51 ("If the affair was secret, it could not have affected anyone else's perception and consequential behavior.").

\textsuperscript{83} 477 US 57, 73 (1986); see note 15 and accompanying text.

\textsuperscript{84} \textit{Howard}, 177 FRD at 53.

\textsuperscript{85} Id at 52.

\textsuperscript{86} Id at 53. Permitting this end-run around the plaintiff's privacy seems inconsistent with FRE 412 and aberrational. The Advisory Committee Notes flatly state that "[t]he revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation." FRE 412 Advisory Committee Notes. Indeed, most courts are willing to extend the aegis of Rule 412 to a non-party witness, at the behest of the plaintiff or witness.

The defendant is apparently limited in his ability to invoke this protection on behalf of third parties. See \textit{Stalnaker v Kmart Corp}, 1996 US Dist LEXIS 10013, \textsuperscript{*}10–11 (D Kan) (overruling defendant's objections to discovery of voluntary sexual activities of four non-party witnesses to the extent they show defendant's willingness to persuade others to engage in such activities; none of the witnesses had themselves objected to discovery).

In \textit{Barta v City and County of Honolulu}, the defense was barred from discovering from non-party witnesses information about the plaintiff's sexual activities. 169 FRD 132, 135–37 (D Hawaii 1996). See notes 68–70 and accompanying text. This privilege against discovery apparently also encompasses the witnesses' own sexual histories. \textit{Burger v Litton Industries, Inc}, 1995 US Dist LEXIS 11373 (S D NY). The \textit{Burger} court based its decision on the Rule 412 Notes, which provide that Rule 412 "applies . . . without regard to whether the alleged victim or person accused is a party to the litigation." Id at \textsuperscript{*}4 (quoting FRE 412 Advisory Committee Notes). However, the witness at issue was neither victim nor accused, but merely a participant in consensual sexual activities with other employees of the defendant corporation. Id at \textsuperscript{*}2, \textsuperscript{*}6. Thus, \textit{Burger} represents a considerable extension of Rule 412.
B. Admissibility Under FRE 412

Given the variations in tolerance among federal courts for permitting discovery of sexual history evidence, one naturally looks to the evidence that courts have admitted in order to develop a posteriori standards for discovery. Unfortunately, it is difficult to derive any clear rules from sexual history admissibility decisions.

1. Procedural Safeguards Governing Admissibility.

FRE 412 prescribes no bright-line rule governing admission of sexual history evidence, but rather a balancing test tilted in favor of the alleged victim. To overcome the presumption that sexual history is not admissible, the defendant must show that the evidence 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." The Rule interposes an additional burden on the defendant in the form of procedural safeguards. At least fourteen days before trial, a defendant seeking to offer evidence under the 412(b)(2) exception must file a written motion describing the evidence and the purpose for its admission, and serve the other parties with the motion. The court must conduct an in camera hearing at which the victim may contest the motion. In addition, "[t]he motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise." Although courts may waive the 14-day requirement under the Rule, many enforce it stringently.


In determining the admissibility of sexual history evidence, most courts hew to the same at-work/not-at-work distinction ap-
plied to discovery disputes. The issue has arisen in several cases where the defense alleged that the plaintiff engaged in sexual banter in the workplace. Where the plaintiff alleges a hostile work environment, and where the defense claims that the accused harasser was aware of the plaintiff's tendency to discuss sexual matters at work, admitting evidence of such banter might be reasonable. Several courts, however, deem admissible all workplace sexual discussion, on the grounds that a plaintiff who engages in such conduct with some co-employees welcomes, under the standard of Meritor Savings Bank, FSB v Vinson, such conduct from others — a far more disturbing conclusion.

The recent decision in Socks-Brunot v Hirschvogel Inc challenges the presumption that evidence of workplace sexual banter goes to the issue of welcomeness. Repudiating its prior evidentiary rulings, the district court in Socks-Brunot ordered a new trial because defense counsel had tainted the first with "highly prejudicial, personally invasive, and legally irrelevant evidence." At work, the plaintiff had discussed with office colleagues a sexual relationship with a former supervisor at another place of employment. Because the defense could not show that the alleged

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95 Admitting such evidence would be unreasonable in a quid pro quo situation. Engaging in sexually explicit banter may invite such banter in return, but does not indicate a willingness to have the terms of one's employment suddenly predicated on submitting to sexual advances. Admitting this evidence would also be unreasonable in extreme manifestations of a hostile work environment. Compare Sublette v The Glidden Co, 1998 US Dist LEXIS 15692, *4–5, *11–12 (E D Pa) (admitting evidence of the plaintiff's extensive workplace sexual conduct, including that she not only engaged in sexual banter but also exhibited her cleavage and fondled male co-workers, because the plaintiff "[did] not allege that either of her harassers touched her"), with Cacciavillano v Ruscello, Inc, 1996 US Dist LEXIS 16528, *4–5 (E D Pa) (excluding evidence of plaintiff's workplace sexual banter because "participation in sexual banter and antics has a much more tenuous relevance to the welcomeness of touching, grabbing, flashing, and poor treatment").

96 477 US 57 (1986); see note 16 and accompanying text.

