

Limiting Discovery of Consensual Sexual or Romantic Relationships in Sexual Harassment Lawsuits

Paul E. Mirengoff

Heather French

Washington, D.C.

The President Clinton/Monica Lewinsky scandal revealed a chasm between those prosecuting Clinton and those who felt that consensual sexual relationships were nobody's business. In the end, the court of public opinion "ruled" that such private questions should not have been asked in the first place. Witnesses faced with questions about their consensual sexual relationships should seek similar rulings.

On January 17, 1998, William Jefferson Clinton, the president of the United States, was asked under oath whether he had engaged in "sexual relations" with Monica Lewinsky. His response set off a chain reaction that culminated in impeachment. Ultimately, the U.S. Senate acquitted him. We suggest that one of the reasons Clinton avoided removal from office was that the American people were offended enough by the question to excuse to some extent his responses—or, at least, the senators who decided his fate believed as much.

On August 17, 1998, following his testimony before the grand jury, Clinton professed to have testified as he did out of the motives one would expect: to protect himself and his family from the inevitable embarrassment surrounding his inappropriate actions and to protect his employment status.¹ Clinton's fears reflect many of the same ones witnesses face every day in garden-variety

sexual harassment lawsuits,² when their personal lives are drawn into the fray of litigation.

Sexual harassment litigation has exploded in recent years.³ So too have the challenges to courts to find a reasonable balance between the legitimate discovery needs of plaintiffs and the privacy rights of witnesses facing questions about their consensual sexual conduct. The issues arise in numerous contexts. Plaintiffs often seek discovery directly

Paul E. Mirengoff is a senior counsel in the labor and employment section of the law firm of Akin, Gump, Strauss, Hauer & Feld, L.L.P., in Washington, D.C. He has represented employers in employment litigation for 20 years. Previously, he was an attorney in the office of general counsel of the U.S. Equal Employment Opportunity Commission.

Heather French is an associate in Akin Gump's labor and employment section. She counsels and litigates on behalf of corporate clients on a variety of labor and employment law issues.

from the alleged harasser about his or her consensual relationships with disinterested nonparties, both inside and outside of the workplace. Similarly, plaintiffs frequently pursue discovery directly from the nonparty, regardless of whether that individual had any direct involvement with the underlying facts giving rise to the litigation. This aggressive discovery may well be intended to unearth relevant information. However, it is also entirely possible, if not likely, that plaintiffs' attorneys will use the discovery to learn embarrassing information that can be publicized or otherwise leveraged into a favorable settlement.⁴

Although nonparties can expect more sympathy for their efforts to prevent discovery into their private affairs, accused harassers can avail themselves of the same sound arguments.

Regardless of the plaintiff's motivation, a witness can find his or her sexual privacy placed in serious jeopardy. Ultimately, the testimony may well be inadmissible in the litigation because of any number of evidentiary barriers.⁵ By that point, however, the witness likely will have suffered irreparable embarrassment, as well as damage to his or her personal and professional life. Or, in extreme cases, the witness may have succumbed to the temptation to commit perjury rather than testifying truthfully about highly embarrassing personal information.

Accordingly, witnesses—both accused sexual harassers and nonparties—have a strong incentive to resist discovery into their consensual sexual relationships. And, as discussed herein, an array of tools exists to support such resistance. Although nonparties can expect more sympathy for their efforts to prevent discovery into their private affairs, accused harassers can avail themselves of the same sound arguments.

This article explores reasonable limitations on plaintiffs' inquiries into witnesses' consensual sexual and romantic relationships at the discovery phase, before the witnesses have suffered intrusion upon their sexual privacy.⁶ First, the article examines the ways in which parties attempt to use evidence of witnesses' consensual relationships. Second, it explores limits on the admissibility at trial of evidence of consensual relationships, which may provide a basis for attempting to prevent this evidence from even being discovered. Third, it examines the theories under which parties and witnesses can argue that discovery should be limit-

ed, in light of the constraints on the admissibility of such evidence. Finally, the article considers available mechanisms under Federal Rule of Civil Procedure 26(e) to exclude or limit the discovery of information about consensual sexual relationships.

