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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

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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?

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I. INTRODUCTION

On June 1, 1997, just days after the Supreme Court had ruled unanimously in a highly-publicized case that Paula Jones could proceed with her sexual harassment suit against President Clinton,[1] a dispute arose on national television between Ms. Jones' lawyers and Robert Bennett, President Clinton's lawyer. On a popular news program, after Ms. Jones' lawyers indicated that they would seek testimony from other women whom the President may have propositioned in the past, Bennett was asked whether that sort of discovery was proper. He responded:

> They raise that now for purposes of trying to humiliate and force and create all sorts of political furor. You know, it's a two-way street . . . We've thoroughly investigated the case. If Paula Jones insists on having her day in court and her trial, and she really wants to put her reputation at issue as we hear, we are prepared to do it.[2]

In fact, later reports confirmed that the President's lawyers had interviewed a man who alleged to have been sexually involved with Jones in the past.[3]

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1. *See* Clinton v. Jones, 117 S. Ct. 1636 (1997).

2. *Meet the Press* (NBC television broadcast, June 1, 1997).

3. *See* Neil A. Lewis, *President's Accuser May Be Questioned On Her Sexual Past*, N.Y. TIMES, June 2, 1997, at A1.

Bennett's apparent threat to sully Ms. Jones' reputation by probing into her sexual past drew harsh criticism from women's groups that have traditionally supported the President,[4] and prompted Bennett to claim that his prior comments had been misunderstood.[5] "[Ms. Jones'] sex life is of no particular concern to me," Bennett explained, while nonetheless vowing to challenge Ms. Jones' reputation for truthfulness without delving into her sexual history.[6]

Whether or not Bennett intended to explore Ms. Jones' sexual past, the popular understanding that this was indeed what he intended by his comments brought to the nation's consciousness a problem that has long been a part of sexual harassment litigation. In fact, it is quite common that during the discovery process, parties to sexual harassment suits attempt to elicit from their opponents information regarding their prior sexual behavior or sexual predisposition.[7] There are various reasons why a party might find such information useful. For example, a plaintiff may wish to elicit information regarding her harasser's prior sexual conduct at work to establish that he created a sexually hostile environment.[8] Likewise, an employer may wish to discover a plaintiff's sexual conduct at work to establish that although the alleged harasser created a sexually hostile environment, the

4. For example, Patricia Ireland, president of the National Organization of Women, stated, "It is very disappointing to see him falling back on the so-called 'nuts or sluts strategy' that has long been used to discredit women who speak out." Brian McGrory, *Tactics on Jones Seen Backfiring for Clinton*, BOSTON GLOBE, June 4, 1997, at A1.

5. *See* David Stout, *Clinton Lawyer Retreats on Threat Over Accuser's Sexual Past*, N.Y. TIMES, June 5, 1997, at A17.

6. *Id.*

7. *See* Lawrence J. Baer et al., *Discovering Sexual Relations — Balancing the Fundamental Right to Privacy Against the Need for Discovery in a Sexual Harassment Case*, 25 NEW ENG. L. REV. 849 (1991); Linda J. Krieger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L.J. 115 (1985); Ellen E. Schultz & Junda Woo, *The Bedroom Ploy: Plaintiffs' Sex Lives are Being Laid Bare in Harassment Cases*, WALL ST. J., Sept. 19, 1994, at A1. For purposes of this Note, "sexual behavior" and "predisposition" will be given the meanings anticipated by the Advisory Committee's note to Federal Rule of Evidence 412. According to the Advisory Committee, "[p]ast sexual behavior connotes all activities that involve actual physical conduct . . . In addition, the word 'behavior' should be construed to include activities of the mind, such as fantasies or dreams." FED. R. EVID. 412 advisory committee's note. The Advisory Committee further intends "sexual predisposition" to mean "evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder." *Id.*

8. *See* Krieger & Fox, *supra* note 7, at 132-36; Baer et al., *supra* note 7, at 851; Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 849 (1991).

plaintiff "welcomed" his conduct.[9] Disclosure of such intimate information, however, has a tendency to embarrass litigants, and to discourage potential plaintiffs from bringing sexual harassment suits.[10] Disclosure of sexual history similarly prompts many sexual harassment plaintiffs to settle a claim for a fraction of its value.[11] Thus, apart from the legitimate reasons why a party may wish to discover information concerning her opponent's sexual past or predisposition, a party may desire such information merely for its value in pressuring the other party to dismiss a suit or to settle it for a sum unequal to its actual settlement value.[12] Consequently, in sexual harassment discovery disputes, courts often address conflicting interests — protecting a party's privacy, preventing abuse of the discovery process, and permitting parties to discover information that is sufficient to argue their cases under existing legal theories.[13]

In 1994, Congress amended the federal rape shield rule[14] to apply to "any civil . . . proceeding involving alleged sexual mis-

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9. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), established the requirement that a plaintiff in a sexual harassment action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e(17) (1994), show that her employer's conduct was "unwelcome." *Meritor*, 477 U.S. at 68. To determine whether Mechelle Vinson, the plaintiff in *Meritor*, "welcomed" her supervisor's conduct under a test that examined the "totality of circumstances" and "the record as a whole," the Supreme Court stated that evidence of her sexually provocative speech or dress was "obviously relevant." *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

Use of such evidence to establish that a plaintiff welcomed her harasser's harassment has been criticized, and indeed the "unwelcome" standard itself has been criticized. *See* Estrich, *supra* note 8, at 826-34; Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 *passim* (1992). Arguably, the 1994 amendments to Rule 412 of the Federal Rules of Evidence, which extend the federal "rape shield" rule to civil cases, has rendered inadmissible much of the evidence previously admissible under this standard. *See* Paul Nicholas Monnin, Note, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155 (1995); Jacqueline H. Sloan, Comment, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines* Meritor Savings Bank v. Vinson, 25 Sw. U. L. REV. 363 (1996).

10. *See* Krieger & Fox, *supra* note 7, at 117; *see also* Priest v. Rotary, 98 F.R.D. 755, 761 (N.D. Cal. 1983) ("Discovery of intimate aspects of plaintiffs' lives . . . has the clear potential to discourage sexual harassment litigants from prosecuting lawsuits[,] . . . to annoy and [to] harass them significantly.").

11. *See* Schultz & Woo, *supra* note 7.

12. *See* Krieger & Fox, *supra* note 7, at 117.

13. *See* Baer et al., *supra* note 7.

14. *See* FED. R. EVID. 412. All subsequent references in this Note to "Rule 412" will refer to rule 412 of the Federal Rules of Evidence.

conduct."[15] Rule 412, a rule of admissibility, renders inadmissible evidence of any alleged victim's prior sexual behavior or sexual predisposition[16] unless the evidence is otherwise admissible under the rules of evidence, and unless its probative value "substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[17] As a rule of admissibility, it does not govern discovery.[18] However, within the scope of discovery, a party can obtain information that "appears reasonably calculated to lead to the discovery of admissible evidence."[19] Further, the Advisory Committee's note to Rule 412 instructs that courts should presumptively issue protective orders precluding the discovery of an alleged victim's sexual predisposition or behavior, "[i]n order not to undermine the rationale of Rule 412."[20] It is therefore clear that Rule 412 has a role to play in sexual harassment discovery disputes. What is unclear is the scope of the role that Rule 412 should play.

Liberal application of Rule 412 to the discovery context will remedy some of the concerns facing sexual harassment litigants. The privacy of many individuals will be better protected. Furthermore, fewer potential plaintiffs will be reluctant to bring sexual harassment claims and fewer will feel compelled to settle their claims for token amounts. However, construing Rule 412 broadly in these disputes could prove to be both underinclusive and overinclusive.

Applying Rule 412 broadly to discovery could be underinclusive in two respects. First, while the privacy interests of alleged victims of sexual misconduct could be protected, because by its terms Rule 412 applies only to alleged victims of sexual misconduct, the privacy interests of their alleged harassers would remain open to public intrusion.[21] For example, any additional protection that Rule 412 could provide Paula Jones during discovery would not prevent the details of any prior sexual proposi-

15. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1919 (1994).

16. See *supra* note 7 for a definition of "sexual behavior" and "sexual predisposition."

17. FED. R. EVID. 412(b)(2).

18. *See* FED. R. EVID. 412 advisory committee's note (stating that the procedures contained in subdivision (c) of the rule, "do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26.").

19. FED. R. CIV. P. 26(b)(1).

20. FED. R. EVID. 412 advisory committee's note.

21. By its terms, Rule 412 applies only to alleged victims of sexual misconduct, and not to alleged perpetrators of sexual misconduct. *See* FED. R. EVID. 412(a)(1), (a)(2).

tions that President Clinton may have made from finding their way to the tabloids. Is the privacy of the *alleged* victim worthy of greater protection than the privacy of the *alleged* victimizer? In other words, does the value of one's interest in privacy depend upon whether one is making or receiving an allegation of sexual harassment? Second, while the Advisory Committee's note to Rule 412 instructs judges to issue protective orders presumptively, this assumes that parties will seek protective orders. Improperly counseled parties who fail to seek protective orders may find their personal lives open to public scrutiny.

A broad application of Rule 412 to the discovery context could likewise prove to be overinclusive. While prohibiting a company from asking a sexual harassment plaintiff questions of an intimate sexual nature may protect her privacy interests, it may also prevent the company from defending the claim adequately. Take, for example, a sexual harassment plaintiff who asserts that alleged workplace harassment has rendered her unable to experience sexual intimacy and, thus, the company should pay her a large sum of money to compensate her injury. If a judge prevents the company from asking her detailed questions about this alleged injury because in the judge's mind the probative value of such information would not substantially outweigh the harm that such questions may cause the plaintiff, the judge would essentially, "turn the rape 'shield' law into a sword solely for plaintiff's benefit."[22] Such a result would seem to be contrary to the basic demands of civil justice.

This Note will examine discovery disputes in sexual harassment cases concerning evidence of an alleged victim's sexual behavior or predisposition. Part II of this Note will examine how these disputes are to be resolved under the Federal Rules of Civil Procedure, and how the amendments to Rule 412 may have altered this scheme. Part III will determine the effect that the amended Rule 412 has had on the outcome of these disputes by examining case law prior to and subsequent to the 1994 amendments to Rule 412, and will conclude that courts today typically apply Rule 412 to these discovery disputes. Part IV will examine the competing policy considerations behind applying Rule 412 to discovery disputes involving an individual's sexual history. This note will conclude in Part IV that although reform is necessary, due to the overinclusiveness and underinclusiveness of Rule 412 applied broadly to the discovery process, Rule 412 inadequately balances the competing interests. This note will therefore pro-

22. Alberts v. Wickes Lumber Co., No. 93 C 4397, 1995 WL 117886, at *5 (N.D. Ill. Mar. 15, 1995).

pose an amendment to the Federal Rules of Civil Procedure that will better balance the competing interests.

II. How the Federal Rules of Civil Procedure Resolve Discovery Disputes Concerning Sexual Evidence

A. *The Legal Standard—Rule 26 of the Federal Rules of Civil Procedure*

Discovery disputes in sexual harassment suits brought in federal court under Title VII of the Civil Rights Act of 1964[23] are governed by Rule 26 of the Federal Rules of Civil Procedure.[24]

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23. 42 U.S.C. §§ 2000e-2000e(17) (1994). The federal cause of action for sexual harassment is brought pursuant to the language in Title VII that makes it unlawful for an employer, "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex." *Id.* § 2000e-2(a)(1). This Note will focus on suits brought under Title VII, although particular cases discussed in this Note may also involve state law tort or statutory claims.

24. *See* Fed. R. Civ. P. 26. All subsequent references in this Note to "Rule 26" will refer to Rule 26 of the Federal Rules of Civil Procedure. The portions to Rule 26 relevant to this Note read:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
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> > (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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 . . .
>
> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the . . . discovery not be had; (2) that the . . . discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the . . . discovery be limited to certain matters; (5) that the discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; . . . (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Under Rule 26, information is subject to discovery if it is unprivileged and, "relevant to the subject matter involved in the pending action."[25] The concept of "relevance" under Rule 26 is broader in scope than the concept of admissibility.[26] Information that is sought in discovery does not need to be admissible, but only, "reasonably calculated to lead to the discovery of admissible evidence."[27] Accordingly, "[i]nadmissible hearsay evidence[,] . . . evidence that would otherwise be inadmissible at trial because of its unduly prejudicial effect[,] . . . [and] [e]ven [evidence that is contrary to] a strong public policy," is discoverable.[28] According to one court, "'a request for discovery should be considered relevant if there is *any possibility that the information sought may be relevant* to the subject matter of the action.'"[29] The scope of Rule 26(b)(1) is purposefully broad to advance important policy considerations such as, "providing both parties with 'information essential to the proper litigation of all relevant facts, . . . eliminat[ing] surprise, and . . . promot[ing] settlement.'"[30] Thus, in a Title VII discovery dispute, evidence of a party's sexual behavior meets the criteria of Rule 26(b)(1) so long as it is not subject to a recognized privilege[31] and it is calculated to lead to admissible evidence.

Even if a discovery request meets the rather broad standard established in Rule 26(b)(1), judges are nonetheless granted discretion under Rule 26(c) to limit the request by issuing a "pro-

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FED. R. CIV. P. 26.

25. FED. R. CIV. P. 26(b)(1).

26. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.2 (2d ed. 1993) ("At present, relevance is interpreted very broadly." (citations omitted)); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.41[1] (3d ed. 1997) ("The scope of relevance during discovery is much broader than the standard of admissibility at trial." (footnote omitted)); Weiss v. Amoco Oil Co., 142 F.R.D. 311, 315 (S.D. Iowa 1992) ("The test of relevance in the discovery context is a very broad one." (citing AM Int'l, Inc. v. Eastman Kodak Co., 100 F.R.D. 255, 257 (N.D. Ill. 1981)).

27. FED. R. CIV. P. 26(b)(1).

28. 6 MOORE, *supra* note 26, § 26.42 (footnotes omitted).

29. *Weiss*, 142 F.R.D. at 315 (quoting *AM Int'l, Inc.*, 100 F.R.D. at 257 (emphasis added) (citation omitted)).

30. *Id.* at 313 (quoting *In re* Hawaii Corp., 88 F.R.D. 518, 524 (D. Haw. 1980)); *see also* FRIEDENTHAL ET AL., *supra* note 26, § 7.1 (stating that discovery's purposes are to preserve relevant information, to ascertain the disputed issues, and to lead parties to admissible evidence concerning the disputed issues).

31. A privilege that could be particularly important for Title VII plaintiffs in discovery disputes is the "psychologist-patient" or "psychiatrist-patient" privilege. *See* Covell v. CNG Transmission Corp., 863 F. Supp. 202, 205 (M.D. Pa. 1994) (finding such a privilege in a Title VII discovery dispute); Ziemann v. Burlington County Bridge Comm'n, 155 F.R.D. 497, 506 (D.N.J. 1994) (same).

tective order."[32] Anyone from whom discovery is sought can seek from a district court a protective order under Rule 26(c) that limits the discovery request by precluding questions regarding certain matters, by limiting the mode of discovery or the circumstances under which discovery can be attained, or by precluding discovery entirely.[33] Under Rule 26(c), the person who seeks to limit the scope of discovery bears the burden to establish "good cause" that a protective order is necessary, "to protect . . . [the] person from annoyance, embarrassment, oppression, or undue burden or expense."[34] Courts often require a person seeking a protective order to meet that burden by demonstrating, "a particular need for protection," rather than by making, "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning."[35] Moreover, courts generally determine whether one has met her burden of establishing "good cause" for a protective order by balancing her opponent's need for the information against the discovery's potential to annoy, embarrass or oppress her.[36] Hence, even though policy considerations that

32. *See* FED. R. CIV. P. 26; *see also* FRIEDENTHAL ET AL., *supra* note 26, § 7.15 ("Federal Rule 26(c) . . . provides the courts with broad discretion to protect a party or other person from 'annoyance, embarrassment, oppression, or undue burden or expense.'" (quoting FED. R. CIV. P. 26(c))); *see also* Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) ("The Federal Rules of Civil Procedure strongly favor full discovery whenever possible. The trial court, however, is given wide discretion in setting the limits of discovery." (citations omitted)); Weiss v. Amoco Oil Co., 142 F.R.D. 311, 313 (S.D. Iowa 1992) ("A district court is afforded wide discretion . . . in limiting discovery where there is a showing of good cause." (citations omitted)); Priest v. Rotary, 98 F.R.D. 755, 761 (N.D. Cal. 1983) ("Even if the information defendant seeks did fall within Rule 26(b), the Court must still consider the propriety of a protective order under 26(c)."); Williams v. District Court, 866 P.2d 908, 912-13 (Colo. 1993) (vacating a trial court's discovery order under Colorado's version of Rule 26, because in denying a motion for a protective order, the trial court merely found the information requested in discovery to be "relevant" under Colorado's Rule 26(b)(1), and failed to consider Rule 26(c)).

33. *See* FED. R. CIV. P. 26(c).

34. FED. R. CIV. P. 26(c); *see also* Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 223 (S.D.N.Y. 1994) ("[T]he burden of persuasion is on the party seeking the protective order . . . ."); *Weiss*, 142 F.R.D. at 314 ("The party or person seeking a protective order bears the burden of making the 'good cause' showing . . . .").

35. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986); *see also* Frank v. County of Hudson, 924 F. Supp. 620, 623 (D.N.J. 1996) (citing *Cipollone*, 785 F.2d at 1121); *Bridges*, 850 F. Supp. at 223 (citing *Cipollone*, 785 F.2d at 1121).

36. *See* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994) ("In considering whether good cause exists . . . the federal courts have generally adopted a balancing process . . . balanc[ing] the requesting party's need for information against the injury that might result." (citations omitted));

underlie Rule 26 favor broad discovery,[37] the rule recognizes that a countervailing policy of protecting an individual who is subject to harassing discovery requests can outweigh the policy considerations that favor broad discovery.[38]

Under this scheme, a party from whom information concerning her past sexual conduct or predisposition is sought in discovery can avoid disclosing the information by one of two arguments. She can argue that the information her opponent seeks fails to meet the standard of Rule 26(b) by being unlikely, "to lead to the discovery of admissible evidence."[39] Given the broad scope of Rule 26(b), this can be a difficult argument to win. In the alternative, she can establish under Rule 26(c) that her opponent has little need for the information, while the information has a substantial tendency to annoy, embarrass or oppress her.[40] While this remains the basic scheme for discovery, the 1994 amendments to Rule 412 may have altered this scheme in the context of discovery disputes involving the sexual history or predisposition of an alleged victim of sexual misconduct.

B. *Rule 412 and its Applicability to Discovery*

On October 28, 1978, President Carter signed into law the Privacy Protection for Rape Victims Act of 1978,[41] stating that, "[t]oo often rape trials have been as humiliating as the sexual assault itself."[42] Prior to this law, which became Rule 412, evidence of a woman's promiscuity was admissible in a rape trial to challenge her credibility[43] and to argue that she consented to the alleged rape.[44] Perhaps Representative Holtzman, who spon-

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Farnsworth, 758 F.2d at 1547 ("While Rule 26(c) articulates a single standard for ruling on a protective order motion, that of 'good cause,' the federal courts have superimposed a somewhat more demanding balancing of interests approach to the rule." (citations omitted)); *Frank*, 924 F. Supp. at 623 (quoting *Pansy*, 23 F.3d at 787).

37. *See supra* notes 26-30 and accompanying text.

38. *See* Friedenthal et al., *supra* note 26, § 7.15.

39. FED. R. CIV. P. 26(b)(1).

40. FED. R. CIV. P. 26(c).

41. Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978).

42. Statement of President Carter upon signing the Privacy Protection for Rape Victims Act of 1978 into law, 14 WEEKLY COMP. PRES. DOC. 1902 (Oct. 30, 1978).

43. *See* 3 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a (3d. ed 1940).

44. *See* 1 *id.* § 62 (finding character evidence of an alleged rape victim's promiscuity to be generally admissible to prove consent); *id.* § 200 (arguing that evidence of particular acts of promiscuity should be admissible to prove consent in a rape trial). Indeed, the Advisory Committee to the Federal Rules

sored the Act, best stated the impetus behind the original enactment of Rule 412:

> Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.[45]

It is apparent from this excerpt that Congress advanced two important policies in enacting Rule 412. First, Congress intended to protect the privacy of rape victims.[46] Second, Congress intended to encourage victims of rape to report the crimes.[47]

As originally enacted, Rule 412 provided that, "in a criminal case in which a person is accused of rape or assault with intent to commit rape,[48] reputation or opinion evidence of the past sexual behavior of an alleged victim . . . is not admissible," while evidence of specific acts of prior sexual behavior was admissible under certain circumstances.[49] In 1994, however, Congress

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of Evidence stated that under Rule 404(a)(2), which makes admissible "[e]vidence of a pertinent trait of character of the victim of [a] crime offered by an accused," such evidence may be used, "in support of a claim of . . . consent in a case of rape . . . ." FED. R. EVID. 404(a)(2) advisory committee's note.

45. 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman), *quoted in* Priest v. Rotary, 98 F.R.D. 755, 762 (N.D. Cal. 1983).

46. "[T]he principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives." 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann).

47. "[B]y protecting victims from humiliation, [the Privacy Protection for Rape Victims Act] encourage[s] the reporting of rape." Statement of President Carter upon signing the Privacy Protection for Rape Victims Act of 1978 into law, 14 WEEKLY COMP. PRES. DOC. 1902 (Oct. 30, 1978).

48. Congress expanded the scope of Rule 412 in 1988 as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7046(a), 102 Stat. 4400 (1988). Rather than applying to criminal rape cases or criminal assault with intent to commit rape cases, the amended Rule 412 applied to criminal cases involving offenses, "under chapter 109A of title 18, United States Code," or any federal criminal case involving a sexual offense. FED. R. EVID. 412 (1988) (amended 1994).

49. FED. R. EVID. 412(a) (1978), *amended by* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7046(a), 102 Stat. 4400 (1988), *amended by* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141(b), 108 Stat. 1919 (1994). The exceptions to the original Rule 412 included evidence that was constitutionally required to be admitted, evidence of prior

amended Rule 412 to apply to, "any civil or criminal proceeding involving alleged sexual misconduct."[50] Thus, Rule 412 now applies to sexual harassment actions.[51] The reason for extending Rule 412 protection to civil cases is explained in the Advisory Committee's note, which states:

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sexual behavior to prove that someone other than the defendant was "the source of semen or injury," and evidence of prior sexual behavior with the defendant to prove that the accused consented to the sexual conduct that was at issue in the prosecution's case. FED. R. EVID. 412(b) (1978) (amended 1994). Before such evidence could be admitted, the defendant was required to present the evidence at a hearing and prove its relevance and that its probative value outweighed its danger of unfairly prejudicing the jury. FED. R. EVID. 412(c) (1978) (amended 1994).

50. FED. R. EVID. 412(a). The portions of the amended Rule 412 that are relevant to this Note read:

> (a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil . . . proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions . . .
>
> (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
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> (c) Procedure to Determine Admissibility.
>
> (1) A party intending to offer evidence under subdivision (b) must:
>
> (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and
>
> (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
>
> (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

FED. R. EVID. 412.

51. Indeed, the Advisory Committee's note states explicitly that, "Rule 412 will . . . apply in a Title VII action in which the plaintiff has alleged sexual harassment." FED. R. EVID. 412 advisory committee's note.

> The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.[52]

Hence, by amending Rule 412 to apply to civil trials, Congress has advanced the same policy considerations that support Rule 412 in its criminal context.

Under the current version of Rule 412, evidence that is, "offered to prove that any alleged victim engaged in other sexual behavior . . . [or] to prove any alleged victim's sexual predisposition," is inadmissible[53] unless it qualifies under a specified exception.[54] The Advisory Committee's note defines "sexual behavior" and "sexual predisposition."[55] According to the Advisory Committee, "[p]ast sexual behavior connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact."[56] Moreover, "behavior" includes, "activities of the mind, such as fantasies or dreams."[57] "Sexual predisposition" is intended to constitute, "evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sex-

52. Id.

53. FED. R. EVID. 412(a)(1), (a)(2).

54. The exceptions to Rule 412 are listed in subsection (b) of the rule. FED. R. EVID. 412(b). The exceptions for criminal trials are essentially the same as those enumerated in the original Rule 412. FED. R. EVID. 412(b)(1). However, the exception for evidence of prior sexual behavior to prove that someone other than the defendant was "the source of semen or injury" was expanded to include proof that another was the source of "other physical evidence." FED. R. EVID. 412(b)(1)(a). The exception for evidence of other sexual behavior or predisposition in civil trials is discussed *infra*, at notes 60-66 and accompanying text.

55. FED. R. EVID. 412 advisory committee's note.

56. *Id.*

57. Id.

ual connotation for the factfinder."[58] Hence, the scope of Rule 412 is quite broad.[59]

Although sexual behavior or sexual predisposition evidence is generally inadmissible under Rule 412 against an alleged victim of sexual misconduct,[60] it may nevertheless be admitted in a civil trial if it qualifies as an exception under Rule 412(b)(2).[61] To qualify as a Rule 412(b)(2) exception, the evidence[62] must meet a two-part test. First, the evidence must be "otherwise admissible" under the other rules of evidence.[63] Next, the proba-

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58. Id.

59. *See, e.g.*, Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105 (E.D. Va. 1995). In *Sheffield*, Shanon Sheffield, a waitress, sued her restaurant's corporate owner for sexual harassment. *See id.* at 106. She alleged that James Bambery, the restaurant's manager, subjected her to a sexually hostile environment by making repeated sexually suggestive comments and gestures toward her, and committed quid pro quo harassment by assigning her extra work when she complained. *See id.* at 106-107. The defendant sought to introduce the testimony of Bambery and other employees that Sheffield often participated in "sexually provocative discussions and activities" at work. *Id.* at 109. Sheffield sought to exclude this evidence under Rule 412. *See id.* The defendant contended that Rule 412 was inapplicable, because the defense sought to prove only that she welcomed Bambery's conduct, and not that she engaged in sexual behavior or had a sexual predisposition. *See id.* at 108. The court, however, held that, "[e]vidence relating to the plaintiff's speech is certainly evidence offered to prove an alleged victim's 'sexual predisposition.'" *Id.* *See also* Arno v. Club Med Inc., Civ. No. 89-20656 SW, 1995 WL 380124, at *3 (N.D. Cal. June 22, 1995) (finding that sexually provocative clothing was within the scope of Rule 412 as evidence of sexual predisposition). *But see* Janopoulos v. Harvey L. Walner & Assocs., No. 93 C 5176, 1995 WL 107170, at *1 (N.D. Ill. Mar. 7, 1995) (marital history is not within the scope of Rule 412).

60. "Rule 412 does not . . . apply unless the person against whom the evidence is offered can reasonably be characterized as a 'victim of alleged sexual misconduct.'" FED. R. EVID. 412 advisory committee's note.

61. *See supra* note 50.

62. "Evidence" in Rule 412(b)(2) means, "evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim" of sexual misconduct. FED. R. EVID. 412(b)(2). It does not include, however, evidence of the alleged victim's reputation. Such evidence is *only* admissible if the victim herself put her reputation in controversy. FED. R. EVID. 412(b)(2).

63. *See* FED. R. EVID. 412(b)(2); *see also* Pizzino v. J. Dillard Hutchens Corp., No. 95-0034-D, 1996 U.S. Dist. LEXIS 14291 (W.D. Va. Aug. 8, 1996). In *Pizzino*, a cashier at a supermarket sued the corporation that owned the supermarket for sexual harassment after the president of the corporation repeatedly directed her to stock shelves with him, and allegedly touched her buttocks, genital area, breasts, and other private body areas on these occasions. *See id.* at *3-4. She sought to exclude evidence at trial that she flirted with male salesmen who frequented the store, arguing that the evidence was inadmissible under Rule 412. *See id.* at *4. The court found that evidence of her flirtatious conduct had little probative value in demonstrating that she did not find her environment to be hostile because there was no evidence that her flirtations were non-consensual, because she initiated the flirtations, and because the

tive value of the evidence must, "substantially outweigh[ ] the danger of harm to any victim and of unfair prejudice to any party."[64] Significantly, this second requirement substantially heightens the standard of relevancy that evidence normally must meet to be admissible.[65] Further, it shifts the burden, "to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence."[66] Finally, even if the evidence meets the test established in Rule 412(b)(2), the party who wishes to admit the evidence must comply with certain pro-

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salesmen were not her subordinates. *See id.* at *8-9. The court further found under Rule 403 that this limited probative value was substantially outweighed by the danger that the jury would be confused and unfairly prejudiced against her. *See id.* at *9. Thus, the court granted her motion to exclude evidence under Rule 412 by finding that the evidence failed to meet the requirements of another rule of evidence. *See id.*

64. FED. R. EVID. 412(b)(2). *See, e.g.*, Cacciavillano v. Ruscello, Inc., No. 95-5754, 1996 U.S. Dist. LEXIS 16528 (E.D. Pa. Nov. 4, 1996). In *Cacciavillano*, Anne Marie Cacciavillano, a waitress, sued her employer for sexual harassment under Title VII, alleging that her supervisors touched her, grabbed her, flashed her, and treated her poorly for refusing to give them sexual favors. *See id.* at *1. The defendants sought to admit evidence under Rule 412. *See id.* Specifically, they sought to admit evidence that she often wrapped her suspenders around her breasts suggestively, that she grabbed her breasts on one occasion and asked a sixteen-year old busboy if he liked them, that on another occasion she unbuttoned her shirt exposing her cleavage with a banana in her pants, that she once waited on a table of customers with her shirt unbuttoned, that she once removed a mint from a male co-worker's mouth with her tongue, and that she discussed sex with her co-workers and exchanged sexual jokes with them. *See id.* at *1-2. The court found that her sexually suggestive and flirtatious conduct had little probative value to determine whether she subjectively found her supervisors' conduct to be offensive, or whether a reasonable woman would find such conduct offensive. *See id.* at *5. The court further found that the evidence was "unfair and prejudicial" to Cacciavillano. *Id.* at *6. Thus, the court determined that the probative value of the evidence was, "too weak to substantially outweigh its danger of harm and unfair prejudice." *Id.*

65. 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." FED. R. EVID. 401. However, even if the evidence meets this low threshold, a judge may exclude evidence, "if its probative value *is substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403 (emphasis added). Thus, by reversing the balancing test of Rule 403 to require that the probative value of evidence, "substantially outweigh[ ] the danger of harm to any victim and of unfair prejudice to any party," Rule 412(b)(2) significantly raises the quantum of relevance that normally must be demonstrated to admit evidence.

66. FED. R. EVID. 412 advisory committee's note.

cedural requirements of Rule 412(c) by seeking an in camera hearing to establish the admissibility of the evidence.[67]

Within the context of discovery, the Advisory Committee has noted that the procedural requirements of Rule 412(c) are inapplicable.[68] Rather, the discovery of prior sexual conduct or predisposition in civil cases remains governed by Rule 26.[69] However, the Advisory Committee asserted that, "[i]n order not to undermine the rationale of Rule 412 . . . courts should enter appropriate orders pursuant to [Rule] 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality."[70] Specifically, the Advisory Committee asserted that, "[c]ourts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence . . . would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery."[71] As an example, the Advisory Committee stated that in an action for sexual harassment, "while some evidence of the alleged victim's sexual behavior [or] predisposition in the workplace may be relevant, non-work place conduct usually will be irrelevant."[72] Further, the Advisory Committee stated that courts should presumptively grant confidentiality orders.[73]

What is significant about the Advisory Committee's commentary regarding discovery is the apparent shift that the Committee advocates in the burden of proof that is needed to obtain a protective order precluding discovery. As noted previously, under Rule 26(c), the person seeking to limit discovery usually

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67. *See* FED. R. EVID. 412(c); *see also* Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105 (E.D. Va. 1995). In *Sheffield*, Shanon Sheffield filed a motion in limine to exclude, "all testimony and/or exhibits which pertain[ed] to her sexual history with persons other than [her harasser]." *Id.* at 107. The defendant answered by summarizing the testimony of the witnesses that the defendant planned to introduce, and by requesting that, should the court consider the testimony to be within the scope of Rule 412, it accept the response as a motion to present evidence under Rule 412(c). *See id.* However, the defendant had not placed its response to the plaintiff's motion under seal, as is required of Rule 412(c) motions under Rule 412(c)(2). *See id.* Therefore, as a sanction for the defendant's, "callous disregard of the procedural safeguards articulated in Rule 412(c)," the court excluded all the testimony that Sheffield sought to exclude and that the defendant sought to admit under Rule 412. *Id.* at 109.

68. *See* FED. R. EVID. 412 advisory committee's note.

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.* (citing Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962-63 (8th Cir. 1993)).

73. *See id.*

bears the burden to establish "good cause" that the protective order is necessary.[74] This generally means that the party seeking to limit discovery must show that the information will cause her, "annoyance, embarrassment, oppression, or undue burden or expense," and that this outweighs her opponent's need for the information.[75] Under the Advisory Committee's interpretation of Rule 412, however, this burden should shift to the party seeking discovery to show that the evidence would be relevant and that it is unavailable without discovery. Further, while judges are given broad discretion under Rule 26(c) to limit discovery as they deem necessary,[76] the Advisory Committee's comment to Rule 412 suggests that judges preclude all questions involving the sexual history or predisposition of an alleged victim of sexual misconduct.

At the very least, this language indicates that judges should consider Rule 412 when issuing protective orders in discovery disputes involving an alleged victim's sexual history. A more expansive reading of this language would dictate that judges run the disputed discovery through the balancing test of Rule 412(b)(2) to determine whether the evidence is, "relevant under the facts and theories of the particular case."[77] This would suggest a higher standard of good cause than that required of parties wishing to preclude discovery, who normally must show a particular need for protection that outweighs the opposing party's need for the evidence.[78] The apparent shift in the burden of showing good cause, as well as the higher standard of good cause, present a conflict between the policy underlying Rule 412 and the policy underlying Rule 26.[79] To understand how courts have resolved this policy conflict, and to understand how courts ought to resolve this policy conflict, it is necessary to compare how courts resolved these discovery disputes both before and after the amendments to Rule 412.