97 Citing Meritor as authority, one court held that evidence of a plaintiff's non-workplace sexual experiences, which she discussed with some co-workers "is highly probative of how little Plaintiff would be offended by [the alleged harasser's] alleged sexual innuendos when she in fact felt comfortable publicizing information regarding her sex life." Fedio v Circuit City Stores, Inc, 1998 US Dist LEXIS 21144, *17–18 (E D Pa). This holding led one law firm, writing for a practitioner's journal, to advise employers that "[w]hile you may not want to harshly discipline an otherwise good employee simply because she made comments in the workplace similar to those made by Fedio, you may want to keep track of them in case they might come in handy later." Jack, Lyon & Jones, PA, Judge Allows Evidence of Complaining Employee's Previous Sexual Behavior, 4 No 6 Ark Emp L Letter 7 (1999).

98 184 FRD 113 (S D Ohio 1999).

99 Id at 120.

100 Id.
harasser had ever heard the stories, the evidence was unquestionably inadmissible. For the same reason, the court excluded evidence that the plaintiff had graphic conversations with a co-worker about oral sex:

No testimony was elicited to indicate that [the alleged harasser] was part of this conversation . . . . No evidence was offered that he ever knew of the conversation . . . . The probative value of such testimony is nil, in the absence of the discussion occurring in the presence of [the alleged harasser]. The prejudicial effect is clear.

The court flatly rejected the defendant's argument that sexual history evidence is admissible as relevant to the issue of welcomeness, implicitly ruling instead that only the alleged harasser's firsthand knowledge of workplace sexual conduct could be probative on this issue.

Less controversial is the exclusion of evidence of sexual behavior that occurred outside the workplace or directly between the alleged harasser and his accuser. In Rodriguez-Hernandez v Miranda-Velez, the appeals court upheld the decision to exclude evidence of the plaintiff's sexual activities outside the workplace, and to admit evidence of the plaintiff's allegedly flirtatious behavior toward the alleged harasser. Unfortunately, few other

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101 Id at 121 ("Had the Court been aware before trial that this highly prejudicial evidence offered by the defendant involved only statements made by plaintiff to co-workers whom she never accused of sexual harassment, the evidence would have been stricken even under the more relaxed Rule 403 standard.").

102 184 FRD at 122. The court excluded a non-party employee's testimony that the plaintiff had acted flirtatiously toward her alleged harasser on the same grounds; the alleged harasser failed to show that he perceived her behavior as flirtatious. Id.

103 Id at 119.

104 Id at 120–22. The Eighth Circuit reasoned similarly in upholding a trial court's exclusion of evidence of a sexual relationship between the plaintiff and her alleged harasser, who was her ex-husband. Because the alleged sexual activity took place outside the workplace, unbeknownst to the defendant employer, it could not have affected the employer's failure to intervene or its decision to terminate the plaintiff. Excel Corp v Bosley, 165 F3d 635, 641 (8th Cir 1999).

105 The apparent exception is Gretzinger v University of Hawaii, 1998 US App LEXIS 15370 (9th Cir) (unpublished disposition). There the Ninth Circuit upheld the trial court's admission of evidence of an alleged sexual misconduct victim's lesbianism, extramarital affair, and alleged sexual assault, because the victim claimed to suffer Post Traumatic Stress Disorder from the alleged harassment. Id at *4–6.

106 132 F3d 848 (1st Cir 1998).

107 Id at 856. What is more confusing is the court's decision upholding the inclusion of evidence that the plaintiff's outside relationship with a married man distracted her from her work, causing the alleged lapses that were the putative reason for her termination. See id. This reasoning is specious. If the plaintiff did in fact fail to perform her duties at work, it should suffice to prove that point directly (for example, by showing that she
admissibility cases have been reported and thus it is difficult to derive a clearer standard for discovery.\footnote{A comprehensive online database search disclosed only eleven reported dispositions of admissibility disputes in civil sexual misconduct cases that considered the applicability of amended FRE 412 at any length. In addition to the cases discussed in notes 94-107 and accompanying text, see also Janopoulos v Harvey L. Walner & Associates, 1995 US Dist LEXIS 2751, *3-4 (N D Ill) (holding that Rule 412 did not bar the admission of plaintiff's marital history in a sexual harassment suit, but that Rules 401 and 402 did); Sheffield v Hilltop Sand & Gravel Co, Inc, 895 F Supp 105, 109 (E D Va 1995) (allowing alleged harasser to testify about the plaintiff's "sexually provocative discussions and activities in the workplace" but barring similar testimony from other employees as a sanction for noncompliance with Rule 412(c) procedural requirements). In addition, the court in McCleland v Montgomery Ward & Co, 1995 US Dist LEXIS 14012 (N D Ill), admitted evidence of the plaintiff's prior childhood abuse, including sexual abuse; the court ruled that the defendant "[did] not proffer plaintiffs' childhood abuse to prove sexual behavior or predisposition." Id at *6 n 1. Yet FRE 412 bars evidence that the victim "engaged in other sexual behavior." FRE 412(a)(1). Enduring sexual abuse is unquestionably a form of sexual behavior, however passive and involuntary. Thus, the McCleland court's ruling is confusing, even disturbing. Its logic would appear to protect voluntary participants in sex, but not unwilling victims. However, the court stated that it would have admitted the evidence anyway under Rule 412(b)(2). Id.}