THE USES OF EVIDENCE OF CONSENSUAL SEXUAL OR ROMANTIC RELATIONSHIPS

Plaintiffs bringing sexual harassment claims typically argue that consensual sexual relationships are relevant to their claims both substantively and as fodder for impeaching the alleged harasser's credibility. Their arguments for the substantive relevance of these relationships depend on which form of sexual harassment they are alleging: "quid pro quo" sexual harassment or "hostile work environment" sexual harassment.⁷ "The essence of a quid pro claim is that an individual has been forced to choose between suffering an employment detriment and submitting to sexual demands."⁸ By contrast, a hostile work environment claim alleges that an employer created or maintained a sexually hostile or abusive work environment.⁹ To prove that such an environment existed, the plaintiff need not show that he or she suffered an actual unwelcome sexual advance, or that employment benefits were gained or lost, or that his or her manager or supervisor committed the harassment. Rather, the plaintiff must show that the sex-based conduct at issue was sufficiently severe or pervasive to have altered the conditions of his or her employment and created an abusive working environment.¹⁰

Plaintiffs may argue that their quid pro quo claims are buttressed by evidence that those who participated in consensual sexual relationships with the alleged harasser received more favorable treatment than they did. Similarly, in hostile work environment cases, plaintiffs may argue that evidence of the alleged harasser's attempts to begin romantic relationships with other employees corroborates their own story. They may also claim that, although consensual, the sexual relationship between the accused and other employees created a sexually hostile environment.

Two recent U.S. Supreme Court decisions on employer liability for hostile environment sexual harassment, *Burlington Industries, Inc. v. Ellerth*¹¹ and *Faragher v. City of Boca Raton*,¹² appear to give plaintiffs additional grounds for pursuing evidence regarding consensual relationships. The *Burlington* and *Faragher* decisions impose strict liability on

employers where supervisors engage in sexual harassment that results in a tangible adverse employment action. The decisions also define an affirmative defense in cases of harassment by supervisors that does not result in any tangible adverse employment action. According to the Court:

The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.¹³

Plaintiffs will miss no opportunity to seek information about consensual relationships that could raise doubt about the perceived fairness or efficacy of a company's method of handling sexual harassment complaints.

Plaintiffs can be expected to seize upon the second element of the *Burlington/Faragher* defense—a showing that the alleged victim unreasonably failed to take advantage of the employer's complaint procedures—to assert the substantive relevance of information about consensual sexual relationships. Specifically, plaintiffs may now attempt to defend their failure to complain about alleged harassment to those managers designated for that purpose under the anti-harassment policy by claiming that these very managers were compromised due to their own consensual sexual relationships.

For example, in a recent hostile work environment case, *Cadena v. Pacesetter Corp.*, the U.S. Court of Appeals for the 10th Circuit affirmed a district court's decision to allow testimony from a nonparty witness about her consensual relationship with the defendant.¹⁴ In *Cadena*, the plaintiff sued her former employer, alleging that her manager, Bauersfeld, subjected her to severe sexual harassment. At trial, the court allowed the plaintiff to ask a second company manager, Humphrey, whether Humphrey ever had a consensual sexual relationship with Bauersfeld. On appeal, the company contended that questions regarding the consensual relationship should have been excluded. The appellate court disagreed. It found the questions relevant to the company's *Burlington/Faragher* defense that the plaintiff had failed to report the alleged harassment to management. The Court explained that "[t]he evidence indicating Cadena knew Humphrey was having a sexual relationship

with Bauersfeld was directly relevant to demonstrate that Cadena's decision not to report the harassment to Humphrey was reasonable."¹⁵

Plaintiffs are not likely to limit inquiries into consensual sexual relationships to cases involving affairs between the alleged harasser and the manager to whom the plaintiff was expected to report complaints of harassment. Rather, plaintiffs can be expected to argue that any sexual relationship involving such a manager is relevant because it might compromise that manager's ability to deal fairly with a sexual harassment complaint, thereby justifying the plaintiff's decision not to complain. Indeed, defendant companies can rest assured that, from this point forward, plaintiffs will miss no opportunity to seek information about consensual relationships that could raise doubt about the perceived fairness or efficacy of a company's method of handling sexual harassment complaints.