III. How the Courts have Resolved Discovery Disputes Involving Sexual Conduct or Predisposition Evidence

As previously discussed,[80] *discoverability* is broader under Rule 26 than *admissibility*. However, the two concepts are interrelated. To determine whether a request for discovery of a party's

74. *See supra* notes 34-36 and accompanying text.
75. Fed. R. Civ. P. 26(c).
76. *See supra* notes 32-38 and accompanying text.
77. Fed. R. Evid. 412 advisory committee's note.
78. *See supra* notes 23-31 and accompanying text.
79. *See supra* notes 23-31 and accompanying text.
80. *See supra* Part II.A.

sexual conduct or predisposition "appears reasonably calculated to lead to the discovery of admissible evidence"[81] under Rule 26(b), it is essential to understand the underlying theories of admissibility. Likewise, to assess whether the weight of evidence outweighs its potential to embarrass, annoy, or oppress the other party,[82] it is necessary to understand theories of admissibility. Consequently, this section begins by surveying some common theories under which evidence of an individual's sexual conduct or predisposition could be admitted.[83]

A. *The Admissibility of Evidence Concerning a Party's Prior Sexual Conduct or Predisposition*

Under Rule 404 of the Federal Rules of Evidence, evidence of a person's character is generally inadmissible if it is offered to prove that the person's actions on a given occasion conformed to her character.[84] Moreover, evidence of her prior actions showing such a character trait is likewise inadmissible if it is offered for the same purpose.[85] Thus, for example, a defendant in a sexual harassment action could not use evidence that the plaintiff engaged in prior sexual conduct to prove that she is a promiscuous person, and that therefore she, and not the alleged harasser, must have initiated sexual conduct.[86] However, the defendant could use the evidence to prove something other than that the plaintiff is promiscuous and thus must have acted promiscuously with her harasser.[87] Therefore, for evidence of a party's sexual

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81. FED. R. CIV. P. 26(b)(1).

82. *See* FED. R. CIV. P. 26(c).

83. The purpose of this section is to examine briefly various theories of admissibility that parties commonly argue to admit evidence of a sexual nature. It is the author's intention to provide a framework that will make the subsequent discussion of cases involving discovery disputes somewhat more comprehensible. It is not the author's intention to provide a comprehensive analysis of theories of admissibility relating to sexual evidence.

84. *See* FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.").

85. *See* FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

86. *See, e.g.*, Priest v. Rotary, 98 F.R.D. 755, 758 (N.D. Cal. 1983) ("It is therefore clear at the outset that the information which defendant seeks to discover regarding plaintiff's sexual history would be inadmissible to prove her propensity to act in conformity therewith.").

87. "[Character evidence] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." FED. R. EVID. 404(b).

behavior or predisposition to be admissible at trial, the proponent of the evidence must argue a theory of admissibility that avoids the prohibition of Rule 404.

One theory that employers may argue to enter evidence of a plaintiff's prior sexual conduct in a sexual harassment suit is that because she engaged in the sexual conduct, it is more likely that she "welcomed" her harasser's conduct.[88] In *Meritor Savings Bank v. Vinson*,[89] the United States Supreme Court established that in a sexual harassment suit brought under Title VII of the Civil Rights Act of 1964,[90] a plaintiff is required to prove that her harasser's conduct was "unwelcome."[91] In *Meritor*, Mechelle Vinson asserted that her supervisor subjected her to several demands for sexual favors at work, fondled her in front of her co-workers, accompanied her to the woman's restroom, exposed himself to her, and raped her.[92] The district court found that she was not a victim of sexual discrimination under Title VII, in part, because it concluded that her sexual relationship with her supervisor was "voluntary."[93] The United States Court of Appeals for the District of Columbia reversed, finding that Vinson's voluntariness

88. *See* Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987); Mitchell v. Hutchings, 116 F.R.D. 481, 484 (D. Utah 1987). Many commentators have been highly critical of the welcomeness inquiry, and the use of evidence of a plaintiff's prior sexual behavior to show that she "welcomed" her harasser's conduct. *See* Estrich, *supra* note 8, at 826-34; Juliano, *supra* note 9, *passim*; Jennifer E. Smith, Note, *Fine Tuning the Wrong Balance: Why the New Rule 412 Does Not Go Far Enough to End Harassment in Sexual Harassment Litigation*, 10 WIS. WOMEN'S L.J. 63, 76-87 (1995); Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621 (1997). While these commentators present very good arguments for reexamining this theory of admissibility, it remains "good law."

89. 477 U.S. 57 (1986).

90. 42 U.S.C. §§ 2000e-2000e(17) (1994).

91. *Meritor*, 477 U.S. at 68 ("The gravaman of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" (citing 29 C.F.R. § 1604.11(a)(1985) (Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex))); *see* Estrich, *supra* note 8, at 826-34 (discussing and criticizing the "unwelcomeness" standard in sexual harassment law); Juliano, *supra* note 9, *passim* (same).

92. *See Meritor*, 477 U.S. at 60.

93. *Id.* at 61. The district court interpreted Title VII discrimination based on sex to provide relief to a woman only if she could demonstrate that her employer withheld from her a tangible or economic job benefit because of her gender. *See id.* at 64. Because the court found that her "voluntary" relationship with her supervisor had "'nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution,'" the court concluded that she was not a victim under Title VII. *Id.* at 61 (alteration in original) (quoting Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (D.D.C. 1983), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd sub nom*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).

was irrelevant.[94] The court determined that the district court's finding that Vinson's sexual relationship with her supervisor was "voluntary" may have been based on testimony concerning Vinson's clothing and her sexual fantasies.[95] The Court of Appeals considered this testimony to have, "'no place in th[e] litigation.'"[96]

While affirming the Court of Appeals' conclusion that Vinson's voluntariness was irrelevant,[97] the Supreme Court nonetheless disagreed with the court's conclusion that testimony concerning Vinson's clothing and fantasies, "had no place in th[e] litigation."[98] Because the Supreme Court found that a sexual harassment plaintiff under Title VII must demonstrate that her harasser's conduct was "unwelcome," the Court determined that "the correct inquiry" was whether she, "*by her conduct* indicated that the alleged [harassment was] unwelcome."[99] The Court concluded that evidence of Vinson's sexually provocative clothing and speech was "obviously relevant" to whether she indicated that her supervisor's conduct was unwelcome.[100] Consequently, the Supreme Court in *Meritor* not only established that a Title VII sexual harassment plaintiff must demonstrate that her harasser's conduct was unwelcome, but that a court can consider the plaintiff's own sexual conduct to determine if she found her harasser's conduct to be unwelcome.[101] While courts have given evidence of a sexual harassment plaintiff's prior sexual conduct varying amounts of weight in determining whether to admit the evidence to show that she welcomed the harassment,[102] courts

94. *See id.* at 62. The circuit court held that a Title VII claim for sexual discrimination can be predicated either on quid pro quo harassment, which the district court found did not exist, or on a hostile or offensive working environment, which the district court had failed to consider. *See id.* The court concluded that if Vinson's tolerance of a hostile environment was a condition of her employment, "her voluntariness 'had no materiality whatsoever.'" *Id.* (quoting Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd sub nom*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).

95. *See id.* at 63.

96. *Id.* (quoting *Vinson*, 753 F.2d at 146 n.36).

97. *See id.* at 68 ("The correct inquiry is whether [Vinson] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.").

98. *Id.* at 68-69.

99. *Id.* at 68 (emphasis added).

100. *Id.* at 69.

101. *See* Estrich, *supra* note 8, at 828 (arguing that the unwelcomeness standard shifts the focus from the harasser to the victim, whose "'conduct' is the yardstick by which we measure assent.").

102. *See* Sloan, *supra* note 9, at 384-89 (discussing three standards of admissibility that have resulted from the courts' interpretation of *Meritor*,

are constrained from automatically admitting evidence of a plaintiff's prior sexual conduct.[103] Although the Supreme Court stated that Mechelle Vinson's provocative speech and dress were "obviously relevant" to determine whether she welcomed her supervisor's advances,[104] it noted that courts, "must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind."[105] Thus, so long as evidence of a sexual harassment plaintiff's prior sexual conduct falls within the permissible parameters of the Federal Rules of Evidence,[106] an

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ranging from *carte blanche* admissibility of a plaintiff's conduct, to a test that balances the probative value of the conduct against its tendency to unfairly prejudice a jury under Federal Rule of Evidence 403, to a test that admits evidence of a plaintiff's conduct only if it occurred within the context of the workplace, and only if the alleged harasser was aware of the plaintiff's conduct); *see also* Juliano, *supra* note 9, at 1578-87 (discussing two tests to determine if the harasser's conduct was unwelcome, one which examines the totality of the circumstances, and one which considers whether plaintiff by her conduct solicited the harassment).

103. *But see* Sloan, *supra* note 9, at 384-85. Sloan argues that some courts have considered *Meritor* to provide, "a strong argument in favor of automatic admission and consideration of evidence concerning the plaintiff's conduct." *Id.* at 384. To support her argument, she cited a footnote in *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154 (8th Cir. 1988), in which the court cited *Meritor* as standing for the proposition that a, "court must consider any provocative speech or dress of the plaintiff in a sexual harassment case." *Id.* at 1155 n.4 (citing *Meritor*, 477 U.S. at 68-69). The admissibility of evidence concerning the plaintiff's sexual conduct, however, was not an issue before the *Wesco* court. Sloan also cited *Weiss v. Amoco Oil, Co.*, 142 F.R.D. 311 (S.D. Iowa 1992), as a court that, "interpreted *Meritor* as having demanded the automatic admission of evidence of the plaintiff's prior sexual conduct that was known to the defendant." Sloan, *supra* note 9, at 385. However, the court in *Weiss* was not concerned with admissibility, but with *discoverability*, which is broader than admissibility. Moreover, the discovery request at issue in *Weiss* was "exactly tailored to be in keeping with" *Mitchell v. Hutchings*, 116 F.R.D. 481 (D. Utah 1987). *Weiss*, 142 F.R.D. at 316. According to Sloan, however, *Mitchell* represented another standard of admissibility that, "severely limit[ed] the admissibility . . . of evidence concerning the plaintiff's prior sexual conduct." Sloan, *supra* note 9, at 386. Because of such weak support, the author finds Sloan's argument unpersuasive.

104. *See Meritor*, 477 U.S. at 69.

105. *Id.* at 69.

106. The "applicable considerations" to which the Court in *Meritor* referred are found in Rules 401, 402, and 403 of the Federal Rules of Evidence. Rule 412 today provides further constraints on the admissibility of evidence of a plaintiff's prior sexual conduct.

Under Rule 401, evidence is relevant only if it has a, "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." FED. R. EVID. 401. Evidence is only admissible at trial if it meets this threshold. *See* FED. R. EVID. 402. *See, e.g.*, Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987). In *Swentek*, the United States Court of Appeals for the Fourth Circuit concluded

employer can use such evidence at trial to demonstrate that she welcomed her harasser's conduct.

A second theory that employers may argue to gain the admittance of evidence of an employee's prior sexual history is that the evidence is necessary to demonstrate that factors other than the harasser's conduct caused the employee's alleged damages, or that the damages are not as extensive as the employee has claimed.[107] Prior to 1991, a prevailing Title VII sexual harassment plaintiff was permitted to recover from her employer only equitable relief and attorney's fees.[108] Congress, however, as part

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that the trial judge improperly admitted evidence of the plaintiff's use of foul language and sexual conduct to demonstrate that she welcomed her alleged harasser's conduct. *See id.* The court stated that, "[p]laintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.'" *Id.* (quoting Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983)). Unlike the situation in *Meritor*, the court found that there was no evidence that the alleged harasser knew of the plaintiff's conduct, or that the harasser believed that the plaintiff welcomed his conduct. *See id.*

Under Rule 403, even evidence that passes the threshold test of Rules 401 and 402 can be excluded if, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. *See, e.g.*, Pizzino v. J. Dillard Hutchens Corp., No. 95-0034-D, 1996 U.S. Dist. LEXIS 14291 (W.D. Va. Aug. 8, 1996). In *Pizzino*, a cashier at a supermarket sued the corporation that owned the supermarket for sexual harassment, alleging that the president of the corporation touched her private body areas. *See id.* at *3-4. Pizzino sought to exclude evidence at trial that she made sexual advances to male salesmen who frequented the store. *See id.* at *6. The court granted her motion to exclude the evidence, finding that because there was no evidence that her flirtations were non-consensual, because she initiated the flirtations, and because the salesmen were not her subordinates, evidence of her flirtatious conduct with them had little probative value in demonstrating that she did not find her supervisor's unwelcome advances to create a hostile environment. *See id.* at *8-9. This limited probative value, the court found, was substantially outweighed by the danger that the jury would be confused and unfairly prejudiced against her. *See id.* at *9. *But see* McCleland v. Montgomery Ward & Co., No. 95 C 23, 1995 WL 57124, at *3-4 (N.D. Ill. Sept. 25, 1995) (finding that the Rule 403 test favored defendant when evidence of the plaintiffs' pre-adolescent and adolescent sexual abuse demonstrated that defendant may not have been the source of the plaintiffs' alleged damages for emotional distress).

107. *See* Krieger & Fox, *supra* note 7, at 124-25 (discussing emotional distress damages in the context of compelled mental examinations under Rule 35 of the Federal Rules of Civil Procedure).

108. *See* 42 U.S.C. §§ 2000-5(g), 5(k) (1994). The text of the statute states in relevant part:

> (g)(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice,

of the Civil Rights Act of 1991,[109] expanded the relief available to Title VII plaintiffs to include compensatory and punitive damages.[110] Thus, since 1991, Title VII sexual harassment plaintiffs have often included in their complaints claims for emotional damages due to the alleged harassment.[111] Furthermore, even if the damage provisions of the 1991 Act are inapplicable to an action for sexual harassment,[112] a plaintiff may still include claims for emotional damages under state tort theories[113] or under state statutory schemes.[114] Hence, depending on the nature of a plaintiff's claim for emotional damages,[115] her

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> and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . .
>
> (k) In any action or proceeding under this title [42 U.S.C. §§ 2000e-2000e(17)] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs . . .

Id. *See also* Estrich, *supra* note 8, at 853-58 (discussing liability limits in Title VII sexual harassment law as it existed prior to the enactment of Title I of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981(a) (1994)) (providing for compensatory and punitive damages in a Title VII sexual harassment suit)).

109. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

110. *See* 42 U.S.C. § 1981(a). The text of the statute states in relevant part:

> (a)(1) In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5 [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act (42 U.S.C. § 2000e-2 or 2000e-3 [or 2000e-16]) . . . the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent.

Id.

111. *See, e.g.*, Bottomly v. Leucadia Nat'l, 163 F.R.D. 617, 619 (D. Utah 1995); McCleland v. Montgomery Ward & Co., No. 95 C 23, 1995 WL 571324, at *3-4 (N.D. Ill. Sept. 25, 1995).

112. The Civil Rights Act of 1991 does not apply retroactively. *See* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

113. *See, e.g.*, Longmire v. Alabama State Univ., 151 F.R.D. 414, 416 (M.D. Ala. 1992) (allowing claims for assault, invasion of privacy, and outrageous conduct); Mitchell v. Hutchings, 116 F.R.D. 481, 483 (D. Utah 1987) (permitting claim for intentional infliction of emotional distress).

114. *See, e.g.*, Bridges v. Eastman Kodak Co., 850 F. Supp. 216 (S.D.N.Y. 1994) (allowing claim to be brought under New York Human Rights Law, N.Y. EXEC. LAW § 296(1)(a) (McKinney 1982)).

115. Evidence of the plaintiff's prior sexual conduct may or may not be relevant to her damages claim, depending on how she characterized the damages. *See, e.g.*, Alberts v. Wickes Lumber Co., No. 93 C 4397, 1995 WL 117886 (N.D. Ill. Mar. 15, 1995). In *Alberts*, a sexual harassment plaintiff

employer may be able to persuade a court to admit evidence of her sexual conduct to rebut her claim of causation,[116] or to demonstrate that her damages were not as extensive as she alleged.[117]

One theory that plaintiffs may argue to have evidence of an alleged harasser's prior sexual conduct admitted is that the harasser by his conduct created a sexually hostile working environment.[118] An essential element of a sexual harassment claim that

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alleged that as a result of her harasser's attempted rape, she was unable to engage in sexual relationships. *See id.* at *5. The court held that the defendant was permitted in discovery to ask her what incidents of sexual intimacy she was referring to because she had, "injected into the very heart of her damages claim her inability to engage in intimate sexual relationships." *Id. See also* James v. Miller, No. 86 C 10081, 1988 WL 72290 (N.D. Ill. July 1, 1988). In *James*, the court permitted the defendant to ask questions about a sexual harassment plaintiff's sexual relationship with her husband, because she sought damages for the decline in frequency of sexual relations with her husband. *See id.* at *1. But see *Bottomly v. Leucadia National*, 163 F.R.D. 617 (D. Utah 1995), in which the court precluded discovery of plaintiff Jennifer Bottomly's prior relationships because they were not related to the causation and extent of her damages, but, "merely [went] to [her] character[, and were] outside of proper bounds of discovery." *Id.* at 620 (citations omitted).