C. Emotional Distress Claims

When the plaintiff claims that she suffered emotional distress as a result of sexual harassment, a court will generally allow more liberal discovery of her sexual history. Although the Supreme Court held in \textit{Harris v Forklift Systems, Inc},\footnote{510 US 17 (1993).} that serious psychological injury is not a prerequisite to a sexual harassment suit,\footnote{Id at 21-22.} many sexual harassment plaintiffs plead emotional distress in order to augment their damages claim. The default remedy for sexual harassment is equitable relief such as back pay, lost wages, or restoration of employment.\footnote{42 USC § 1981a(a)-(b) (1994).} Further, because punitive damages may be awarded only upon a showing that the employer acted "with malice or with reckless indifference,"\footnote{42 USC § 1981a(b)(1).} courts rarely award them.\footnote{Some plaintiffs do win punitive damage awards, however uncommonly. See \textit{Fedio v Circuit City Stores, Inc}, 1998 US Dist LEXIS 21144, *7, *10-11 (E D Pa) (upholding jury's award of $15,000 in punitive damages in a Title VII retaliation case because the jury found sufficient evidence of malicious or reckless behavior).} Accordingly, plaintiffs have strong incentives to request damages for emotional distress.

The danger to the plaintiff is that by pleading emotional distress she may expose herself to discovery inquiries that would otherwise be blocked under the balancing test. Early decisions

missed meetings or failed to make deadlines), without reference to the external source of her distraction.
held that by claiming emotional distress or mental anguish, the plaintiff automatically placed her mental and physical condition in controversy, leaving her vulnerable to a range of discovery inquiries, including compelled examinations under FRCP 35.\textsuperscript{114} Some recent cases have adopted a "reasonable person" standard, holding that an ordinary emotional distress claim does not place the plaintiff's psychological health in controversy if a reasonable person would have suffered such distress under identical circumstances.\textsuperscript{115} However, when a plaintiff fails to proffer corroborating testimony of more serious impairment, courts are unlikely to award "more than nominal damages . . . for mental anguish."\textsuperscript{116} The plaintiff must therefore choose between forsaking potentially substantial damages, and presenting evidence of significant psychological harm that may open a line of inquiry into her sexual behavior for the defendant to pursue.

Advancing claims alleging similar types of injuries, such as sexual dysfunction, may impinge a plaintiff's ability to avoid intrusive discovery requests. In a civil sexual assault case decided only three and a half months after Rule 412 went into effect, the magistrate judge confronted the "balancing test" imposed by the conflicting mandates of FRCP 26(b)(1) and FRE 412.\textsuperscript{117} The court upheld the plaintiff's refusal to answer certain deposition questions involving her use of birth control at the time of the alleged assault,\textsuperscript{118} but did require her to answer other sex-related questions to resolve specific variances in the testimony.\textsuperscript{119} In particular, the court directed the plaintiff to answer a question concern-

\textsuperscript{114} Zabkowicz v West Bend Co, 585 F Supp 635, 636 (E D Wis 1984).
\textsuperscript{115} See Truong v Smith, 183 FRD 273, 275–76 (D Colo 1998) ("The mere filing of a lawsuit alleging emotional harm, without a separate claim of intentional infliction of emotional distress, and without a damages claim of severe and emotionally devastating harm does not put her emotional condition at issue."); Burrell v Crown Central Petroleum, Inc, 177 FRD 376, 380 (E D Tex 1997) ("Asking for mental anguish damages does not place a plaintiff's physical or medical condition 'in controversy.'"); Lahr v Fulbright & Jaworski, LLP, 164 FRD 204, 210 n 2 (N D Tex 1996) (distinguishing intentional infliction of emotional distress from 'garden variety claim[s] of emotional distress'). But see Hertenstein v Kimberly Home Health Care, Inc, 1999 US Dist LEXIS 9258, *7, *18 (D Kan) (granting defendant's FRCP 35(a) motion and declining to limit inquiry into private, non-work-related sexual activities, although the plaintiff only alleged emotional distress and mental anguish).

\textsuperscript{116} Burrell, 177 FRD at 382, citing Patterson v P.H.P. Healthcare Corp, 90 F3d 927, 938 (5th Cir 1996). But see Farpella-Crosby v Horizon Health Care, 97 F3d 803 (5th Cir 1996) (upholding jury award of $7,500 in compensatory damages to sexual harassment plaintiff whose own testimony was sufficient to allow the jury to infer that she experienced stress and humiliation).


\textsuperscript{118} Id at *6–7.

\textsuperscript{119} Id at *11–13.
ing the difficulties with sexual intimacy she claimed to experience after the assault. Because the plaintiff had made those difficulties a cornerstone of her damages claim, the court held that the defendant had a right to challenge her on that matter.¹²⁰

Until a consensus develops that a simple emotional distress claim does not automatically place the plaintiff’s mental state in jeopardy, courts may allow discovery of a plaintiff’s sexual history on the grounds that the defendant has the right to seek potential alternative stressors in the plaintiff’s past.¹²¹ This is particularly likely if the plaintiff alleges sexual dysfunction as a result of the harassment. Although the plaintiff may be able to exclude such evidence at trial by arguing that the specific evidence fails to surmount FRE 412(b)(2)’s presumption against admissibility,¹²² the defendant will likely convince the judge that the need to develop the factual record requires the discovery of such evidence. Accordingly, sexual harassment plaintiffs who are sensitive to invasive discovery requests should be very cautious about alleging emotional distress.