EVIDENTIARY CONSTRAINTS ON THE ADMISSIBILITY OF EVIDENCE OF CONSENSUAL RELATIONSHIPS

The Federal Rules of Evidence provide sexual harassment defendants with a series of potential arguments against the admissibility of evidence about the consensual relationships of their employees. To the extent that plaintiffs seek to introduce such evidence as substantively relevant under Federal Rule of Evidence 401, the Rules contain three primary obstacles: (1) Rule 401 itself, which requires that the proffered evidence be relevant; (2) Rule 404(b), which provides for the exclusion of evidence of a person's similar acts if the only purpose of the evidence is to prove conformity therewith on a particular occasion; and (3) Rule 403, which calls for the exclusion of even relevant evidence if its probative value is substantially outweighed by its tendency to prejudice or confuse the fact-finder or to waste time. To the extent that plaintiffs attempt to use evidence of consensual relationships for purely impeachment purposes, the evidence must meet the requirements contained in Rule 608(b). We address these evidentiary constraints in turn.

Relevance Under Rule 401

Every federal circuit court of appeals that has considered this issue has held that evidence of consensual sexual relationships does not demonstrate or suggest discrimination because neither consensual workplace liaisons nor any preferential treatment

arising therefrom amounts to discrimination under Title VII.¹⁶ Thus, in seeking to introduce evidence of consensual sexual relationships, plaintiffs cannot rely on the impropriety, per se, of granting preferential treatment to consensual sexual partners.

This creates difficulties in both quid pro quo and hostile work environment cases for plaintiffs seeking to establish the relevance of evidence regarding consensual sexual relationships. In the quid pro quo context, plaintiffs must show that they themselves were offered preferential treatment in exchange for sexual favors. Evidence of a truly consensual relationship that ultimately resulted in favoritism arguably has little, if any, relevance to whether the plaintiff was offered the fundamentally different type of relationship labeled “quid pro quo.” Only if there is reason to believe that the relationship in question may not have been consensual would evidence pertaining to that relationship seem relevant. For instance, historical evidence that engaging in a sexual relationship with the accused harasser was a frequent pathway to advancement might raise a basis for doubting whether a given sexual relationship was purely consensual.

In hostile work environment cases, plaintiffs will be hard-pressed to show that the existence of purely consensual (and therefore lawful) sexual relationships created an unlawful work environment.¹⁷ Again, only a proffer that the work environment was permeated with sexual favoritism might hold promise for a plaintiff seeking to explain the relevance of evidence of consensual sexual relationships in a hostile work environment case. And if plaintiffs instead argue that evidence of the alleged harasser’s advances directed at those with whom the alleged harasser ultimately had a consensual affair corroborates their own account of advances allegedly directed at them, they will face strong constraints based on other rules of evidence.

As noted earlier, *Burlington* and *Faragher*, the recent U.S. Supreme Court cases that define the affirmative defense available to employers who claim to have exercised reasonable care to prevent and correct sexual harassment in the workplace, will spawn additional arguments that evidence of consensual sexual relationships is relevant. In cases like *Cadena*, where the consensual relationship is between the plaintiff’s supervisor and the individual to whom the plaintiff was expected to report that supervisor’s misconduct, the plaintiff will have a strong argument for the relevance (and ultimate admissibility) of evidence regarding the relationship. However, more general arguments that a

manager was compromised by an affair with someone other than the accused may well be insufficient to establish relevance.

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Limitations Under Rule 404(b)

As suggested above, the fact that consensual sexual relationships do not constitute sexual harassment forces plaintiffs to craft imaginative arguments to establish the relevance of such relationships to their claims of unlawful sexual conduct. Some of these arguments may rest on the similarity between conduct associated with entering into a consensual relationship (e.g., an advance) and alleged conduct about which the plaintiff complains. But even if this type of argument persuades a court that evidence of events surrounding consensual relationships has some substantive relevance, the plaintiff still must overcome the serious obstacle contained in the so-called propensity rule.¹⁸ Specifically, Rule 404(b) provides that evidence of other acts cannot be used “to show action in conformity therewith.” Instead, it must be used for some other purpose, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.”¹⁹

Historically, plaintiffs have found it difficult to establish that evidence of consensual relationships is being used other than to show “propensity.” As explained earlier, though, plaintiffs may now have an avenue, under the *Burlington/Faragher* cases, for arguing that evidence of such relationships pertains to the merits of the employer’s affirmative defense. However, Rule 404(b) continues to pose a substantial, if not insuperable, obstacle to attempts to corroborate claims about an alleged harasser’s actions toward the plaintiff through evidence about the harasser’s actions toward those with whom he or she has had consensual sexual relationships.