116. See, for example, *McCleland v. Montgomery Ward & Co.*, No. 95 C 23, 1995 WL 571324 (N.D. Ill. Sept. 25, 1995), in which sexual harassment plaintiffs sought to exclude from trial evidence of childhood and adolescent sexual abuse. *See id.* at *1. They sought damages for humiliation and emotional suffering. *See id.* at *2. During discovery, however, the defendant learned that after the alleged harassment, the plaintiffs never told their doctors or therapist that they had been harassed, but disclosed their childhood abuse in discussing their emotional suffering. *See id.* Thus, the court denied the plaintiffs' motion, because the evidence demonstrated that the alleged harassment may not have been the cause of their emotional distress, and because this probative value was not outweighed by its danger of unfair prejudice or undue delay under Federal Rule of Evidence 403. *See id.*

117. *See, e.g., Bottomly*, 163 F.R.D. at 620 ("[E]xpert testimony . . . is admissible as probative of *damages* and causation . . . . However, matter that is not related to causation and *extent of damage* . . . is outside of proper bounds of discovery." (emphasis added) (citations omitted)); *see also* Ramirez v. Nabil's, Inc., Civ.A. No. 94-2396-GTV, 1995 WL 609415, at *2-3 (D. Kan. Oct. 5, 1995) (granting defendant's motion to compel a sexual harassment plaintiff to release prior medical and psychiatric records, that may disclose, "conditions and experiences . . . [that] may themselves be the cause of some or all of the emotional distress."). *But see Bottomly*, 163 F.R.D. at 620 ("If the victim was vulnerable and psychologically feeble, the harasser must accept the condition of the person who was subjected to the improper conduct."). *See also* Mitchell v. Hutchings, 116 F.R.D. 481, 484-85 (D. Utah 1987) (defendants not permitted to discover evidence of a sexual harassment plaintiff's sexual past to demonstrate that because promiscuous people are less likely to be offended by sexual harassment, the plaintiff suffered less extensive damages).

118. *See* Baer et al., *supra* note 7, at 851-52; Krieger & Fox, *supra* note 7, at 132.

is predicated on the hostile environment theory[119] is that the harasser by, "severe or pervasive" conduct,[120] "create[d] an objectively hostile or abusive work environment — environment that a reasonable person[121] would find hostile or abusive," and that the victim herself found abusive.[122] Hence, the victim of a hostile working environment may be able to enter evidence of her harasser's conduct toward other women in the workplace to demonstrate that his harassing conduct was pervasive and objectively hostile.[123]

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119. See Juliano, *supra* note 9, at 1566-74, for an overview of the hostile environment theory in sexual harassment law. See Estrich, *supra* note 8, at 839-47 for a critical examination of the hostile environment theory.

120. *See* Estrich, *supra* note 8, at 843-47 (discussing and criticizing the pervasive requirement). Estrich ultimately concludes that, "the degree of pervasiveness should be a measure of relief, rather than a requirement to establish a violation." *Id.* at 858.

121. *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (holding that a female Title VII plaintiff states a claim for hostile environment sexual harassment, "when she alleges conduct which a *reasonable woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." (emphasis added) (citations and footnotes omitted)); *see also* Juliano, *supra* note 9, at 1571-72 (discussing *Ellison* within the context of other tests to establish a hostile environment claim).

122. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982))). Other elements that make out a prima facie claim for sexual harassment under the hostile environment theory include: (1) that the employee is part of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based on her gender; and (4) that the employer knew of the harassment and failed to take appropriate action. *Henson*, 682 F.2d at 903-05. *See also* Juliano, *supra* note 9, at 1569-72 (discussing the *Henson* test, which, "remains the primary test for establishing sexual harassment under Title VII," *id* at 1571, as well as other tests).

123. *See, e.g.*, Broderick v. Ruder, 685 F. Supp. 1269, 1280 (D.D.C. 1988) (holding that the, "consensual sexual relations [of an employee's supervisors with persons other than herself], in exchange for tangible employment benefits, while possibly not creating a cause of action for the recipient of such sexual advances who does not find them unwelcome, do . . . create and contribute to a sexually hostile working environment."). *But see* Biggs v. Nicewonger Co., 897 F. Supp. 483, 485 (D. Or. 1995) (granting defendant's motion to exclude evidence of a supervisor's sexually-harassing conduct that was unwitnessed by and unrelated to the plaintiff, finding it irrelevant to her claim). *See also* McCleland v. Montgomery Ward & Co., No. 95 C 23, 1995 WL 571324, at *3-4 (N.D. Ill. Sept. 25, 1995) (granting defendant's motion to exclude evidence under Federal Rule of Evidence 403 of a non-party's complaint of sexual harassment by someone other than the plaintiffs' alleged harasser.) In *McCleland*, the court found that the slight probative value of the evidence was substantially outweighed by the danger of unfair prejudice, the

Another element that is essential to state a sexual harassment claim predicated on the hostile environment theory is that, "the employer knew or should have known of the harassment in question and failed to take prompt remedial action."[124] Evidence of the alleged harasser's prior sexual conduct may establish that the employer, "knew or should have known of the harassment in question."[125] Hence, a plaintiff may be able to enter evidence of her harasser's sexual conduct to establish that the employer knew or should have known of the harassment, and failed to take appropriate action.[126]

Finally, under the quid pro quo theory of liability for sexual harassment,[127] a plaintiff must establish that, "[t]he acceptance or rejection of the harassment . . . [was] an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment[.]"[128] Evidence that someone other than the

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likely confusion of issues, and the likely waste of time in trying a collateral issue. *See id.*

124. *Henson*, 682 F.2d at 905. The Supreme Court, while not defining a particular standard for employer liability in hostile environment suits, has found that, "Congress wanted courts to look to agency principles for guidance in this area." *Meritor*, 477 U.S. at 72.

125. *Henson*, 682 F.2d at 905. See, for example, *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548 (E.D. Cal. 1990), in which three former employees of the defendant alleged that their supervisor engaged in sexual harassment against them, and against other employees prior to their employment. *See id.* at 549. The plaintiffs alleged that the employer, "knew or should have known of [the alleged harasser's] prior conduct," and they sought in discovery the telephone numbers and addresses of each female employee who had worked with their supervisor. *Id.* at 549-50. Although the court found that the former female employees had a privacy interest in not having their names and addresses disclosed, and that the defendant had an obligation to preserve that privacy interest, the court found that the information sought was "highly relevant," and held that the privacy interest was outweighed by the importance of the information. *See id.* at 551-52. *But see* Longmire v. Alabama State Univ., 151 F.R.D. 414 (M.D. Ala. 1992). While acknowledging that a hostile environment plaintiff must establish that her employer knew or should have known of her harasser's conduct, the *Longmire* court held that evidence of an alleged harasser's harassing conduct towards other women prior to the plaintiff's employment, and his harassing conduct prior to his employment with the defendant was "absolutely irrelevant." *Id.* at 417-18.

126. *See* Krieger & Fox, *supra* note 7, at 134.

127. See Juliano, *supra* note 9, at 1565-66, for an overview of the quid pro quo theory of sexual harassment liability. See Estrich, *supra* note 8, at 834-39, for a critical examination of the quid pro quo theory.

128. *Henson*, 682 F.2d at 909 (citing 29 C.F.R. § 1604.11(a) (1981) ("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

plaintiff submitted to her supervisor's sexual advances and received a benefit that the supervisor denied the plaintiff can demonstrate that receipt of the benefit was conditioned on the employee's submission to the advances.[129] Therefore, evidence of an alleged harasser's sexual relationships with the plaintiff's co-workers may be admissible to prove that his adverse action towards her or his refusal to grant her a job benefit was a response to her refusal to submit to his harassing conduct.[130]

It is in light of theories of admissibility such as these[131] that courts assess the strength of evidence concerning a party's sexual conduct that is at issue in a discovery dispute. Even if a court determines that such evidence is strong enough to pass the threshold test of Rule 26(b)(1),[132] the court still must weigh its strength against the opposing privacy interests of the party affected by its disclosure.[133] To understand the effect that the 1994 amendments to Rule 412 have had on discovery disputes involving sexual evidence, it is necessary next to examine the cases prior to and subsequent to the enactment of Rule 412.

B. *Cases Analyzing Evidence of a Party's Sexual Conduct or Predisposition in a Discovery Dispute Prior to the Amendments to Rule 412.*

The first reported sexual harassment case to resolve a discovery dispute in which a party sought to elicit information about his opponent's sexual conduct was *Priest v. Rotary*.[134] Evelyn Priest, a waitress at a bar owned by George Rotary, alleged that between

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conduct by an individual is used as the basis for employment decisions affecting such individual . . . .")).

129. See, for example, *King v. Palmer*, 598 F. Supp. 65 (D.D.C. 1984), where the court found that liability for quid pro quo sexual harassment would exist if, "a sexual relationship is solicited by or given the supervisor and favored treatment by the supervisor results as the payoff." *Id.* at 68-69. But where the harassment is based on a mere sexual attraction, "plaintiff must fairly and squarely meet the issue by positive proof . . . [as opposed to] rumor, knowing winks and prurient overtones." *Id.* at 69. *But see* DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 308 (2d Cir. 1986) (holding that, "voluntary, romantic relationships cannot form the basis of a sex discrimination suit under . . . Title VII.").

130. *See* Baer et al., *supra* note 7, at 851-52.

131. The foregoing discussion is by no means comprehensive. *See supra* note 83.

132. *See* FED. R. CIV. P. 26(b)(1).

133. *See supra* notes 32-38 and accompanying text; *see also* Baer et al., *supra* note 7, at 852-57 (examining how courts have weighed the probative value of evidence concerning a harasser's sexual conduct against the constitutional right of privacy).

134. 98 F.R.D. 755 (N.D. Cal. 1983).

February and June of 1978, Rotary sexually harassed her by subjecting her to a sexually hostile environment, and by firing her when she refused to submit to his sexual advances.[135] Rotary contended that Priest herself was the sexual aggressor in their relationship, and that he fired her after she attempted to "pick up" male customers.[136] During her deposition, Rotary attempted to obtain highly detailed information concerning Priest's sexual conduct.[137] After Priest refused to answer these questions, Rotary sought to compel her to answer the questions, and Priest sought a protective order under Rule 26(c) of the Federal Rules of Civil Procedure.[138] The United States Magistrate granted Priest the protective order, and Rotary sought reconsideration.[139]

On reconsideration, the court first considered whether the information Rotary sought met the relevance standard of Rule 26(b)(1).[140] Rotary contended that the evidence he sought established that Priest had a "habit" of, "living with men to derive economic benefit from them[.]"[141] Although "habit" evidence is distinguished from character evidence that is prohibited by Rule 404,[142] the court held that, "repeated instances of living with other persons for economic benefit will not establish a habit."[143]

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135. *See id.* at 756.

136. *Id.*

137. *See id.* Rotary's counsel asked Priest the following questions:

> (1) Have you had any sexual relations with any gentlemen since leaving employment at the Fireside? Would you tell me those person's names?
>
> (2) Have you had any sexual relations with any man prior to June 23 of 1978, other than . . . those men that you listed yesterday . . . ?
>
> (3) In 1977 did you proposition any man for sexual relations?
>
> (4) . . . Would you tell me the name of each person that you have had sexual relations with for the last ten years?
>
> (5) Would you tell me the names [*sic*] of each individual that have [*sic*] sexually propositioned you in the last ten years?
>
> (6) Have you ever sexually propositioned any man within the last ten years?

Id. n.1 (alteration in original) (citations omitted).

138. *See id.* at 756-57.

139. *See id.* at 757.

140. *See* FED. R. CIV. P. 26(b)(1).

141. *Priest*, 98 F.R.D. at 758.

142. *See* FED. R. EVID. 406 ("Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit.").

143. *Priest*, 98 F.R.D. at 759 (discussing Levin v. United States, 338 F.2d 265, 271-72 (D.C. Cir. 1964) (holding that weekly observance of the Sabbath by an Orthodox Jew was not evidence of habit)). The *Priest* court reasoned that, "[i]f an individual's religious practices do not properly constitute a habit, then clearly neither do characteristics of one's personal relationships." *Priest*, 98 F.R.D. at 759.

Rotary further argued that he sought the evidence to establish that Priest had a motive[144] to retaliate against him by falsely accusing him of sexual harassment.[145] The court, however, found that Rotary failed to establish, "the connection between [Priest's] past relationships and a desire for retaliation against him[.]"[146] Rotary finally argued that the information he sought established that Priest had a desire for economic enrichment, and that this desire constituted a motive to meet male customers while working for him.[147] The court, however, found, "nothing about [Priest's] past relationships [that was] specifically relevant to [her] conduct as a cocktail waitress at [Rotary's] bar."[148] Consequently, the court concluded that the discovery Rotary sought failed to meet the requirements of Rule 26(b)(1).[149]

The court next considered whether a protective order was proper under Rule 26(c).[150] The court expressed concern that questions such as the ones that George Rotary sought to compel[151] had "the clear potential to discourage sexual harassment litigants from prosecuting lawsuits[.]"[152] The court found that this result, "clearly contravene[d] the remedial effect intended by Congress in enacting Title VII[.]"[153] Indeed, the court found that, "[s]exual harassment plaintiffs would appear to require particular protection from this sort of intimidation and discouragement if the statutory cause of action . . . is to have meaning."[154] What is particularly instructive about the court's policy analysis is that it in essence anticipated the 1994 amendments to Rule 412. After discussing the "similar state of affairs [that] once con-

144. Under Federal Rule of Evidence 404(b), evidence of "motive" is an express exception to the general prohibition against character evidence. *See* FED. R. EVID. 404(b).

145. *See Priest*, 98 F.R.D. at 760.

146. *Id.*

147. *See id.*

148. *Id.*

149. *See id.* at 761.

150. *See* FED. R. CIV. P. 26(c). In discussing the policy conflict between liberal discovery and the privacy interests of Evelyn Priest, the court stated that, "[w]hen a discovery request 'approach[es] the outer bounds of relevance and the information requested may only marginally enhance the objectives of providing information to the parties or narrowing the issues, the Court must then weigh that request with the hardship to the party from whom the discovery is sought.'" *Priest*, 98 F.R.D. at 761 (alteration in original) (quoting Carlson Cos. v. Sperry & Hutchinson Co., 374 F. Supp. 1080, 1088 (D. Minn. 1974)).

151. *See supra* note 137.

152. *Priest*, 98 F.R.D. at 761.

153. *Id.*

154. *Id.*

fronted victims . . . [of] rape,"[155] and the consequent enactment of Rule 412, the court stated that, "courts and [the] bar can avoid repeating in this new field of civil sexual harassment suits the same mistakes that are now being corrected in the rape context."[156] The court concluded, "in the context of civil suits for sexual harassment, and absent extraordinary circumstances, inquiry into such areas should not be permitted, either in discovery or at trial."[157] Consequently, the court granted Priest a protective order prohibiting any inquiry into her prior sexual conduct.[158]

In *Mitchell v. Hutchings*,[159] the United States District Court for the District of Utah articulated a standard that was not quite as restrictive as the "absent extraordinary circumstances" standard articulated in *Priest*, but that nonetheless restricted the sexually-related questions defendants could ask sexual harassment plaintiffs in discovery. In 1987, three Utah police officers sued their City employer and officer Carl Hutchings for sexual harassment and intentional infliction of emotional distress.[160] Hutchings and the City sought to depose three people with whom the plaintiffs had allegedly engaged in sexual relations.[161] Hutchings and the City also sought to depose a photographer who had allegedly taken sexually suggestive pictures of the plaintiffs,[162] another police officer who had been allegedly restrained by fellow officers while one of the plaintiffs fondled him, and a psychologist who treated one of the plaintiffs for the distress that Hutchings allegedly caused.[163]

The plaintiffs argued that Hutchings and the City were attempting to elicit character evidence that is inadmissible under Rule 404.[164] Further, they contended that the inquires were "calculated to annoy, embarrass, and oppress" them.[165] They sought

155. *Id.*

156. *Id.* at 762.

157. *Id.* The court rested this conclusion on the premise that, "even in the criminal context, [the courts and Congress have concluded that] the use of evidence of a complainant's past sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value such evidence may have." *Id.*

158. *See id.*

159. 116 F.R.D. 481 (D. Utah 1987).

160. *See id.* at 483.

161. *See id.*

162. *See id.* The court stated that the pictures may have been taken of "one or more of the plaintiffs." *Id.*

163. *See id.*

164. *See* FED. R. EVID. 404.

165. *Mitchell*, 116 F.R.D. at 483.

to quash the deposition subpoenas, and alternatively they sought a protective order under Rule 26(c).[166] Hutchings and the City argued that questions were necessary to determine whether the plaintiffs had welcomed Hutchings' alleged conduct.[167] They also argued that the information was necessary to demonstrate that the plaintiffs were promiscuous, and thus less likely to be distressed by Hutchings' alleged conduct.[168] They argued further that they should be permitted to question the psychologist concerning his patient's sexual behavior to determine whether Hutchings caused her emotional damages and whether they were as extensive as she had asserted.[169]

Under Rule 26(b)(1),[170] the court noted that if the evidence were irrelevant and inadmissible, and if it did not, "appear that the evidence sought [would] lead to evidence that is admissible," then it had the authority to limit the discovery.[171] Because the evidence that the defendants sought to discover, "ha[d] a bearing on the Title VII claim, on the emotional distress claim, on character evidence and on damages," the court determined that it would, "review what it consider[ed] to be the bounds of relevant testimony[.]"[172]

The court acknowledged that under *Meritor Savings Bank v. Vinson*[173] it could examine the plaintiffs' conduct to determine

166. *See id.* at 482-83.