III. COURTS SHOULD RECONSIDER THEIR APPROACH TO DISCOVERY OF SEXUAL HISTORY

The plain text of FRE 412 says nothing about discovery. Setting aside the admonition in the Advisory Committee Notes that FRE 412 should influence courts’ application of FRCP 26, it is wholly plausible that the two rules could operate entirely independently of each other. Although a close nexus exists between discovery of evidence and its presentation at trial, the two functions are still discrete components of the litigation process. Discovery of sexual history evidence cannot possibly prejudice the jury if the judge adheres to the standards of FRE 412 and excludes that which is improper. Rather than make uncertain estimates of what the victim might reveal, the judge may more readily apply the proper standard with the disputed evidence at hand.¹²³ Although the victim’s dignity may be bruised in a blunt deposition, she will be spared public humiliation. She may request that the deposition be sealed, and can expect her lawyer

¹²⁰ Id at *12–14.
¹²¹ See Hertenstein, 1999 US Dist LEXIS 9258 at *18 (“Inquiries about private, non-work-related sexual activity appear relevant to evaluate the cause and extent of psychological injuries alleged by plaintiff.”).
¹²² See note 38 and accompanying text.
¹²³ See notes 65–66 and accompanying text.
and the judge to control the use of embarrassing evidence at trial.\textsuperscript{124}

Nevertheless, although broad discovery may be consonant with the statute’s plain meaning,\textsuperscript{125} it is inconsistent with the Advisory Committee Notes, which were adopted by the Conference Report accompanying Public Law 103-322,\textsuperscript{126} and printed as a supplement to FRE 412 in the United States Code. The Notes admonish that “[i]n 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.”\textsuperscript{127} Limiting discovery in this fashion best suits sexual harassment policy goals, and reduces the incidence of distracting elements at the trial.

A. Failing to Prevent Discovery Abuse Will Subvert The Public Policy Goals Underlying Rule 412

Congress expanded the damages remedy under the Civil Rights Act of 1991 to prompt victims to adjudicate their claims within the legal system.\textsuperscript{128} Although the number of sexual harassment complaints filed at the EEOC has increased significantly over the past two decades,\textsuperscript{129} evidence suggests that only a small percentage of harassment victims ever bring suit.\textsuperscript{130} As the Advisory Committee Notes recognized:

[T]he wish to encourage victims to come forward when they have been sexually molested do[es] 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 en-

\textsuperscript{124} According to this line of reasoning, just as it may be uncomfortable but necessary to discuss intimate details with one’s doctor or psychologist, so too in a civil sexual harassment lawsuit should necessity prevail. The incentive created by the newly available damage remedies may also soften the sting of revealing intimate details in a closed forum.

\textsuperscript{125} “[T]he primary rule of statutory construction [is that] a statute’s plain meaning should be given priority in its construction.” Western Union Telegraph Co v FCC, 665 F2d 1126, 1137 (DC Cir 1981). Justice Scalia has observed that “[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.” Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 23 (Princeton 1997).

\textsuperscript{126} See note 34.

\textsuperscript{127} FRE 412 Advisory Committee Notes.

\textsuperscript{128} See note 23 and accompanying text.

\textsuperscript{129} See note 24.

\textsuperscript{130} See Note, 48 Vand L Rev at 1158–59 (cited in note 29).
gage in sexual misconduct, but in also providing relief to
the victim.\(^{131}\)

To encourage sexual harassment victims to come forward by of-
fering the assurance that the process will not expose irrelevant
details of their intimate lives during the trial, only to allow de-
fendants to expose those same details during discovery, would be
figuratively to yank the rug out from under the victims' feet and
subvert the very process intended to ensure their rights. Judges
must manage the discovery process so that the victim's reason-
able expectations of privacy are not destroyed.

There will likely always be some unscrupulous attorneys
willing to use discovery as a means of intimidation. The law
should not be structured in a way that affords them an unfair
advantage.\(^ {132}\) Courts should move to protect sexual harassment
victims during discovery because, as this Comment will demon-
strate, they can do so at almost no cost to defendants who do not
seek to employ unfair tactics.

B. Discovery of a Victim's Sexual History Is Almost Always Un-
necessary under Existing Defenses to a Sexual
Harassment Lawsuit

An employer essentially has two defenses to a charge of sex-
ual harassment: (1) that there was no sexual harassment because
the conduct was not unwelcome;\(^ {133}\) or (2) that although sexual
harassment may have occurred, the employer has an affirmative

\(^{131}\) FRE 412 Advisory Committee Notes.

\(^{132}\) See Oliver W. Holmes, The Path of the Law, 10 Harv L Rev 457, 459 (1897):

If you want to know the law and nothing else, you must look at it as a bad
man, who cares only for the material consequences which such knowledge
enables him to predict, not as a good one, who finds his reasons for con-
duct, whether inside the law or outside of it, in the vaguer sanctions of
conscience.

\(^ {133}\) See Meritor Savings Bank, FSB v Vinson, 477 US 57, 69 (1986), in which the Court
held that:

[T]he fact that sex-related conduct was "voluntary," in the sense that the
complainant was not forced to participate against her will, is not a de-
fense to a sexual harassment suit brought under Title VII. The gravamen
of any sexual harassment claim is that the alleged sexual advances were
"unwelcome."