The Balancing Test Under Rule 403

Even if a plaintiff can show that evidence of an alleged harasser’s consensual sexual relationships is relevant for a purpose other than establishing “propensity,” the evidence still will not be admitted unless it passes the balancing test established

by Federal Rule of Evidence 403. Rule 403 excludes relevant evidence where its probative value “is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . waste of time.” The rule applies to evidence otherwise admissible under both Rules 402 and 608. Hence, it applies to both substantive relevance and credibility.

Courts often bar the evidence altogether on the basis of prejudice or confusion.

Those seeking to exclude evidence of consensual sexual relationships have substantial arguments that such evidence is inherently prejudicial, confusing, or misleading. Consensual sexual relationships can be viewed as socially objectionable, and thus prone to prejudice the jury, because they involve individuals who choose to engage in sexual relations outside of marriage. Even worse, the relationships often involve individuals who *are married*, but not to each other. And, society’s view of the immorality of the relationships may well increase when the relationship involves co-workers or supervisors and subordinates. Consequently, regardless of any modicum of legal relevance a party can assert with respect to consensual workplace affairs, a substantial risk exists that evidence concerning the relationship will prejudice the jury against the defendant.

Moreover, the inflammatory nature of the allegations—which often go to sex, but not to sex *discrimination*—presents a substantial risk of confusing the jury. As noted earlier, the law does not prohibit consensual sexual relationships between supervisors and subordinates, or even favoritism by supervisors towards employees with whom they are having such relationships. Yet, given the sensational nature of evidence of such relationships and such favoritism, juries may lose sight of, or simply elect to ignore, this rule. Accordingly, courts often bar the evidence altogether on the basis of prejudice or confusion.²⁰

Courts also sometimes exercise their discretion under Rule 403 to exclude evidence in order to protect witnesses from undue harassment or embarrassment.²¹ Even before the enactment of the Federal Rules of Evidence, the Ninth Circuit had recognized that “it is sometimes desirable that . . . evidence, even though it may be relevant, should be excluded where the minute peg of relevancy will be entirely obscured by the dirty linen hung

upon it.”²² Few subjects fall more squarely into the category the court described than consensual sexual relationships in the workplace.

Arguments based on the tendency of such evidence to embarrass are most appealing when made by a third-party witness—that is, a witness who engaged in a consensual relationship with the individual accused of sexual harassment.²³ However, accused harassers also have a right to protection from *undue* harassment or embarrassment. Moreover, third-party witnesses can be unduly embarrassed by evidence of their consensual sexual relationships even if that evidence comes in the form of testimony from the accused harasser.

Credibility Issues Under Rule 608(b)

Evidence of consensual sexual or romantic relationships may be relevant to assessing a witness’s credibility. However, to the extent that such evidence is offered for this purpose, it must meet the significant requirements of Federal Rules of Evidence 608(b), 403, and 611(a)(3) before it may be admitted. Specifically, the evidence must (1) be probative of truthfulness or untruthfulness as required by Rule 608(b); (2) pass the balancing test imposed by Rule 403 that the probative value of the evidence not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, etc.; and (3) not be harassing or unduly embarrassing to the witness under Rule 611(a)(3). Only when all three requirements are met will plaintiffs be allowed to impeach a witness’s credibility during cross-examination under Rule 608(b).²⁴ Courts have restricted evidence of consensual relationships on the basis that it failed under one of the aspects of the Rule 608(b) test.²⁵

The Truthfulness Requirement Under Rule 608(b)