167. *See id.* at 483.

168. *See id.*

169. *See id.* at 485. The defendants also argued that evidence of the plaintiffs' sexual behavior was admissible as "habit" evidence under Federal Rule of Evidence 406. *See id.* at 483. The court, however, agreed with the reasoning of the *Priest* court and concluded that evidence of prior sexual behavior does not constitute evidence of "habit" under Rule 406 as an exception to the general prohibition of character evidence. *See id.* at 485 (citing Priest v. Rotary, 98 F.R.D. 755 (N.D. Cal. 1983)).

Finally, the defendants argued that the information they sought was necessary under Utah's law for intentional infliction of emotional distress. *See id.* at 483. Under Utah law, to prove intentional infliction of emotional distress, a plaintiff must show that the defendant acted intentionally either with the purpose of inflicting emotional distress, or with "outrageous" conduct that a reasonable person would expect to result in emotional distress. *See id.* at 484 (citing Samms v. Eccles, 358 P.2d 344, 346-47 (Utah 1961)). The *Mitchell* court found that the requirement that Hutchings' conduct be outrageous was measured by an objective standard, but would also require a jury to examine Hutchings' conduct, "in the context of the working environment." *Id.* Thus, the court concluded that, "all evidence of sexual behavior in the workplace environment, whether known to the defendants or not, is relevant." *Id.*

170. *See* FED. R. CIV. P. 26(b)(1).

171. *Mitchell*, 116 F.R.D. at 483-84.

172. *Id.* at 484.

173. 477 U.S. 57 (1986).

whether they welcomed the alleged harassment.[174] The court determined that, "evidence relating to the work environment where the alleged sexual harassment took place is obviously relevant, if such conduct was known to . . . Hutchings."[175] However, "evidence of sexual conduct which is remote in time or place to plaintiffs' working environment is irrelevant."[176] Thus, the court found that evidence that the plaintiffs engaged in sexual conduct was inadmissible and unlikely to lead to the discovery of admissible evidence if it was unconnected to the workplace and if Hutchings was unaware of it.[177] The court further stated that, "[g]iven the annoying and embarrassing nature of this discovery . . . as a matter of law . . . Rule 26 . . . preponderates against its discoverability."[178] The court concluded that the subpoenas of the three sexual partners of the plaintiffs should be quashed until Hutchings and the City could demonstrate that the partners had information that was relevant.[179] Further, the court concluded that the photographer could be deposed, "but the only photographs which [we]re pertinent to [the] litigation [we]re those which [were] publicly displayed in the police station or privately displayed to the defendants."[180]

In response to the argument that the information was relevant to show that because the plaintiffs were promiscuous, they were less likely to be distressed by Hutchings' harassment, the court noted that "[p]ast sexual conduct does not . . . create emo-

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174. *See Mitchell*, 116 F.R.D. at 484 (citing *Meritor*, 477 U.S. at 69); *see also supra* notes 88-106 and accompanying text (discussing *Meritor*).

175. *Id.*

176. *Id.*

177. *See id.* Evidence of the plaintiffs' sexual behavior that occurred at work and of which Hutchings had no knowledge of was, however, admissible to determine whether Hutchings' conduct was objectively outrageous to constitute intentional infliction of emotional distress. *See id.*

178. *Id.* at 484.

179. *See id.* at 485-86.

180. *Id.* at 486; *see also* Douglass v. Blue Cross & Blue Shield of Kan, CIV. A. No. 88-2257-S, 1989 WL 134548 (D. Kan. Oct. 23, 1989). In *Douglass*, Susan Douglass sued both her supervisor and her employer for sexual harassment under Title VII and under the Kansas Act Against Discrimination, KAN. STAT. ANN. §§ 44-1001-1044 (1995). *See id.* at *1. The defendants sought to compel the production of certain "boudoir" photographs of Douglass, arguing that they were relevant to show that Douglass welcomed her harasser's conduct. *See id.* The magistrate denied the defendants' motion, and, distinguishing *Mitchell*, emphasized that the photographs of Douglass were not taken in the workplace, and were neither displayed openly at work nor to the alleged harasser. *See id.* at *1-2 (citing *Mitchell*, 116 F.R.D. at 485). The defendants sought review of the magistrate's order. *See id.* at *1. The court found that the magistrate correctly limited the scope of the defendants' inquiry, "to information pertinent to the work environment." *Id.* at *2 (citing *Mitchell*, 116 F.R.D. at 485).

tional calluses that lessen the impact of unwelcomed sexual harassment."[181] Thus, the court found that their prior sexual conduct had, "absolutely no bearing on the emotional trauma they may feel from sexual harassment that is unwelcome."[182] In contrast to this argument, however, the court found that the, "expert opinion relating to the extent of plaintiff's emotional trauma and its causes is obviously relevant to the damages issue."[183] Thus, the court permitted Hutchings and the City to ask the psychologist about all the information on which he based his expert opinion, and to ask him how other hypothetical information, if known to him, would affect his opinion.[184]

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181. *Mitchell*, 116 F.R.D. at 485.

182. *Id.*

183. *Id*; *see also* James v. Miller, No. 86 C 10081, 1988 WL 72290 (N.D. Ill. July 1, 1988). In *James*, the plaintiff alleged that due to sexual harassment, she suffered emotional damages that "affected her whole life," and resulted in a decline in the frequency of sexual relations with her husband. *Id.* at *1. The court held that questions about the frequency with which she had had sex with her husband both before and after the harassment were relevant under Rule 26(b)(1) to her damages claim. *See id. But see* Kennedy v. Fritsch, No. 90 C 5446, 1991 WL 277624 (N.D. Ill. Dec. 19, 1991). In *Kennedy*, three waitresses sued a restaurant alleging sexual harassment under Title VII and intentional infliction of emotional distress. *See id.* at *1. The defendants sought to compel the discovery of detailed information about the plaintiffs' sexual activities before, during, and after their employment, alleging that the plaintiffs put their emotional and mental health at issue by asserting a Title VII and an emotional distress claim. *See id.* While the court found that, "[t]he existence of difficulties in the personal lives of plaintiffs contemporaneous with the alleged emotional distress they suffered would effect a determination as to whether the alleged conduct of the defendants caused the distress[,]" the court nonetheless found that the defendants had, "already asked any questions reasonably calculated to yield such information." *Id.* at *2. Thus, the court determined that the additional questions regarding the plaintiffs' sexual lives were calculated merely to "humiliate" them. *Id.*

184. *See id*; *see also* Bridges v. Eastman Kodak Co., 850 F. Supp. 216 (S.D.N.Y. 1994). In *Bridges*, Susan Bridges, Virginia D'Aponte and Kimberly Muryasz sued Eastman Kodak and others for sexual harassment under Title VII and under New York's Human Rights Law, N.Y. EXEC. LAW § 296(1)(a) (McKinney 1982). *Bridges*, 850 F. Supp. at 218. The plaintiffs sought to prove that as a result of an abusive working environment, "they suffered injuries to their psychological well-being including emotional pain, suffering and mental anguish." *Id.* at 220-21. Eastman Kodak sought to ask the plaintiffs and their therapists about the plaintiffs' psychological histories, and sought to obtain their medical records. *See id.* at 222. The court held that questions about the plaintiffs' psychological history were permissible because they asserted damages for mental anguish. *See id.* at 223 (citations omitted). However, the court emphasized that the defendants would not be permitted to "engage in a fishing expedition by inquiring into matters totally irrelevant to the issue of emotional distress[,]" but would be limited to inquiring about the cause and extent of the emotional harm. *Id.* Citing both *Mitchell* and *Priest*, the court offered as an example that, "it would be inappropriate for defendants to question plaintiffs

The "remote in time or place" standard of *Mitchell* is obviously less restrictive than the "absent extraordinary circumstances" standard of *Priest.* This is understandable given that *Priest* was decided prior to *Meritor Savings Bank v. Vinson,*[185] and given that the plaintiffs in *Mitchell,* unlike the plaintiff in *Priest,* were seeking damages for emotional trauma. Nonetheless, taken in tandem, these two early cases illustrate a sensitivity of courts both to the reality that in sexual harassment cases parties often use sexual questions in discovery to intimidate their opponents, and to the fact that there are circumstances under which such evidence can be highly relevant. Subsequent courts facing similar discovery disputes would follow these two decisions.

One such court was the United States District Court for the Southern District of Iowa in *Weiss v. Amoco Oil Co.*[186] In May of 1990, after Angel Streebin, an employee of Amoco Oil who had occasionally dated Arnold Weiss, alleged that Weiss sexually harassed her, Amoco Oil terminated Weiss's employment.[187] Weiss sued Amoco Oil for wrongful discharge, and sought to depose Streebin.[188] Streebin, who allegedly had pinned up cards of a sexual nature at her work station, had sent another employee a birthday card with sexual connotations, had made sexual jokes with other employees, and had discussed her sexual conduct at work, sought a protective order under Rule 26(c) to prohibit the discovery of her sexual history.[189] Weiss requested that he be permitted to inquire into Streebin's sexual activities with Amoco Oil employees during her employment that he had known about.[190] Amoco argued[191] that such information was irrelevant under Rule 26(b)(1), and was meant to harass Streebin.[192]

The court noted that under *Meritor Savings Bank v. Vinson,*[193] evidence of a plaintiff's sexual past is, "relevant in assessing her

about their past sexual histories in order to show that sexually promiscuous people are less likely to be offended, and thus less damaged, than those who are not as sexually active." *Id.* at 223 n.5.

185. 477 U.S. 57 (1986).

186. 142 F.R.D. 311 (S.D. Iowa 1992)

187. *See id.* at 312-13.

188. *See id.* at 312.

189. *See id.* at 312-13.

190. *See id.* at 312.

191. Streebin did not submit a brief, but Amoco submitted a brief supporting Streebin's motion that the court considered in ruling on the motion. *See id.* at 312 n.1.

192. *See id.* at 314-15.

193. 477 U.S. 57 (1986).

contact with her alleged harasser."[194] Further, the court noted that unlike the situation in *Mitchell v. Hutchings*,[195] Weiss did not seek to discover information that was "remote in time or place" to Streebin's employment, or that was unknown to him.[196] Rather, the court found that Weiss's requested discovery was, "exactly tailored to be in keeping with the *Mitchell* decision."[197] The court concluded that the requested discovery was relevant under Rule 26 to determine whether Streebin welcomed Weiss's conduct, to explain, "the context of Weiss's words and actions toward Streebin,"[198] and to assess, "the thoroughness of Amoco's investigation into Streebin's complaint of sexual harassment."[199] Thus, the court held that Streebin failed to meet her burden of establishing "good cause" under Rule 26(c).[200]

Another case citing both *Priest* and *Mitchell* is *Longmire v. Alabama State University*.[201] In *Longmire*, Venus Longmire, an employee of Alabama State University, alleged that Dr. Leon Howard, the University's former president, attempted to rape her.[202] Longmire filed charges against Howard with the Equal Employment Opportunity Commission, and with Alabama's Ethics Commission.[203] In June of 1991, after the University terminated her employment, Longmire sued the University, the members of its Board of Trustees, and Howard, alleging a number of causes of action, including sexual harassment under Title VII.[204] Howard counterclaimed that Longmire abused the legal process and defamed him.[205]

One of several discovery disputes[206] arose in which Longmire sought information about Howard's prior sexual conduct,

194. *Weiss*, 142 F.R.D. at 315 (citing *Meritor*, 477 U.S. at 69).

195. 116 F.R.D. 481 (D. Utah 1987).

196. *Weiss*, 142 F.R.D. at 316 (citing *Mitchell*, 116 F.R.D. at 484).

197. *Id.*

198. *Id.* (citing Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 565 (8th Cir. 1992); Jones v. Wesco Invs., Inc., 846 F.2d 1154, 1155 n.5 (8th Cir. 1988); Morris v. American Nat'l Can Corp., 730 F. Supp. 1489, 1495 (E.D. Mo. 1989)).

199. *Id.*

200. *Id.* at 317.

201. 151 F.R.D. 414 (M.D. Ala. 1992).

202. *See id.* at 416.

203. *See id.*

204. *See id.* at 415-16.

205. *See id.* at 416.

206. The court described the discovery phase of the case as being, "marked by hostility, anger and a general inability on the part of counsel to get along." *Id.* The court reported that between October 30 and December 18 of 1992, at least nine separate discovery motions were filed by the parties. *See id.* at 416-17.

and the defendants sought information about Longmire's prior sexual conduct.[207] In October of 1992, the court entered an order permitting the defendants to ask Longmire about her sexual conduct only with people that Howard had known about while she was employed at the University.[208] The court's order also permitted Longmire to ask about Howard's sexual relations with persons that he supervised during his most recent term as President of the University.[209] Longmire, however, sought to ask Howard about his sexual conduct while he was employed at another university prior to serving as President of Alabama State, and about his sexual conduct while he had been employed at Alabama State prior to his employment at the other university.[210] Howard, likewise, sought to ask Longmire about her prior sexual relations beyond the limits that the court had set.[211] Both parties appealed the court's order.[212]

Longmire argued that the evidence of Howard's sexual activities prior to returning to Alabama State to serve as its president were relevant to demonstrate that the Board of Trustees knew or should have known about Howard's improper sexual activities prior to hiring him.[213] The court noted, however, that it had dismissed a previous claim by Longmire in which she asserted that the Board of Trustees negligently supervised Howard.[214] Further, the court noted that under the quid pro quo theory of sexual harassment, strict liability applies, while under the hostile environment theory, Longmire could prevail against the University and its trustees only if she could show that they knew or should have known about Howard's harassment of her and failed to take "prompt remedial action against Dr. Howard."[215] Thus, the court found that the trustees' knowledge of Howard's sexual conduct at another university and at Alabama State during a prior tenure were "absolutely irrelevant" to her Title VII

207. *See id.* at 417.

208. *See id.*

209. *See id.*

210. *See id.* The court noted that Dr. Howard left Alabama State in 1976 to work for Jackson State University, and returned to Alabama State in 1984. *See id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.* at 418.

215. *Id.* (citing Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989)). The court stated that Longmire, "never specifically categorized her sexual harassment claim as either a 'quid pro quo' claim or a 'hostile environment' claim." *Id.*

claims.[216] Additionally, the court found it, "important . . . [to] place limits on the inquiries into sensitive areas such as sexual activity in order to control the case."[217] Thus, the court concluded that the limitations contained in the October order were, "consonant with both the letter and the spirit of Rule 26 and necessary to prevent unnecessary embarrassment and invasions of Dr. Howard's private life."[218]

The court further found, however, that Ms. Longmire had the same interests as Dr. Howard in, "being free from harassment, embarrassment, and unnecessary invasions into [her] private life."[219] Like the defendant in *Priest v. Rotary*,[220] Howard argued that inquiries into Longmire's prior sexual behavior could reveal that she, "engaged in sexual relationships with individuals in authority over her, resulting in [her] accepting money or favors from such individuals after they have been placed in a compromising position."[221] Such evidence, Howard contended, would be relevant under Rule 404(b) of the Federal Rules of Evidence[222] to demonstrate that Longmire had a "motive, plan, or scheme" to put him in a similar situation.[223] The court concluded, however, that, "[t]his sort of generalized allegation that there might be some 404(b) evidence somewhere in the case is insufficient to overcome the 'potential of the requested discovery

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216. *Id.*

217. *Id.*

218. *Id.* The court instructed, however, that if Longmire had, "actual evidence, not argument, which would establish a good faith basis for the inquiry about Dr. Howard's sexual activity at places other than Alabama State and some relevance to that inquiry, [she could] make an ex parte motion under seal requesting that the court allow such inquiry." *Id.*

In the end, however, Longmire was able to attain the discovery of the desired information about Howard's sexual past. Because Howard asserted a defamation counterclaim, the court found that under Alabama law, he had placed his character at issue. *See id.* at 419 (citing Parker v. Newman, 75 So. 479, 485 (Ala. 1917)). Thus, the court concluded that Longmire could ask Howard about "any incidents where he is alleged to have assaulted other females or attempted to force them to have sex with him against their wills." *Id.* Further, the court stated that if Howard offered evidence of his good character, Longmire could "ask questions about any extra-marital affair that Dr. Howard may have had while he was either at Jackson State or Alabama State." *Id.*

219. *Id.* at 418.

220. 98 F.R.D. 755 (N.D. Cal. 1983).

221. *Longmire*, 151 F.R.D. at 418.