In the context of quid pro quo suits, the unwelcomeness requirement clearly excludes
consensual "office romances"; for hostile environment claims, the requirement suggests
that the alleged victim did not by her own behavior indicate her receptivity to the com-
plained-of conduct.
defense under *Burlington Industries v Ellerth* and *Faragher v City of Boca Raton.* Under neither defense is it necessary to discover unknown facts about the plaintiff's sexual history.

If the employer's defense is that the complained-of conduct was not unwelcome, the employer need not embark on a fishing expedition for sexual details from the plaintiff's past. In the case of a quid pro quo sexual harassment claim, it should suffice for a defendant to discover specific facts about the plaintiff's relationship with the alleged harasser, including facts concerning their sexual relationship; for example, in what ways did she manifest her consent to the conduct? Much of this information the defendant employer should be able to obtain from the alleged harasser, and need only seek corroboration or denial from the plaintiff. Any other sexual history information simply does not go to the issue of the plaintiff's consent to the conduct.

Similarly, when the plaintiff complains of hostile work environment sexual harassment, her own workplace conduct, including her dress and type of speech, is highly relevant to the question of whether the conduct was welcome or whether in fact it rose to the level of a hostile work environment under *Meritor.*

To establish such a defense, the employer may readily query the plaintiff's fellow employees about the nature of the plaintiff's workplace demeanor, but should not be permitted to question her about sexual behavior that took place out of the full view of her fellow employees, such as a private sexual relationship with a fellow employee. It is fatuous to suggest that a plaintiff's workplace demeanor could be sufficiently brazen to excuse the highly sexualized atmosphere that constitutes a hostile work environment, yet be so unknown to the employer that discovery would be required to learn more about it.

134 118 S Ct 2257, 2270 (1998).
136 No statute or court has impinged the defendant's right to discover any sexual history between the alleged offender and victim, and this Comment does not advocate curtailing that right.
137 477 US at 68–69 (see note 16 and accompanying text).
138 The Supreme Court recently held that commonplace social intercourse between men and women, including simple teasing, offhand comments, and isolated incidents, unless extremely serious, does not constitute sexual harassment. *Faragher,* 118 S Ct at 2283. Because such behavior by the alleged harasser does not support a prima facie case of sexual harassment, neither should like conduct by the alleged victim (such as telling the occasional off-color joke) excuse genuine sexual harassment. For the plaintiff's workplace conduct to signal that the harasser's "extreme" behavior, see id at 2284, was not unwelcome, she presumably would have to engage in similar extreme behavior herself, which her fellow non-party employees could not fail to notice. In such circumstances, the defendant employer may question those own employees at less cost to both itself and the plain-
More importantly, the Supreme Court has recently signaled a shift in sexual harassment law that emphasizes the responsibility of the employer to establish a reasonable system to prevent and correct incidents of sexual harassment, and on the employee to take advantage of that system. A defendant may mount a successful defense by focusing on the behavior of the plaintiff at the time the alleged harassment occurred, and not on such issues as whether she slept with a coworker in the previous three years, had an abortion, or suffered molestation as a child. This defense properly shows the way out from the traditional preoccupation with the victim's sexual behavior, and focuses instead on the responsible steps both victim and employer can take to reduce the problem of sexual harassment.

Congress indicated no precise intent as to how FRE 412 should constrain discovery; rather, it left this application to the courts. When courts are thus invited to make common law, they should perform this duty in a reasonable and restrained manner. FRE 412 clearly defines a role for the judiciary in shaping the outcome of the interplay of FRCP 26 and FRE 412. Rather than resolve the tension between these two rules on a purely ad hoc basis, courts should establish a consistent and fair standard that upholds the purposes of FRE 412, to eliminate prejudicial testimony and to provide an environment in which sexual harassment victims are not discouraged from seeking a civil remedy.

IV. A WAY FORWARD? LIMITS ON DISCOVERY OF SEXUAL HISTORY IN CALIFORNIA STATE COURTS

California provides a model for the treatment of sexual history evidence during the pretrial phase of sexual misconduct law-

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139 See Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2292–93.

If [the legislature] enacts some sort of code of rules, the code will be taken as complete (until amended); gaps will go unfilled. If instead it charges the court with a common law function, the court will solve new problems as they arise, but using today's wisdom rather than conjuring up the solutions of a legislature long prorogued.

With FRE 412, Congress has clearly invited the courts to fill the gaps.
suits. Rather than leave the issue to unguided judicial discretion, California's civil sexual misconduct shield\(^\text{141}\) expressly defines the permissible scope of discovery in such cases.\(^\text{142}\)

A. California's Statutory Protections

California law provides that in a sexual harassment or similar civil sexual misconduct suit, any party seeking to discover the plaintiff's sexual history with any person other than the alleged perpetrator must establish specific facts showing good cause, relevancy, and the likelihood that discovery will lead to admissible evidence.\(^\text{143}\) The requisite showing must be by noticed motion,

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\(^{142}\) Cal Civ Proc Code § 2017(d). Iowa's sexual harassment shield also extends to discovery, Iowa Code Ann § 668.15(1), but is not discussed further here because of a dearth of case law applying it. Among the states with rape shield laws, only New Hampshire provides that the rape shield protections extend to the discovery phase. NH Rule Evid 412 (Michie 1998).