Rule 608(b) permits a party to use specific instances of conduct to impeach the credibility of a witness on cross-examination only if the instances of conduct are probative of truthfulness or untruthfulness.²⁶ Several courts have stated that engaging in adultery or other consensual sexual conduct is not probative evidence, in and of itself, of a witness’s character for untruthfulness. In *Robinson v. Canon U.S.A., Inc.*, for example, the defendant asked the plaintiff during a discovery deposition whether she had extramarital affairs, including relationships with customers or other company employees.²⁷ When the plaintiff refused

to answer, the defendant argued to the court that evidence of the plaintiff's other sexual relationships bore on the plaintiff's credibility in that her "willingness to engage in other sexual relationships outside her marriage might bear upon the veracity of her claims."²⁸ The court rejected the defendant's argument, explaining that evidence of the plaintiff's consensual affairs "has no bearing on Plaintiff's truthfulness [under Rule 608(b)] . . . unless it is Defendant's intention to simply portray Plaintiff as a 'bad person' and therefore unworthy of belief, in which case the Court rejects the effort out of hand."²⁹

In some instances, the plaintiff may attempt to present evidence of a consensual sexual relationship as part of an effort to show that a witness has been untruthful about that specific relationship. In this situation, the plaintiff has a more direct basis for asserting that evidence of a sexual relationship bears on the issue of truthfulness or untruthfulness than where the plaintiff is merely arguing that an adulterous relationship tends to show deceitfulness.

Nonetheless, there are substantial arguments against the admissibility of such evidence even in this context. First, courts often refuse to permit impeachment of a witness by reference to prior alleged conduct that has no bearing on the substantive issues in the case.³⁰ Second, it can be argued that a lack of candor regarding a consensual relationship that was highly embarrassing but not illegal is not probative of a witness's general lack of truthfulness. As one court explained in the context of a fabrication regarding substance abuse, an "isolated untruth . . . apparently motivated by extreme emotional distress, would seem to have little if any conceivable relevance to [a witness's] credibility at trial."³¹

The Balancing Test Under Rule 403

Even if a court determines that evidence concerning consensual sexual or romantic relationships is probative of truthfulness or untruthfulness as required by Rule 608(b), such testimony may nevertheless be excluded under Rule 403. As discussed above, Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Courts can use Rule 403 to exclude evidence of consensual sexual or romantic relationships in the

context of sexual harassment litigation, even if such evidence is potentially admissible for truthfulness under Rule 608(b). For instance, in *Stahl v. Sun Microsystems, Inc.*, the plaintiff sued her former employer for sex discrimination, alleging a hostile work environment.³² During cross-examination, the plaintiff was not allowed to inquire whether her district manager was having a sexual relationship with his administrative assistant, both of whom testified on behalf of the company. On appeal, the plaintiff argued that the evidence was improperly excluded because it bore on the credibility of both witnesses. However, the court concluded that even "assuming this evidence was relevant to credibility," it could be excluded because "its probative value was slight, while the potential for unfair prejudice [was] obvious."³³

Rule 611 requires courts to balance the probative value of the evidence against the potential embarrassment to be suffered by the witness, in much the same way the court would do under Rule 403.

Undue Embarrassment Under Rule 611(a)(3)

The final argument under Rule 608(b) for precluding cross-examination regarding consensual sexual relationships pertains to the unduly embarrassing situation it creates for the witness. As early as 1931, the U.S. Supreme Court recognized that courts had an affirmative duty to protect a witness "from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him."³⁴ The duty was later incorporated into Federal Rule of Evidence 611(a)(3), which provides that courts "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment."

Rule 611 requires courts to balance the probative value of the evidence against the potential embarrassment to be suffered by the witness, in much the same way the court would do under Rule 403. Given the highly personal nature of consensual sexual relationships, coupled with the arguably minimal relevance of such evidence to issues of general credibility, few plaintiffs are likely to succeed under this standard.

CONSTRAINTS ON THE DISCOVERY OF EVIDENCE OF CONSENSUAL RELATIONSHIPS

As we have just seen, plaintiffs face numerous evidentiary obstacles when attempting to introduce evidence surrounding consensual relationships. In most cases, at least one of the obstacles should prevent the admission of the evidence. However, for third-party witnesses, and indeed in many cases for the accused harasser as well, the real concern is less with whether such evidence will be admitted at trial than with whether it will be discovered during pretrial proceedings. To someone whose marriage, reputation, or career can be destroyed by the disclosure of an extramarital affair, responses to questions about such matters during pretrial discovery can cause irreparable damage even if the evidence is never formally admitted at trial.