222. Rule 404(b) contains examples of permissible uses of character evidence that are not proscribed by the rule's general prohibition of character evidence. FED. R. EVID. 404(b). They include, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

223. *Longmire*, 151 F.R.D. at 418.

to harass, intimidate, and discourage [Longmire] in her efforts to prosecute her cause.'"[224] Rather, the court found that Howard's requested discovery, "'would only serve as [a tool] of annoyance and harassment.'"[225] The court thus affirmed the limitations specified in the October order.[226]

In sum, prior to the enactment of the 1994 amendments to Rule 412, federal courts generally protected the privacy interests of individuals in sexual harassment discovery disputes that involved sexual behavior or predisposition evidence. However, federal courts also recognized that in particular disputes, a party's need for particularly relevant information could outweigh his opponent's privacy interests.[227] The courts often found the

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224. *Id.* (quoting Priest v. Rotary, 98 F.R.D. 755, 761 (N.D. Cal. 1983)).

225. *Id.* (quoting Mitchell v. Hutchings, 116 F.R.D. 481, 485 (D. Utah 1987)).

226. *See id.* at 421. As with Longmire's requested discovery, however, the court specified that, "[i]f the defendants have actual evidence, as opposed to argument, which would establish a good faith basis for the inquiry about Ms. Longmire's past sexual activity and some relevance to it, they may make an ex parte motion under seal requesting that the court allow such inquiry." *Id.* at 418-19.

227. Of course, one issue that is unresolved by the federal courts is whether a litigant's *constitutional* right of privacy is implicated when the courts compel the litigant to divulge her prior sexual history. *See* Baer et al., *supra* note 7 (discussing the tension between a Title VII sexual harassment plaintiff's need for broad discovery of her harasser's sexual history with his fundamental right of privacy). Given the protection afforded privacy under Rule 26(c) it is unlikely that a federal court would ever reach this issue. *See, e.g.*, Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 650 (D.S.C. 1989) ("Because this court finds that [Rule 26] adequately protect[s] the [blood] donor's privacy interests in this case, the court need not engage in a constitutional analysis.").

Notably, however, California state courts have recognized a state constitutional right of privacy that is implicated in discovery disputes involving sexual evidence. *See, e.g.*, Vinson v. Superior Court, 740 P.2d 404 (Cal. 1987). In *Vinson*, Katherine Vinson applied for a job with the Peralta Community College District. *See id.* at 407. She alleged that her interviewer commented on her attractiveness, her anatomy, and his desire to have sexual relations with her, and intimated to her that her attaining the position was conditioned on her acquiescence to his sexual desires. *See id.* After Vinson was hired by another department of the Peralta Community College District, her original interviewer arranged to have her transferred to his department, and fired her soon thereafter. *See id.* Vinson sued the Peralta Community College District, asserting claims for sexual harassment, wrongful discharge, and intentional infliction of emotional distress, and alleging damages for continuing mental ailments. *See id.* The defendants sought to compel Vinson to undergo a medical and a psychological exam. *See id.* at 407-408. Vinson sought a protective order prohibiting questions during the exam into her sexual history. *See id.* at 408. The court found that the federal Constitution protects the right to sexual privacy in the context of both married and unmarried individuals. *See*

evidence irrelevant under Rule 26(b)(1)[228] unless it related directly to an element of the cause of action, such as the unwelcomeness requirement,[229] or directly to an allegation of damages.[230] Moreover, even when courts permitted the discovery, they often limited its scope to evidence that was not, "remote in time or place to [the party's] working environment."[231] Thus, although the federal discovery scheme operates under a broad concept of "relevance,"[232] under Rule 26(c) the federal courts have recognized that an individual's interest in privacy often outweighs a party's need for broad discovery of sexual evidence.[233]

C. *Cases Analyzing Evidence of a Party's Sexual Conduct or Predisposition in a Discovery Dispute Subsequent to the Enactment of Rule 412.*

A case that perhaps best illustrates the influence that Rule 412 can have in a discovery proceeding is *Burger v. Litton Indus-*

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id. at 410 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)). However, the court found it more significant that the California Constitution specifically protects the right of privacy as an inalienable right that encompasses sexual relations. *See id.* (citing Fults v. Superior Court, 152 Cal. Rptr. 210 (Cal. Ct. App. 1979); Morales v. Superior Court, 160 Cal. Rptr. 194 (Cal. Ct. App. 1979)). While the defendants argued that Vinson waived her right to privacy by asserting mental and emotional damages, the court stated that Vinson was not, "compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy." *Id.* The court found that while Vinson implicitly waived her right to privacy, the waiver encompassed only discovery that was, "directly relevant to [her] claim . . . and essential to the fair resolution of the lawsuit." *Id.* at 411 (citing Britt v. Superior Court, 574 P.2d 766, 775 (Cal. 1978)). Thus, the court concluded that while she, "waived her right to privacy . . . by alleging continuing mental ailments . . . she has not, merely by initiating this suit for sexual harassment and emotional distress, implicitly waived her right to privacy in respect to her sexual history and practices." *Id.*

228. *See* Longmire v. Alabama State Univ., 151 F.R.D. 414 (M.D. Ala. 1992); Priest v. Rotary, 98 F.R.D. 755 (N.D. Cal. 1983).

229. *See* Weiss v. Amoco Oil Co., 142 F.R.D. 311 (S.D. Iowa 1992); Mitchell v. Hutchings, 116 F.R.D. 481 (D. Utah 1987); *see also supra* notes 88-106 and accompanying text (discussing the "unwelcomeness" requirement and its proof in Title VII suits).

230. *See* Kennedy v. Fritsch, No. 90 C 5446, 1991 WL 277624 at *1-2 (N.D. Ill. Dec. 19, 1991); James v. Miller, No. 86 C 10081, 1988 WL 72290 at *1 (N.D. Ill. July 1, 1988); *Mitchell*, 116 F.R.D. at 485.

231. *Mitchell*, 116 F.R.D. at 484.

232. *See supra* notes 23-31 and accompanying text.

233. *See* Longmire v. Alabama State Univ., 151 F.R.D. 414, 418 (M.D. Ala. 1992); *Mitchell*, 116 F.R.D. at 485; Priest v. Rotary, 98 F.R.D. 755, 761-62 (N.D. Cal. 1983).

tries, Inc.[234] In May of 1995, Joffre Burger, the plaintiff in a sexual harassment action against Litton Industries and against Mr. Schoen, her supervisor, deposed "Laura,"[235] a non-party witness whose husband had been fired by Schoen.[236] Laura testified about the sexual activities of her co-workers while working at another facility owned by Litton, and about being sexually harassed by Mr. Schoen.[237] The defendants' counsel asked Laura whether she had had sexual relationships with other Litton employees during her employment.[238] Burger's attorney objected, asserting that the question violated Laura's right of privacy.[239] Laura refused to answer any questions about her sexual relationships.[240]

In May of 1995, the defendants argued at a conference held before the court that the evidence would impeach Laura, because she frequently discussed with her co-workers her sexual relationships.[241] Thus, they contended that the evidence they sought would put her testimony that the Litton employees, "were talking about sex all the time"[242] into proper context.[243] Further, they argued that the deposition testimony they sought would demonstrate that Laura was biased, because Schoen had fired one of the employees with whom she allegedly had a sexual relationship.[244] The court suggested that "a very strict confidentiality order" would sufficiently protect Laura's privacy interests, and that she could seek a protective order if she desired.[245] Because Laura failed to seek a protective order, the court in July of 1995 ordered that her deposition be continued, "subject to a motion by her for reconsideration."[246] Burger sought reconsideration, and Laura's attorney in a letter to the court objected to the questions, asserting that they violated her right to privacy

234. No. 91 CIV. 0918 (WK) (AJP), 1995 WL 476712 (S.D.N.Y. Aug. 10, 1995).

235. "Laura" is the fictitious name of the witness, used by the court to protect her identity. *See id.* at *1. For convenience, this Note will likewise refer to her by this pseudonym.

236. *See id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.* at *2.

242. *Id.* (quoting from Laura's deposition).

243. *See id.*

244. *See id.* at *1.

245. *Id.*

246. *Id.*

under California law.[247] The court treated the letter as joining in Burger's motion, and granted the motions to reconsider.[248]

On reconsideration, the court noted that although Rule 412 does not apply "directly" to the discovery process, the court was obliged to consider it in deciding the discovery dispute to preserve the policy of Rule 412.[249] The court further noted that under Rule 412, Litton and Schoen had the burden to show that, "'the evidence sought to be discovered would be relevant under the facts and theories of the . . . case, and [could not] be obtained except through discovery.'"[250] The court agreed with the defendants that, "Laura's discussions about sex with others at Litton would be relevant (in a discovery sense)" to put her testimony about the sexual nature of the workplace conversation into context.[251] However, the court found that the defendants' counsel had already asked her if she discussed her sexual relationships at work, and that she answered in the negative.[252] Thus, the court concluded that although questions about her sexual relationships could lead to discovery about her conversations at work concerning those relationships, the defendant's "attenuated claim of need" for this information did not "substantially outweigh[ ]" the invasion of Laura's privacy.[253] Further, the court found that because the defendants had already established that Laura's husband had been fired by Schoen, another inference of bias, even if it were true, could not "substantially outweigh" the invasion of her privacy.[254] Hence, the court held that Litton and

247. *See id*; *see also* Vinson v. Superior Court, 740 P.2d 404 (Cal. 1987) (finding a right to sexual privacy that is protected by the California Constitution during discovery).

248. *See Burger*, 1995 WL 476712, at *1.

249. *See id.* at *2 (citing FED. R. EVID. 412 advisory committee's note).

250. *Id.* (quoting FED. R. EVID. 412 advisory committee's note).

251. *Id.*

252. *See id.*

253. *Id.* (citing FED. R. EVID. 412(b)(2)).

254. *Id.* at *3. *But see* Blackmon v. Buckner, 932 F. Supp. 1126 (S.D. Ind. 1996). In *Blackmon*, the court granted the defendants' motion to admit evidence under Rule 412(c) that Jeffrey Blackmon, a prisoner who sued two prison officials alleging that they acted with deliberate indifference to the threat that other prisoners would rape him, had had a homosexual relationship with another prisoner. *See id.* at 1129. Blackmon's lover had been moved by Major Norman Buckner, one of the defendants, away from Blackmon. *See id.* Blackmon wrote to Buckner requesting that his lover be returned to his cellblock, and Buckner didn't respond. *See id.* Less than three weeks later, Blackmon initiated the suit. *See id.* The court found that the evidence attacked Blackmon's credibility, and suggested a motive to file a false claim against Buckner. *See id.* Thus, the court concluded that under Rule 412 its probative value substantially outweighed the danger of unfair prejudice to Blackmon. *See id.*

Schoen failed to meet their burden of showing that the evidence they sought would be, "'relevant under the facts and theories of the . . . case.'"[255] In so holding, the court not only shifted the burden from Laura to Litton and Schoen to show good cause for the protective order, but the court also heightened the standard for good cause by making Litton and Schoen show that the value of the evidence would "substantially outweigh" Laura's interest in privacy.

In *Barta v. City of Honolulu*,[256] the United States District Court for the District of Hawaii also applied the balancing test of Rule 412(b)(2) to a determine a party's eligibility for a protective order under Rule 26(c). Clarissa Barta, a former employee of the Honolulu Police Department, sued the City and County of Honolulu and several of its employees for sexual harassment and intentional infliction of emotional distress.[257] During one deposition, the defendants' counsel asked the deponent if he had ever had a sexual relationship with Barta.[258] During another deposition, the defendants' counsel asked Sheila Nitta, Barta's former roommate, if Barta had ever dated anyone while they lived together.[259] Nitta responded affirmatively, and over the objections of Barta's counsel, Nitta provided the names of Hawaii police officers that Barta had dated.[260] The defendants' counsel further asked Nitta to describe two incidents, one in which Barta had allegedly been found "in a compromising position" with an officer at an off-duty party, and another in which she had allegedly attempted to seduce an officer outside the workplace.[261]

Barta sought a protective order to preclude the discovery of her sexual conduct outside the workplace, arguing that Rule 412 prevented its admissibility despite the broad scope of Rule 26(b)(1).[262] She asserted that the defendants' questions were asked in order to harass and intimidate her.[263] The defendants argued that as a rule of admissibility, Rule 412 was inapplicable to their discovery dispute.[264] Further, they argued that the infor-

255. *Burger*, 1995 WL 476712, at *2 (quoting FED. R. EVID. 412 advisory committee's note).

256. 169 F.R.D. 132 (D. Haw. 1996).

257. *See id.* at 133. Barta's complaint also asserted claims of assault, battery, false imprisonment, retaliation, and racial and sex discrimination. *See id.*

258. *See id.* at 134.

259. *See id.* at 134 n.4.

260. *See id.*

261. *Id.* at 134 n.5.

262. *See id.* at 134-35.

263. *See id.* at 135.

264. *See id.*

mation they sought was necessary to show that Barta welcomed the alleged harassment, and that it was necessary to support their defenses in regard to "issues of causation, damages, and apportionment."[265] Finally, they argued that because Barta testified that she was a devout member of the Mormon Church, she had placed her credibility at issue, and thus evidence of her sexual practices that contradicted Morman doctrine was necessary to challenge that testimony.[266]

The court stated that the purpose of Rule 412 is to "'safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping . . . and the infusion of sexual innuendo into the factfinding process.'"[267] To further this policy rationale, the court found that it, "must impose certain restrictions on discovery to preclude inquiry into areas which will clearly fail to satisfy the balancing test of Rule 412(b)(2)[.]"[268] Thus, the court concluded, "Rule 412 . . . must constrict the broad scope of Rule 26(b)(1)."[269]

The court stated that it was "convinced" that the sexual conduct of Barta while at work and with named defendants was relevant, and that the defendants should be given "reasonable leeway for discovery of evidence pertaining to those areas."[270] However, the court found that evidence of Barta's sexual conduct with non-defendants away from the workplace was outside the proper scope of Rule 26(b)(1).[271] The court concluded that her sexual conduct "remote in time [or] kind from her claims" was irrelevant to her claims or to the defendants' defenses, and in particular to the welcomeness inquiry.[272] Further, the court found that the defendants had neither been "precluded from discovery of . . . Barta's sexual experience . . . at the time of her marriage, nor . . . deprived of significant discovery concerning her behavior relevant to other values central to the Mormon faith."[273] Thus, the court found that the defendants were not precluded from

265. *Id.*

266. *See id.* at 136.

267. *Id.* at 135 (quoting FED. R. EVID. 412 advisory committee's note).

268. *Id.*

269. *Id.* In arriving at this conclusion, the court quoted the language in the Advisory Committee's note to Rule 412 that advocates shifting the burden of showing good cause to the defendant in Rule 26(c) determinations. *See id.* (quoting FED. R. EVID. 412 advisory committee's note).

270. *Id.* at 135 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986); Sanchez v. Zabihi, 166 F.R.D. 500, 502-03 (D.N.M. 1996); Mitchell v. Hutchings, 116 F.R.D. 481, 484 (D. Utah 1987)).

271. *See id.* at 136.

272. *Id.*

273. *Id.*

discovering evidence that would test Barta's claim for damages or her credibility.[274] Therefore, the court concluded that the discovery "would not lead to evidence [that] would meet the balancing test for admissibility under Rule 412(b)(2)."[275]

In *Sanchez v. Zabihi*,[276] the United States District Court for the District of New Mexico also applied Rule 412 to a discovery dispute. In July of 1995, Winona Sanchez sued her employer and Mohammad Zabihi, alleging that Zabihi created a sexually hostile work environment by making unwanted sexual advances towards her.[277] She asserted claims for sexual harassment under Title VII, for intentional infliction of emotional distress, and for punitive damages.[278] In an interrogatory, the defendants sought detailed information about any sexual advances she had made to or received from a co-worker at any job in the previous ten years and about any relationships she had had with other co-workers during the same period.[279] Sanchez refused to answer the questions, asserting that the information was inadmissible under Rule 412 and, therefore, not reasonably calculated to lead to the discovery of admissible evidence under Rule 26.[280] The defendants sought to compel Sanchez to answer the interrogatory, contending that Sanchez was the sexual aggressor, and that thus the

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274. *See id.*

275. *Id.*

276. 166 F.R.D. 500 (D.N.M. 1996).

277. *See id.* at 500.

278. *See id.* Sanchez also asserted a claim for intentional interference with an employment contract. *See id.*

279. *See id.* at 501. Specifically, the interrogatory asked:

> 1. In the last ten (10) years, have you ever:
>
> a. made any personal, romantic, or sexual advances towards any co-worker, or any person with whom you worked at the time, or any person who also worked at your same place of employment; or
>
> b. been the subject of personal, romantic, or sexual advances by a co-worker, or by any person with whom you worked at the time, or by any person who also worked at your same place of employment; or
>
> c. had a close personal, romantic, or sexual relationship, however brief, with any co-worker, or any person with whom you worked at the time, or any person who also worked at your same place of employment?
>
> If so, for each item above, please identify the person(s) involved, the relevant date(s), the relevant place(s) of employment, the number and/or frequency of any such advance(s), whether such advance(s) were welcome or unwelcome, whether you or the other person(s) involved ever complained in any way regarding any such advance(s), and the length and duration of any such relationship(s).

Id.