Whereas the Advisory Committee addressed the issue of discovery only tangentially in drafting FRE 412, concern for the privacy rights of the sexual harassment victim at the pretrial stage clearly influenced the California legislature as it drafted civil shield legislation. In section I of the bill establishing the original California civil sexual harassment shield, the legislature declared:

The discovery of sexual aspects of complainant's [sic] lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. . . . Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the “Catch-22” of invoking their remedy only at the risk of enduring further intrusions into details of their personal lives in discovery.

Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial.

1985 Cal Stat 1328 § 1. The original civil sexual harassment shield was codified at Cal Civ Proc Code § 2036.1; with the passage of California's Civil Discovery Act of 1986, the substance of § 2036.1 was reenacted as § 2017(d). Mendez v Superior Court, 253 Cal Rptr 731, 735 (Cal App 1988). Although this declaration was not included in the text of this recodification, California courts continue to cite the legislative intent expressed in regard to § 2036.1 in cases applying § 2017(d). See id; Vinson v Superior Court, 740 P2d 404, 411 (Cal 1987).

\(^{143}\) Cal Civ Proc Code § 2017(d) provides:

In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that
not at an ex parte hearing. To induce this cooperation, the court must impose a monetary sanction against any party that unsuccessfully makes or opposes such a motion for discovery, unless the court finds ameliorating circumstances.

In addition, a separate California statute prohibits introduction of sexual history evidence (except for sexual conduct with the defendant) offered to show consent by the alleged sexual harassment victim or to demonstrate absence of injury, except where the plaintiff has pled loss of consortium as an injury or has placed her prior sexual conduct in dispute. A third statute establishes strict procedural guidelines that require written notice of intent to introduce sexual history evidence, and provides that courts should decide the relevancy of such evidence outside the presence of the jury. Significantly, California law affords greater protection to the sexual harassment plaintiff even though there is no cap on damages, unlike under federal law.

B. Judicial Application of the California Protections

The California Supreme Court first applied the state sexual harassment shield in Vinson v Superior Court. Although the court required the sexual harassment plaintiff to submit to a psy-

discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be made by noticed motion and shall not be made or considered by the court at an ex parte hearing. This motion shall be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for discovery, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

144 Id. As under the Federal Rules, see FRE 37(a)(2)(A), the party making the motion must certify that he attempted a good faith informal resolution of each discovery issue with the opposing counsel.
145 Id. The Iowa statute is substantively similar to the California statute except that it fails to elaborate the procedural provisions and the requirement of sanctions. See Iowa Code Ann § 668.15(1).
146 Cal Evid Code § 1106 (West 1995).
147 Cal Evid Code § 783 (West 1995).
148 In a case that attracted national attention, a California jury awarded a sexual harassment plaintiff $50,000 in compensatory damages for emotional distress and $6.9 million in punitive damages. Weeks v Baker & McKenzie, 66 FEP Cases (BNA) 581, 583 (Cal Super 1994). The court reduced the award to $3.5 million. Id at 584–85.
chological examination,\textsuperscript{150} it granted her motion to restrict all inquiries into her sexual history.\textsuperscript{151} The court held that the plaintiff's constitutional right to privacy encompassed sexual relations and that the defendants had failed to establish any compelling reason to justify impinging that right.\textsuperscript{152}

In Mendez v Superior Court,\textsuperscript{153} the California Court of Appeals rejected a defendant's argument that all of a victim's workplace-related sexual conduct is subject to discovery. The court sustained the prohibition on discovery of the plaintiff's workplace sexual partners\textsuperscript{154} because the plaintiff agreed not to introduce evidence of the detrimental effect of the alleged assault upon her marriage\textsuperscript{155}; the court was also concerned for the privacy of third parties.\textsuperscript{156} The plaintiff's claim of emotional distress did not justify the defendants' request to seek alternative stressors in her sexual history, because even ordinary sexual misconduct cases invariably entail an element of emotional distress in the form of the "outrage, shock and humiliation of the individual abused."\textsuperscript{157}

In the Mendez court's view, "because such distress is inextricably intertwined in the cause of action,"\textsuperscript{158} allowing a claim of emo-

\textsuperscript{150} The plaintiff had sued for intentional infliction of extreme emotional distress and alleged that she continued to suffer from "diminished self-esteem, reduced motivation, sleeplessness, loss of appetite, fear, lessened ability to help others, loss of social contacts, anxiety, mental anguish, loss of reputation, and severe emotional distress." Id at 409. The court emphasized that its decision to order the psychological examination was "based solely on the allegations of emotional and mental damages in this case. A simple sexual harassment claim asking compensation for having to endure an oppressive work environment . . . would not normally create a controversy regarding the plaintiff's mental state." Id.

\textsuperscript{151} Id at 412.

\textsuperscript{152} Id at 410–12. Although California courts cite a federal and state constitutional right of privacy encompassing sexual relations as one cornerstone of their sexual history discovery rulings, see Barrenda L. v Superior Court, 76 Cal Rptr 2d 727, 730 (Cal App 1998), this right is hardly integral to a decision to afford sexual harassment victims special procedural protection.