If applied correctly, the discovery rules should provide witnesses with substantial protection from inappropriate invasions of their privacy.

The Federal Rules of Civil Procedure, not the Federal Rules of Evidence, govern the scope of discovery in sexual harassment litigation. And, unfortunately for those seeking to avoid discovery, the Federal Rules of Civil Procedure do not preclude discovery of information merely because that information will be inadmissible at trial. Rather, according to Rule 26(b), a litigant is permitted a “broad and liberal” scope of discovery regarding “any matter, not privileged, which is relevant to the subject matter involved in the pending action.”³⁵ The information sought during discovery “need not be admissible at the trial if the information . . . appears reasonably calculated to lead to the discovery of admissible evidence.”³⁶

Nonetheless, although the federal rules permit liberal discovery, they do so “for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.”³⁷ Thus, if applied correctly, the discovery rules should provide witnesses with substantial protection from inappropriate invasions of their privacy.

The federal rules confer discretion on courts to issue protective orders limiting the scope of discovery or the disclosure of sensitive information “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”³⁸ A party seeking a protective order has the initial burden of

demonstrating “good cause” to limit discovery.³⁹ Good cause can be established by showing either of two things: (1) that the matter sought to be inquired into during discovery is irrelevant to the issues involved in the pending action; or (2) that even if relevant, no need for the information has been shown, or the hardship to the person from whom the discovery is sought outweighs the need of the person seeking the discovery of the information.⁴⁰

Relevance Issues for Protective Orders

As we have discussed, the relevance of evidence of consensual sexual relationships is usually subject to serious question.⁴¹ During discovery, however, it is sometimes difficult to demonstrate, *a priori*, that evidence of consensual relationships clearly will not be relevant at trial. For until the parties have completed discovery, it is not always obvious how particular pieces of evidence might fit into the larger picture of the case. Since the burden is on the party seeking a protective order to show good cause to limit discovery, and since Rule 26 calls for the disclosure of information “reasonably calculated to lead to the discovery of admissible evidence,” courts sometimes grant considerable leeway to plaintiffs, even when the relevance of the information sought seems dubious.

On the other hand, while the evidentiary rules do not apply directly to discovery, they should inform a court’s understanding of what information “appears reasonably calculated to lead to the discovery of admissible evidence.”⁴² Indeed, courts have adopted this approach in cases involving Federal Rule of Evidence 412, which deals with evidence of an alleged victim’s past sexual behavior. In that context, courts have recognized that “[a]lthough Rule 412 addresses admissibility, it is applicable and has significance in deciding certain discovery motions.”⁴³ The same approach should apply to the evidentiary rules that restrict the uses of information about consensual relationships, even when the individuals involved cannot receive the protections of Rule 412. If the information is not likely to be relevant, courts should weigh that fact carefully in deciding whether it passes muster under the discovery rules.

Need, Hardship and Balancing Issues for Protective Orders

Even if the information sought in discovery is potentially relevant, a witness may demonstrate good cause for a protective order by showing that

the requesting party does not really need the information, or that he or she would suffer hardship from discovery that outweighs the requesting party's need for the information.⁴⁴ When a party moves for a protective order on this basis, "the court must attempt to balance the relative positions of both parties."⁴⁵

In doing so, courts will consider numerous factors.⁴⁶ Those that relate most directly to the discovery of consensual sexual relationships are (1) whether the disclosure will violate any privacy interest; (2) whether the information is being sought for a legitimate or improper purpose; and (3) whether disclosure will cause a party embarrassment.

Witnesses typically can present strong arguments that disclosure of their consensual sexual relationships will violate their privacy interests and cause substantial embarrassment. As noted earlier, this is true whether the witness is the accused harasser or his or her partner in the consensual relationship. The other key factor—that the information is not sought for a legitimate purpose—may be more problematic. However, when the plaintiff's relevance argument is particularly attenuated, courts may be willing to infer that the information is being sought for illegitimate purposes, such as the extortion of a settlement.