280. *See id.*

information showed that Sanchez could not prove that Zabihi's behavior was unwelcome.[281]

The court stated that although the motion to compel was governed by Rule 26, it was obliged to "remain[ ] mindful of the policy underlying Rule 412."[282] Thus, the court found that Rule 412 was applicable, and had "significance in deciding [the defendants'] discovery motion."[283] The court held that under both Rule 26 and Rule 412, "[t]he proper query . . . is whether the information sought . . . is reasonably calculated to lead to the discovery of admissible evidence in light of the parties' claims and defenses, while remaining mindful of the policy underlying Rule 412[.]"[284] The court concluded that the interrogatory should be "narrowly tailored" to permit the defendants some discovery while protecting Sanchez's privacy interests.[285] To attain this result, the court granted the defendants' motion to compel some of the information, while issuing a protective order *sua sponte* precluding the rest.[286] The court limited the scope of the inquiry to the previous three years, determined that Sanchez did not need to answer any of the questions in relation to the co-worker who had become her husband, and ordered that her answers be given under oath and given only to the defendants' attorney.[287]

Like the court in *Sanchez*, the United States District Court for the District of Maryland in *Herchenroeder v. Johns Hopkins University*

281. *See id.* at 501. The defendants also argued that the evidence demonstrated that Sanchez had a "habit" of sexually aggressing under Rule 406. *See id.* at 502. The court cited *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983) in denying the motion to compel premised on Rule 406. *Sanchez*, 166 F.R.D. at 502 (discussing the Rule 406 argument made and rejected in *Priest*, 98 F.R.D. at 758-59). *See also* Mitchell v. Hutchings, 116 F.R.D. 481, 485 (D. Utah 1987) (rejecting the argument that evidence of plaintiff's sexual behavior was admissible as "habit" evidence).

282. *Sanchez*, 166 F.R.D. at 501 (citing Monnin, *supra* note 9, at 1197-98).

283. *Id.* at 502 (quoting FED. R. EVID. 412 advisory committee's note).

284. *Id.*

285. *Id.*

286. *See id.* at 500.

287. *See id.* at 502. Finding that it was "hindered in making a ruling" because it had not seen the information that the defendants sought in their interrogatory, the court "employ[ed] several of the procedural safeguards used in a Rule 412(c) proceeding in the context of the . . . Rule 26 discovery motion." *Id.* Thus, the court prohibited the defendants' attorney from sharing the information with anyone, including his clients, without a motion, a hearing, and a court order. *See id.* at 503. In addition to these limitations, the court also struck the word "personal" from subsections (a), (b) and (c) of the interrogatory as vague. *See id. See also supra* note 279 (text of defendants' interrogatory).

Applied Physics Laboratory[288] permitted discovery of sexual evidence only after granting a protective order that was not sought. P.J. Herchenroeder sued The Johns Hopkins University Applied Physics Laboratory ("Laboratory"), her employer, and Phil Sodergren, her supervisor, for sexual harassment and for defamation.[289] Among other things, she alleged that Sodergren often accused her of having sexual relations with Warren Brood, a business associate.[290] During her deposition, the Laboratory's counsel asked Herchenroeder if she had ever engaged in sexual activity with Brood.[291] After she answered no, the Laboratory's attorney asked her if she and Brood had ever discussed having sexual relations.[292] Herchenroeder refused to answer this question. The Laboratory sought to compel her answer, arguing that the information was relevant to whether Sodergren believed Herchenroeder welcomed his conduct, to whether Sodergren's statements were true or made maliciously, recklessly, or negligently, and to the credibility of Brood, who was an important witness for Herchenroeder.[293] Herchenroeder asserted that the information was inadmissible under Rule 412, and thus not discoverable.[294]

After quoting the language from the Advisory Committee's note to Rule 412 that instructs judges to issue protective orders presumptively under Rule 26(c), the court stated that, "in determining whether the requested discovery . . . is appropriate, I must look to both [Rule] 26 and [Rule] 412."[295] The court agreed that under all three of the Laboratory's arguments the discovery was relevant.[296] However, although Herchenroeder did not seek a protective order,[297] the court determined that given the "highly sensitive" nature of the discovery, "the requested discovery should [not] be permitted without an appropriate protective order/confidentiality agreement as contemplated by [Rule] 412."[298] Further, the court, pursuant to Rule

288. 171 F.R.D. 179 (D. Md. 1997).

289. *See id.* at 180.

290. *See id.*

291. *See id.*

292. *See id.*

293. *See id.*

294. *See id.*

295. *Id.* at 182 (citing Sanchez v. Zabihi, 166 F.R.D. 500 (D.N.M 1996); Barta v. City of Honolulu, 169 F.R.D. 132, 135 (D. Haw. 1996)).

296. *See id.*

297. While Herchenroeder did not seek a protective order, the court noted that the Laboratory indicated its willingness to enter into a protective order. *See id.*

298. *Id.*

26(c)(3),[299] ordered that the Laboratory ask its questions through interrogatories.[300] While the court left the terms of the "protective order/confidentiality agreement" to be worked out by the parties,[301] it indicated that it found the protective orders in *Sanchez* and *Barta* to be "instructive."[302]

In contrast to *Sanchez* and *Herchenroeder*, the court in *Ramirez v. Nabil's, Inc.*[303] did not enter an unsought protective order in a discovery dispute to safeguard the policy of Rule 412. In October of 1995, Nabil's, Inc., a company that was being sued by three former employees for sexual harassment, sought to compel one plaintiff to authorize the release of her medical and psychiatric records, and to compel another plaintiff to disclose the names and addresses of her health care providers for the previous five years.[304] Nabil's argued that the discovery could lead to evidence that would contradict the plaintiffs' claims that they suffered emotional damages, or that would indicate that factors other than the alleged harassment caused their emotional distress.[305] Further, Nabil's contended that the information could lead to the discovery of admissible sexual propensity evidence of one of the plaintiffs.[306] In response, the plaintiffs asserted that the information Nabil's sought concerned adolescent problems, and that Rule 412 was intended to prevent intrusive questioning that probes into one's adolescent past.[307]

After quoting the language from the Advisory Committee's note to Rule 412 that states that, "[c]ourts should presumptively issue protective orders barring discovery unless the party seeking discovery"[308] proves that the evidence is relevant and discoverable, the court stated that the plaintiffs "proffered no adequate reason for barring the discovery."[309] The court concluded that the information Nabil's sought, "appear[ed] reasonably calcu-

299. Rule 26(c)(3) permits a judge to order that discovery be pursued by a method different than the method sought. FED. R. CIV. P. 26(c)(3).

300. *See Herchenroeder*, 171 F.R.D. at 182. The court stated that if the Laboratory believed after Herchenroeder answered the interrogatories that further questioning was appropriate, the court would determine whether she should be further deposed. *See id.*

301. *Id.* at 182-83. The court noted that if the parties were unable to come to an agreement on the order's terms, the court would establish the terms. *See id* at 183.

302. *Id.* at 183 n.14.

303. Civ.A. No. 94-2396-GTV, 1995 WL 609415 (D. Kan. Oct. 5, 1995).

304. *See id.* at *1.

305. *See id.* at *2.

306. *See id.*

307. *See id.* at *3.

308. FED. R. EVID. 412 advisory committee's note.

309. *Ramirez*, 1995 WL 609415, at *3.

lated to lead to the discovery of admissible evidence."[310] Thus, the court placed the burden on the plaintiffs to establish that the information was not discoverable. This approach contrasts with the approach taken by the *Sanchez*[311] and *Herchenroeder*[312] courts, which granted protective orders the opponents of the discovery did not seek in order to safeguard the policy of Rule 412.[313]

In *Alberts v. Wickes Lumber Co.*,[314] the United States District Court for the Northern District of Illinois, like the court in *Ramirez*, did not enter an unsought protective order to safeguard the plaintiff. However, like the courts in *Burger* and *Barta*, the court applied the balancing test of Rule 412(b)(2) in resolving a discovery dispute. Susan Alberts, an employee of Wickes Lumber Co., sued Wickes and Jim Crew, an employee of Wickes, for sexual harassment alleging that in 1992 Crew subjected Alberts to numerous sexual advances.[315] One such incident occurred at a conference in June of 1992, in which Crew allegedly entered Alberts' hotel room and sexually assaulted her.[316] During the incident, Alberts allegedly told Crew that she had no birth control in an attempt to persuade him to stop.[317] Alberts contended that because of the incident, she experienced continuing emotional distress, and had difficulty engaging in sexual intimacy.[318] Later that summer Crew allegedly found condoms in the glove compartment of Alberts' car.[319]

During her deposition, Crew's attorney asked Alberts several questions about her use of contraceptives in 1992,[320] about whether she kept condoms in her car,[321] about whether she dis-

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310. *Id.*

311. Sanchez v. Zabihi, 166 F.R.D. 500 (D.N.M. 1996).

312. Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab., 171 F.R.D. 179 (D. Md. 1997).

313. *See Herchenroeder*, 171 F.R.D. at 182; *Sanchez*, 166 F.R.D. at 500.

314. No. 93 C 4397, 1995 WL 117886 (N.D. Ill. Mar. 15, 1995).

315. A thorough recitation of the facts of *Alberts* can be found in *Alberts v. Wickes Lumber Co.*, No. 93 C 4397, 1996 U.S. Dist. LEXIS 1211 (N.D. Ill. Feb. 5, 1996) (considering defendants' motion for summary judgment).

316. *See id.* at *15-17. Crew allegedly entered Alberts' hotel room, pushed her onto her bed, kissed her, fondled her genitals, exposed his penis and instructed her to perform fellatio. *See id.*

317. *See Alberts*, 1995 WL 117886, at *2 n.1.

318. *See id.* at *4-5.

319. *See id.* at *3.

320. Crew's attorney asked Alberts the following questions: "[I]n the year 1992, was it your testimony that you never used any kind of birth control?" *Id* at *1. "[I]n the month of June of 92 what form of birth control [were you] using?" *Id.* at *3.

321. *See id.* at *3. Specifically, Crew's attorney asked Alberts, "At any time did you have any contraceptives in that automobile in the garage?" *Id.* Further,

cussed with her expert witness two alleged affairs she had had with other Wickes' employees,[322] and about the problems she had allegedly experienced attaining sexual intimacy after the assault.[323] Alberts refused to answer the questions, asserting that under Rule 412 the evidence that Crew sought was inadmissible, and thus the questions were not calculated to lead to admissible evidence under Rule 26(b)(1).[324] Crew sought to compel Alberts to answer the questions.[325]

The court announced a two-step analysis to determine if the information Crew sought was calculated to lead to admissible evidence under Rule 26(b). First, the court stated it would evaluate the relevance of the information.[326] Second, the court stated it would weigh the probative value of the information according to Rule 412(b)(2)[327] to determine if it substantially outweighed the danger of harm or of unfair prejudice to Alberts.[328] Thus, although the court acknowledged the tremendous difficulty in determining whether the relevance of the requested discovery "substantially outweighed" the danger of harm to Alberts,[329] the court analyzed each disputed discovery request under the test of Rule 412(b)(2).[330]

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he asked, "[I]f Crew says he saw contraceptives in there, he is being mistaken, is that correct? In the month of August 1992, were you using any form of birth control?" *Id.*

322. *See id.* at *4. Specifically, Alberts was asked if she had told her psychologist that she had had an affair with a manager named Dick Bradford, and if she had had an affair with another employee named Wade Baldwin. *See id.*

323. *See id.* at *5.

324. *See id.* at *1.

325. *See id.*

326. *See id.* at *2.

327. *See* FED. R. EVID. 412(b)(2); *see also supra* notes 64-66 and accompanying text (discussing the Rule 412(b)(2) balancing test).

328. *See Alberts*, 1995 WL 117886, at *2.

329. *Id.* at *1.

330. Regarding the questions concerning Alberts' use of contraceptives in 1992, *see supra* note 320, the court found that if she in fact used contraceptives in 1992, then she could have been lying about not having contraceptives on night of the alleged assault. *See Alberts*, 1995 WL 117886, at *2. However, if Alberts had in fact made the statement to Crew to dissuade his sexual attack, then the fact that she was lying strengthened her claim. *See id.* If she was not lying, and really had no contraceptives on the night of Crew's attack, then the court stated that Crew could argue that the only reason she did not have sex with him was because she had no birth control. *See id.* The court noted, however, that Alberts' testimony established on its face that she had no birth control on the night of the attack. *See id.* Thus, the court concluded that Crew could make this argument based on the record. *See id.* Consequently, the court concluded that permitting Crew to ask the questions concerning Alberts' use of birth control to prove that she actually had birth control would be "at

The court did not, however, explicitly mention the policy rationale of Rule 412.[331]

Finally, in *Holt v. Welch Allyn, Inc.*,[332] the United States District Court for the Northern District of New York, like the court in *Ramirez*, quoted the Advisory Committee's note to Rule 412, but construed the language narrowly in deciding a discovery dispute. In August of 1995, Michele Holt sued Welch Allyn, her former employer, for sexual harassment.[333] Welch Allyn issued a

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most, minimally probative of any issue in the case." *Id.* The court determined that this minimal probative value would "clearly be outweighed by the substantial harm and prejudice to . . . Alberts." *Id.*

Regarding the questions about whether Alberts had kept condoms in car, *see supra* note 321, the court found that if she had in fact kept condoms in her car, a jury could infer that she could not have been as traumatized as she claimed from the assault if just a few weeks after the assault she permitted Crew into her car, and permitted him to open a glove compartment that contained condoms. *See Alberts*, 1995 WL 117886, at *3. The court found that the probative value of that information would substantially outweigh the harm or prejudice it might cause Alberts. *See id.* at *4. The court noted that during the discovery phase, the determination as to whether this information would substantially outweigh the danger of harm or prejudice to Alberts was "a very difficult determination to make." *Id.* The court stated, however, that because Alberts alleged emotional distress damages that "last[ed] to the present time," the balancing test of Rule 412(b)(2) favored Crew. *Id.*

Regarding the questions concerning whether Alberts had disclosed to her expert witness that she had had affairs with other Wickes' employees, *see supra* note 322, the court found that during the deposition of Alberts' expert witness, Crew never asked him if knowledge of these affairs would affect his opinion. *See Alberts*, 1995 WL 117886, at * 4. Thus, the court concluded that it could not determine if this information had "any relevance to the case whatsoever, much less sufficient probative value as to substantially outweigh the danger of prejudice and harm to [Alberts]." *Id.*

Finally, regarding the questions about Alberts' inability to engage in sexual intimacy, the court found that Rule 412 was inapplicable, because those questions did not concern her sexual behavior, but her lack of sexual behavior. *See id.* at *5. Further, the court found that even if Rule 412 applied to those questions, because Alberts "injected into the very heart of her damages claim her inability to engage in intimate sexual relationships," the very high probative value of the information would substantially outweigh the danger of harm or of prejudice to Alberts. *Id.* Indeed, to prohibit Crew from testing Alberts' damages claim "would be to turn the rape 'shield' law into a sword solely for [Alberts'] benefit." *Id.* The danger of harm or prejudice to Alberts, the court determined, had to be weighed in light of the fact that she herself had "injected this issue in a very direct and substantial way into the case." *Id.*

331. *See id* at *2-5; *see also* Bottomly v. Leucadia Nat'l, 163 F.R.D. 617, 619 (D. Utah 1995) (holding that in determining the scope of discovery of psychological records under Rule 26(b)(1), the rules of evidence, such as Rule 412, may impose limitations on discovery).

332. No. 95-CV-1135 (RSP/GJD), 1997 WL 210420 (N.D.N.Y. Apr. 15, 1997).

333. *See id.* at *1.

deposition subpoena to obtain from a non-party photographs that allegedly showed Holt at a party that was attended by a male exotic dancer, and that were allegedly shown to Welch Allyn employees at the workplace with Holt's knowledge.[334] Holt sought to quash the subpoena, arguing that the photographs were inadmissible under Rule 412 and "presumptively not discoverable."[335] The magistrate judge denied the motion to quash the subpoena, finding the photographs presented evidence relevant to whether or not the alleged harassment was welcome, and Holt appealed.[336] The court affirmed the Magistrate's denial, stating that Holt had confused what was admissible under Rule 412 with what was discoverable under Rule 26.[337] Although the court quoted the Advisory Committee's note to Rule 412, it concluded that as the photographs were allegedly distributed to Welch Allyn employees, and as Holt allegedly saw the photographs and did not appear to be offended, the magistrate judge correctly held that they were relevant.[338]

In sum, since the 1994 amendments to Rule 412 have been enacted, some courts have applied Rule 412 to discovery disputes that involve sexual behavior or sexual predisposition evidence. Some courts in issuing protective orders have required the party seeking to discover sexual behavior or predisposition evidence to show that the evidence would be relevant under the facts and theories of the case by proving that the evidence meets the test of Rule 412(b)(2).[339] Other courts have explicitly narrowed the scope of discovery in furtherance of the policy rationale behind Rule 412 by issuing protective orders even when protective orders were not sought.[340] Although some courts have taken a more traditional approach to these discovery disputes,[341] others

334. *See id.* at *7.

335. *Id.*

336. *See id.*

337. *See id.*

338. *See id.* at *8. According to the court, the standard for reversing a magistrate judge's order concerning a motion to quash a deposition subpoena was whether the order was "'clearly erroneous or contrary to law.'" *Id.* at *7 (quoting Aries Ventures Ltd. v. Axa Fin. S.A., 696 F. Supp. 965, 966 (S.D.N.Y. 1988)).