\textsuperscript{153} 253 Cal Rptr 731 (Cal App 1988).

\textsuperscript{154} Id at 738–40.

\textsuperscript{155} Initially the plaintiff's husband had joined her suit seeking damages for loss of consortium, but then dropped this claim. Id at 733.

\textsuperscript{156} The court wrote that:

\textquote{Insofar as defendants seek to pry into plaintiff's sexual conduct with others, they necessarily seek to pry into the third party's sexual conduct. While theoretically such third parties could seek to appear in this action and oppose defendants' discovery motions, such privilege under these circumstances is meaningless; first and foremost, what is sought by defendants is the right to ferret out the existence and identity of such third parties.}

\textsuperscript{157} 253 Cal Rptr at 740.

\textsuperscript{158} Id.
tional distress to expose the plaintiff to discovery of her sexual history would circumvent the very protections the statute intended to establish.\(^{159}\)

Other California cases have similarly refused to allow an emotional distress claim to open the door to broad inquiries into the plaintiff's sexual history. In *Barrenda v Superior Court*,\(^{160}\) the court cited *Vinson* and *Mendez* in its decision barring the discovery of intimate details of plaintiffs' possible abortions, sexual experiences, and molestation experiences prior to their contact with the defendant.\(^{161}\) The court held that the defense had failed to demonstrate any independent proof that prior sexual activity could have contributed to the plaintiffs' emotional distress.\(^{162}\) Another court ruled that even where the defendant's psychiatric expert testified that discovery of childhood sexual assaults was relevant to the issues of emotional distress and adult sexual perceptions and behavior, the sexual harassment shield bars discovery.\(^{163}\) The court found that nonconsensual prior sexual activity was just as protected as consensual prior sexual activity,\(^{164}\) and that to grant the discovery request would effectively vitiate the protection of the harassment shield.\(^{165}\)

**V. PROPOSED SOLUTIONS**

California demonstrates the feasibility of greater safeguards to protect the sexual harassment plaintiff in discovery. While not every aspect of California practice is suitable for federal courts, federal courts should adopt at least the principle of defining more clearly when sexual history evidence is discoverable. Although judicial discretion has some legitimacy in this context — several of the federal court decisions examined above appear to have reached intuitively reasonable decisions\(^{166}\) — clarifying the standards will nevertheless promote more consistent treatment.

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\(^{159}\) Id at 740–41.

\(^{160}\) 76 Cal Rptr 2d 727 (Cal App 1998). This was not a sexual harassment case, but rather a suit by two former foster children alleging negligence by the county for allowing ongoing sexual abuse by a member of the foster family.

\(^{161}\) Id at 729.

\(^{162}\) Id at 731–32.

\(^{163}\) Knoettgen v Superior Court, 273 Cal Rptr 636, 638 (Cal App 1990).

\(^{164}\) Id.

\(^{165}\) Id. The court characterized the employer's discovery request as "precisely that which the Legislature has declared offensive, harassing, intimidating, unnecessary, unjustifiable, and deplorable." Id.

\(^{166}\) See notes 76–86 and accompanying text.
A. Arguments For More Clearly Defined Procedural Safeguards

Federal judges should establish more clearly defined procedural safeguards to protect the victim's rights during deposition. First, courts should adopt a per se rule that a harassment victim's sexual history, including work-related sexual history, is not subject to the automatic disclosure requirements of FRCP 26(a)(1). It is uncertain whether this issue has arisen in litigation, but at least one practitioner's journal has suggested its applicability, stating that sexual harassment defense attorneys should "argue[e] that undisclosed conduct should have been voluntarily disclosed as relevant to the issues in the case. At a minimum, defense counsel should argue that the name and address of any other employee with whom the Plaintiff has engaged in any sexually related activity of any kind be voluntarily disclosed." Because the discoverability of sexual history is such a closely-litigated issue, and because discretionary standards rather than clear-cut rules govern, it would be ludicrous to sanction the plaintiff for not rushing forward to provide intimate details of her sexual life. Instead, courts should actively promote good faith attempts by the parties to agree voluntarily on the terms of discovery of sexual history.167

Second, when the defendant has a valid reason to discover the plaintiff's sexual history, courts should preserve the essence of the notice requirement inherent in the 14-day rule for admission of sexual history evidence under Rule 412. The purpose of this 14-day requirement is to give the plaintiff fair notice of forthcoming inquiries. Although the Advisory Committee Notes plainly state that these procedural requirements do not apply to discovery,169 courts should still rely on the principle of shielding the witness from an interrogative ambush. For example, the court could require some sort of noticed motion, as under the

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167 Richard Moon, Strategies for Taking the Deposition of the Plaintiff and the Alleged Harasser, 503 PLI/Lit 735, 744 (1994).
168 The Federal Rules now require parties moving to compel discovery to certify that they have "in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." FRCP 37(a)(2)(A) (1994). See also Cal Civ Proc Code § 2017(d) (West 1998) (requiring any party moving to compel discovery of sexual history to append to the motion a "declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion"). Ideally, courts should encourage parties to come to terms at the onset of the discovery process, rather than waiting until a discovery dispute has already occurred.
169 FRE 412 Advisory Committee Notes ("The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases.").
California rules, or exercise its prerogative to review discovery questions about sexual history before the defendant poses them to the plaintiff.