339. *See, e.g.*, Barta v. City of Honolulu, 169 F.R.D. 132, 135 (D. Haw. 1996); Burger v. Litton Indus., Inc., No. 91 CIV. 0918 (WK) (AJP), 1995 WL 476712, at *2 (S.D.N.Y. Aug. 10, 1995).

340. *See, e.g.*, Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab., 171 F.R.D. 179, 182 (D. Md. 1997); Sanchez v. Zabihi, 166 F.R.D. 500, 502 (D.N.M. 1996).

341. *See, e.g.*, Holt v. Welch Allyn, Inc., No. 95-CV-1135 (RSP/GJD), 1995 WL 210420 (N.D.N.Y. Apr. 15, 1997); Ramirez v. Nabil's, Inc., Civ.A. No. 94-2396-GTV, 1995 WL 609415 (D. Kan. Oct. 5, 1995).

have recognized that by virtue of the requirement that information sought in discovery appear "reasonably calculated to lead to the discovery of admissible evidence,"[342] Rule 412 must inform whether the discovery is in fact calculated to lead to admissible evidence.[343] Although Rule 26 still governs discovery disputes, as advocated by the Advisory Committee to Rule 412,[344] the policy rationale of Rule 412 has had a significant impact on Rule 26 determinations involving the discovery of prior sexual behavior or predisposition evidence.

IV. THE INADEQUACY OF RULE 412 APPLIED TO DISCOVERY DISPUTES AND A PROPOSAL FOR REFORM

As this Note has demonstrated, both prior to and subsequent to the 1994 amendments to Rule 412, courts have often restricted discovery inquiries into sexual behavior or sexual predisposition evidence. Since the 1994 amendments to Rule 412 have been enacted, some courts have made it significantly more difficult to discover this information, by requiring parties seeking discovery to show that discovery would pass the test of Rule 412(b)(2). Given the harassing nature of this sort of discovery and the privacy interests implicated, it is unquestionable that reform is desirable. However, the Advisory Committee's recommendations and the inconsistent judicial response to those recommendations inadequately effectuate such reform.

What is needed in this area is a consistent treatment of the problem. Judicial construction of language buried in a note to an evidentiary rule does not lend itself to such consistency. Indeed, while the courts in *Burger*[345] and *Barta*[346] read the Advisory Committee's recommendations to require that such discovery pass the test of Rule 412(b)(2), other courts, like the courts in *Ramirez*[347] and *Holt*,[348] quote these recommendations, but give them no substantive effect. If the privacy interests implicated are sufficiently important, then the scope of protection granted to

342. FED. R. CIV. P. 26(b)(1).

343. *See, e.g.*, Alberts v. Wickes Lumber Co., No. 93 C 4397, 1995 WL 117886, *1-2 (N.D. Ill. Mar. 15, 1995); Bottomly v. Leucadia Nat'l, 163 F.R.D. 617, 619 (D. Utah 1995).

344. *See supra* notes 68-73 and accompanying text.

345. Burger v. Litton Indus., Inc., No. 91 CIV. 0918 (WK) (AJP), 1995 WL 476712 (S.D.N.Y. Aug. 10, 1995).

346. Barta v. City of Honolulu, 169 F.R.D. 132 (D. Haw. 1996).

347. Ramirez v. Nabil's, Inc., Civ.A. No. 94-2396-GTV, 1995 WL 609415 (D. Kan. Oct. 5, 1995).

348. Holt v. Welch Allyn, Inc., No. 95-CV-1135 (RSP/GJD), 1997 WL 210420 (N.D.N.Y. Apr. 15, 1997).

one's privacy interests in discovery should not depend upon the forum.

More effective protection could be attained by enacting a new discovery rule applicable in all courts than through judicial construction of commentary to an evidentiary rule. Indeed, it is unclear how much authority an Advisory Committee's note will have over a court. This is particularly the case when the Advisory Committee's note interprets a Federal Rule of Evidence, while purporting to instruct how a Federal Rule of Civil Procedure ought to be interpreted. Amending the Federal Rules of Civil Procedure, by contrast, will achieve the desired consistency, as it will be applicable to all federal district courts. Moreover, it will eliminate the anomaly of having an Advisory Committee note interpreting a rule of admissibility instruct discovery.

One state that has enacted a discovery rule to deal specifically with the discovery of sexual evidence is California. California's rule states in part:

> 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 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.[349]

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349. CAL. CIV. PROC. CODE § 2017(d) (West Supp. 1997). Jennifer Smith has used this rule as the basis for a proposed amendment to the Federal Rules of Civil Procedure. Her proposed rule states:

> 1. *Requests for Discovery* of complainants' sexual conduct in sexual harassment, sexual assault and sexual battery cases.
>
> (a) In any civil action, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of the plaintiff's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant and is admitted in accordance with subdivision (b) of this section.
>
> (b) A party seeking discovery concerning the plaintiff's sexual conduct under subdivision (a) of this section is required to establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject

The weakness of this rule is that it applies only to plaintiffs. By its terms, it applies neither to non-party witnesses, nor to defendants.[350] Thus, the California rule, like Rule 412 applied to discovery, is underinclusive, ignoring the privacy interests of many other individuals. This result is defensible if the only policy concern underlying the rule is to encourage victims of sexual misconduct to bring suits vindicating their rights. However, if protection of privacy is also a goal of the rule, then to be defensible the rule requires one to make a judgment that the privacy of plaintiffs is more worthy of protection than the privacy of non-plaintiffs. One ought not to assume that merely because an individual alleges sexual harassment, her privacy interests are worthier of protection than the privacy interests of the individual she alleges to have perpetrated the harassment.

Perhaps a better discovery rule than the California rule would be one that is applicable to any discovery of sexual behavior or predisposition evidence, regardless of who is answering the questions. While under Rule 26(c) any individual from whom discovery is sought can move to limit the discovery by mandating that the discovery remain confidential,[351] not every individual will seek such a protective order. Evidence of one's sexual behavior or predisposition, however, is of such an intimate nature that one should not have to seek a court order to keep such information confidential. A better rule, therefore, would be one that would presumptively insure the confidentiality of any discovery of sexual behavior or predisposition evidence. Rather than

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> matter of the action and reasonably calculated to lead to the discovery of admissible evidence. That showing shall be made by noticed motion and shall not be made or considered by the court at an ex parte hearing.

Smith, *supra* note 88, at 108 app. The principal difference between Smith's proposed rule and the California rule is that Smith's proposed rule begins with a presumption of non-discoverability, which she derives from California's discovery rule for sexual conduct in administrative proceedings. *See id.* at 106 n.199 and accompanying text (quoting CAL. GOV'T CODE § 11507.6 (West 1995)). The author's criticism of the California rule which follows also applies to Smith's proposed rule.

350. Recall, however, that California courts liberally construe their constitutional right of privacy to protect against intrusive discovery of sexual evidence. *See supra* note 227 (discussing Vinson v. Superior Court, 740 P.2d 404 (Cal. 1987)); Boler v. Solano County Superior Court, 247 Cal. Rptr 185, 187 (Cal. Ct. App. 1987) (finding that a discovery order compelling an individual sexual harassment defendant to answer questions concerning his prior "sexual relations, intimacies, flirtations, and socializing . . . with any employees" violated his right of privacy).

351. FED. R. CIV. P. 26(c)(2) (a court may limit the discovery "on specified terms and conditions.").

requiring the individual from whom discovery is sought to show good cause why the discovery should be confidential, the party seeking discovery should have to show good cause why the information should not remain confidential.

While a discovery rule that grants sexual behavior or predisposition evidence presumptive confidentiality would protect the privacy interests of any individual from whom such discovery is sought, it would also further the policy of encouraging victims to bring suits. Although potential plaintiffs would still face intrusive questioning regarding their sexual histories, they would at least have peace of mind in knowing that their sexual histories would not become known to readers of the local newspaper. Other measures under such a rule could also be implemented that would advance this goal. For instance, the rule could mandate that any party seeking discovery of sexual behavior or predisposition evidence provide the individual who is to answer such questions with written notice of the intent to ask the questions and a general description of the questions to be asked. The rule could further require that the party seeking the discovery articulate in the written notice a theory of relevance that would meet the standard of Rule 26(b)(1). This provision would serve several purposes. First, it would insure that the target of the intrusive questions would not be "caught off-guard." Second, by forcing the party seeking the discovery to articulate a theory of relevance up front, it would perhaps prevent the party from pursuing inquiries supported by more tenuous theories of relevance. Third, it would permit the individual to seek a protective order prior to the discovery if the articulated theory of relevance is weak or if the proposed inquiry is overly broad. Not only would this provision further the policy of encouraging victims of sexual misconduct to bring suits, it would eliminate surprise, and encourage the parties prior to discovery to agree upon the scope of such discovery.

The Advisory Committee for the Federal Rules of Civil Procedure could propose the following rule that would achieve these results:

> *Confidentiality of sexual evidence; required notice.* Any party who seeks in discovery information that would meet the definition of sexual behavior or predisposition evidence under Rule 412 of the Federal Rules of Evidence shall give the individual from whom the discovery is sought at least seven days written notice describing the general nature of the questions, and articulating the relevance of the discovery under Rule 26(b)(1). Any information given in discovery under this rule shall not be disclosed by the party

> seeking the discovery to anyone unless that party by motion to the court in which the action is pending, or in the case of a deposition, to the court in the district where the deposition was taken, shows that the party's need to disclose the information outweighs the harm that such disclosure would cause to the privacy interests of the individual from whom the discovery was obtained.

Under this proposed rule, an individual from whom discovery is sought could still seek a protective order under Rule 26(c) to limit the discovery if it is over broad. Under Rule 26(c), of course, she would need to establish good cause by showing that her opponent's need for the information does not outweigh its potential to annoy, to embarrass or to oppress her.[352]

While courts should continue to develop the substantive meaning of the terms "good cause" and "relevance," they should not follow the Advisory Committee's note to Rule 412 and require the proponent of discovery to show that the discovery is relevant under all the facts and theories of the case. In particular, courts should not follow the approach of *Burger*[353] and *Barta*[354] by placing the burden on the party seeking discovery to show that the discovery would meet the requirements of Rule 412(b)(2). If the reason that discoverability under Rule 26(b)(1) is broader than admissibility is to permit parties to determine facts that are essential to litigate their cases and to formulate legal theories,[355] then requiring a party to show at this stage of the litigation that the information "would be relevant under the facts and theories of the particular case"[356] is contrary to the policy underlying the scope of Rule 26(b)(1). In other words, it is precisely because a party lacks crucial facts that the party at the discovery phase of a case often cannot show that the discovery is relevant under all the facts and theories of the case. Thus, the party needs leeway to seek information that would not be admissible at trial.

This is especially so if a court requires a party seeking discovery to meet the standard of Rule 412(b)(2). If it is difficult for a party in discovery who does not know all the facts of the case to show that information is relevant under the facts and theories of the case, it is by implication even more difficult to show that the

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352. *See supra* notes 34-36 and accompanying text.

353. Burger v. Litton Indus., Inc., No. 91 CIV. 0918 (WK) (AJP), 1995 WL 476712 (S.D.N.Y. Aug. 10, 1995).

354. Barta v. City of Honolulu, 169 F.R.D. 132 (D. Haw. 1996).

355. *See supra* note 30 and accompanying text.

356. FED. R. EVID. 412 advisory committee's note.

probative value of the information "substantially outweighs" the harm to the person giving the information. Indeed, the *Alberts*[357] court in applying Rule 412(b)(2) to discovery expressed frustration in that:

> However difficult this balancing of interests [under Rule 412(b)(2)] 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 and before a majority of the evidence surrounding the alleged incident is in the possession of the parties, much less before the court.[358]

By contrast, it seems significantly easier for a party to show under Rule 26(c) that the tendency of information to annoy, to embarrass, to oppress, or to cause her undue burden or expense is greater than her opponent's need for the information. By applying this standard to Rule 26(c) motions involving sexual behavior or predisposition evidence, as courts applied before the 1994 amendments to Rule 412, courts will shield the individuals seeking the protective orders from discovery requests that are merely intended to harass. However, parties will also be permitted under this standard the flexibility to discover information that, although embarrassing, is truly relevant. Moreover, if the discovery is subject to the presumptive confidentiality and notice provisions of the proposed rule, the embarrassing nature of the discovery will be further mitigated.

The Advisory Committee for the Federal Rules of Civil Procedure, in assessing the proposed rule, should consider the problems inherent in requiring a proponent of discovery to show that the discovery would be relevant under all facts and theories of the case. Particularly, the Advisory Committee should consider the response of some courts to this language in the note to Rule 412, and the problems inherent in requiring a proponent of discovery to show that the discovery would meet the test of Rule 412(b)(2). After considering these problems, in adopting the proposed rule, the Advisory Committee should draft a note addressing these problems and instructing courts not to analyze discovery requests under Rule 412(b)(2), or to require proponents of discovery to show that their requests are relevant under all the facts and theories of the cases.

The proposed rule, in tandem with the explanatory note, would achieve the consistency that is lacking under the current

357. Alberts v. Wickes Lumber Co., No. 93 C 4397, 1995 WL 117886 (N.D. Ill. Mar. 15, 1995).

358. *Id.* at *1.

scheme of applying Rule 412 to discovery. The proposed rule would also further sexual privacy interests, correcting the underinclusiveness of the current scheme, and encouraging victims of sexual misconduct to vindicate their injuries in court. Furthermore, the proposed scheme would preserve the flexibility of parties to discover sexual evidence that is truly relevant, resolving the overinclusive problem of the current scheme.

V. CONCLUSION

Congress, in enacting the 1994 amendments to Rule 412, made it significantly more difficult for a party to a trial for sexual harassment to enter evidence of another's prior sexual behavior or predisposition.[359] In extending Rule 412 protection to civil cases, Congress determined that in the civil context, individuals who have been sexually victimized ought to receive the protections that victims of sexual misconduct receive in the criminal context.[360] Congress thus extended two important policy considerations to the civil context: victims of sexual misconduct ought to be protected from judicial invasions of their privacy, and victims of sexual misconduct ought to be encouraged to use the judicial process to attain justice from those who have sexually victimized them.[361]

Within the context of discovery, to assure that these important policies are not undermined, the Advisory Committee to Rule 412 has advocated that courts "should enter appropriate orders pursuant to [Rule 26(c)]."[362] Specifically, the Advisory Committee has instructed that courts should "presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence . . . would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery."[363] Courts have consciously restricted the discovery of sexual behavior or predisposition evidence in light of this language.[364] Some courts have even read this language to require that the parties seeking such discovery show that the value of the discovery substantially out-

359. *See supra* Part II.B (discussing changes made by the 1994 version of Rule 412).

360. *See* FED. R. EVID. 412 advisory committee's note ("The need to protect alleged victims . . . do[es] not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief.").

361. *See supra* notes 45-47, 52 and accompanying text.

362. FED. R. EVID. 412 advisory committee's note.

363. *Id.*

364. *See supra* Part III.C (discussing cases construing Rule 412 in the context of discovery).

weighs the harm that such discovery might cause to the privacy interests of the individuals from whom the discovery is sought.[365]

While the policies that underlie Rule 412 are important, there are other important policy considerations that are unique to discovery. The scope of discovery, under Rule 26(b)(1), is broad so that parties may have sufficient information to litigate their cases, to eliminate surprise, and to promote settlement.[366] Under Rule 26(c), however, courts can limit the scope of discovery when it is necessary to protect the privacy interests of parties from being abused. By advocating that courts presumptively issue protective orders under Rule 26(c) that preclude discovery unless a party seeking discovery shows that the discovery is relevant under all facts and theories of the case, the Advisory Committee has raised the standard of relevance in discovery. This shift inhibits the policy that favors broad discovery.

While there is a need to prevent sexual harassment litigants from harassing their opponents through the discovery process, applying Rule 412 to discovery is inadequate for two reasons. First, it is underinclusive in that it does not protect the privacy of individuals who are not alleged victims of sexual misconduct. Second, it is overinclusive by substantially raising the standard of discoverability, thereby precluding discovery that is potentially crucial to a case. The discovery cases involving sexual behavior or predisposition evidence that arose prior to the enactment of the 1994 amendments to Rule 412, however, illustrate that courts recognized and protected the privacy interests of parties from abuse through Rule 26(c).[367] By amending the Federal Rules of Civil Procedure to mandate that sexual evidence be granted presumptive confidentiality and by applying the traditional Rule 26(c) standard to cases in which discovery of sexual evidence is used to harass, courts will preserve the sexual privacy of all individuals from whom this sort of discovery is sought, while providing parties maximum flexibility to discover essential information. In short, desired reform that does not suffer from the underinclusive and overinclusive nature of applying Rule 412 to discovery would be achieved and would be applied consistently, and the policy interests underlying both Rule 412 and Rule 26 would be preserved.

365. *See supra* Part III.C (discussing cases construing Rule 412 in the context of discovery).

366. *See supra* note 30 and accompanying text.

367. *See supra* Part III.B (discussing Rule 26 determinations involving sexual behavior or predisposition prior to the enactment of Rule 412).