Third, and for similar reasons, there should be a rebuttable presumption that defendants may discover sexual history evidence only through interrogatories, not depositions. As one court noted, interrogatories are the “least intrusive means” of discovery, and hence the most suitable for a delicate line of inquiry. Responding to a written inquiry in privacy and with the assistance of one’s attorney is simply not as invasive or upsetting as having to answer direct and possibly contentious questions by opposing counsel in a setting that approximates a court of law, with the swearing of an oath, the presence of a stenographer, and so forth. Interrogatories also facilitate appeals to the judge when a question appears to overstep the bounds of propriety; in a deposition, the deponent’s attorney is more limited in her ability to intercede. While interrogatories are substantially less helpful to opposing counsel because they lack spontaneity and do not readily admit clarifying or follow-up questions, they are much less expensive. It is notable that in many of the contested discovery cases cited above, the typical method of discovery was an interrogatory. Depositions, by contrast, are more likely to facilitate abuse, because the proceedings are adversarial by nature but lack the neutral intermediary that is the judge.

170 Cal Civ Proc Code § 2017(d) (West 1998); see note 144 and accompanying text.
171 FRCP 26 already permits parties to petition the court to order that “discovery may be had only by a method of discovery other than that selected by the party seeking discovery.” FRCP 26(c)(3). In sexual harassment cases, judges should issue protective orders routinely unless there is a compelling reason not to do so.
173 See Sexual Conduct — Discovery Limits, 12 No 8 Fed Litigator 228, 229 (Aug 1997) (“Due to the sensitive nature of information about sexual behavior or predisposition, consideration should be given to the means of discovering it. Posing questions through written interrogatories, with answers given in writing, generally will be the least intrusive means of discovery.”).
174 Fortune, Underwood, and Imwinkelried, Modern Litigation Handbook § 6.5 at 251 (cited in note 46). However, attorneys may also try to consult with their clients who are being deposed, at least partially obviating one of the perceived differences between “crafted” interrogatories and “spontaneous” depositions. See id § 6.7.5 at 265 (“Attorneys can attempt to frustrate a discovery deposition by conferring with the deponent ‘off the record,’ through whispers or consultations during unilaterally declared recesses. The discovery rules do not address the issue of consultations during depositions.”) (footnote omitted).
175 See, for example, Sanchez v Zabihi, 166 FRD 500 (D NM 1996); Howard v Historic Tours of America, 177 FRD 48 (D DC 1997).
176 Fortune, Underwood, and Imwinkelried, Modern Litigation Handbook § 6.7 at 259 (cited in note 46) ("[T]he deposition takes place in a conference room or office, out of the
Fourth, although many judges are reluctant to interfere in the discovery process, preferring to let counsel negotiate the details themselves, courts should appreciate the special and sensitive nature of sexual history testimony and stand ready to play a more active and direct supervisory role.

B. Arguments for Substantive Safeguards

Establishing that the sexual harassment victim is entitled to all reasonable procedural safeguards does not resolve the question of when she should have to submit to sexual history questioning in the first place. Courts should distance themselves from the at-work/not-at-work dichotomous test, propounded by the Advisory Committee Notes and endorsed by many courts and defense attorneys, because it is a simplistic and overinclusive standard. Instead, courts should favor the reasoning exemplified in *Howard v Historic Tours of America* and *Socks-Brunot v Hirschvogel Inc*, that sexual history evidence of the victim with regard to co-workers other than the defendant does not pass the balancing test in most circumstances.

The proper treatment of an emotional distress claim is more difficult. The approach of the California courts is inapposite at the federal level, because it is predicated on the California legislature’s unambiguous intent that alleged sexual misconduct victims be protected at all phases of litigation, including discovery. Congress has made no such declaration. Nevertheless, in light of the Supreme Court’s ruling in *Faragher v City of Boca Raton*
that only "extreme" behavior rises to the level of actionable sexual harassment, an objective victim is likely to experience some level of emotional distress. Accordingly, when the plaintiff claims ordinary mental anguish and does not seek disproportionate damages, she should not forfeit her protection in discovery.185

CONCLUSION

By amending FRE 412, Congress took an important step toward promoting alleged sexual harassment victims' pursuit of legal remedies. The amended Rule excludes prejudicial evidence and makes the victim feel more comfortable with her participation in the legal proceedings, secure in the knowledge that irrelevant details of her sexual history will not be revealed at trial. However, Congress insufficiently addressed the issue of discovery, leaving open a gap in the law which an unscrupulous attorney could exploit to intimidate the victim through forcible disclosure of her sexual history. Although many judges have suitably wielded the considerable discretion that FRE 412 allows them in regulating discovery of a victim's sexual history, some have not, adhering to outmoded beliefs about appropriate social mores and adult behavior. Consistent with their right to fill the interstices of procedural rules, courts should establish more clear and thorough standards to ensure that a sexual harassment plaintiff is not harassed a second time, at her deposition.

184 See note 138.
185 See Farpella-Crosby v Horizon Health Care, 97 F3d 803, 808-09 (5th Cir 1996) (upholding jury award of $7,500 in compensatory damages to sexual harassment plaintiff whose own testimony was sufficient to allow a jury to infer that she experienced stress and humiliation).