Courts have relied on each of the three key factors discussed above to conclude that protective orders were necessary to shield witnesses from questions about their consensual sexual relationships. In *Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2*, for instance, the court concluded that the limited relevance of questions about whether certain relationships were consensual was outweighed by the burden on the nonparty witness's privacy rights if the court compelled him to respond to the questions.⁴⁷

MECHANISMS FOR LIMITING THE DISCOVERY OF EVIDENCE OF CONSENSUAL RELATIONSHIPS

In view of the available arguments in favor of limiting discovery regarding consensual sexual relationships, witnesses and parties should not hesitate to seek protective orders restricting such discovery. By promptly seeking the assistance of the court, witnesses and parties can force plaintiffs to explain precisely why they claim to need this type of highly personal information. If the plaintiff has no persuasive explanation, the discovery can be avoided altogether. And even if the plaintiff has

such an explanation, the logic of that explanation may suggest limitations on the discovery that will substantially reduce, if not eliminate, the resulting invasion of privacy and embarrassment.

In view of the available arguments in favor of limiting discovery regarding consensual sexual relationships, witnesses and parties should not hesitate to seek protective orders restricting such discovery.

In opposing discovery regarding consensual sexual relationships, the first option is to seek an order that the discovery not occur at all. Witnesses and parties can (and often should) request protection from having to answer any questions, whether at a deposition or in an interrogatory, about such relationships. Alternatively, they should seek restrictions that will limit the inquiry to narrow questions that are appropriately tailored to obtain relevant information with the minimum invasion of privacy. As we have suggested, such restrictions may cure the problem as effectively as an order precluding discovery altogether.

In *Wheeler*, for example, the court required the plaintiffs to explain their need for discovery about a particular consensual relationship. In light of the explanation presented, the court then limited the scope of discovery to an inquiry about whether the witnesses in question had "such a relationship that a reasonable person might doubt the veracity of [the nonparty witnesses'] testimony" as suggested by the plaintiff.⁴⁸ The court understood that because a relationship can create bias whether or not it is sexual, the key component of legitimate discovery was evidence of the relationship, not evidence that the relationship was sexual in nature. The court was thus able to ensure that the plaintiff could obtain the requisite amount of information to argue bias without forcing the nonparties (the plaintiff's manager and the employee with whom the manager had a consensual relationship) to reveal details about their consensual sexual relationship, or even that they had one.

Stalaker offers another example of how courts use protective orders to limit the damage caused by discovery into consensual sexual relationships.⁴⁹ In *Stalaker*, the plaintiff sued her employer claiming that Graves, an employee of the defendant, sexually harassed her and created a hostile work environment. When the plaintiff noticed depositions for four nonparty witnesses,

the defendant moved for a protective order to restrict inquiry into the witnesses' voluntary romantic conduct or sexual-related activities. The court limited discovery to allow only questions about relationships with the defendant. Even then, the questions could go only to whether the defendant had attempted to "encourage, solicit, or influence" the employees to engage in a sexual relationship with him.⁵⁰ The *Stalnaker* court also ordered that any discovery on the issue be used only for purposes of the litigation and kept confidential.

Finally, even in cases where courts refuse to impose substantive discovery limitations, they readily impose protective orders to seal the personal information.⁵¹ Therefore, at a minimum, defendants and nonparty witnesses should seek protective orders to seal the confidential information. While the questions themselves are intrusive, at least a protective order will limit disclosure as well as the amount of leverage plaintiffs can gain from the information.

The discovery of evidence regarding consensual sexual relationships can wreak havoc on the personal affairs of the participants. Such discovery, or the prospect thereof, can also alter significantly the settlement dynamics of the case. Thus, attorneys representing defendants or third-party witnesses should use every available mechanism to restrict plaintiffs' ability to obtain such information. The rules of evidence and of civil procedure, coupled perhaps with the growing societal distaste for such questioning, make such efforts far from hopeless.

ENDNOTES

¹Statement of President Clinton (August 17, 1998), *reprinted* in Peter Baker, *The Breach: Inside the Impeachment and Trial of William Jefferson Clinton* 433-34 (2000).

²Sexual harassment lawsuits stem from the cause of action for sex discrimination in the workplace created under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

³See generally 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 745 (3d ed. 1996).

⁴See Cass R. Sunstein, *Lessons from a Debacle: From Impeachment to Reform*, 51 Fla. L. Rev. 599, 614 (1999) ("Now we do not know the magnitude of the problem, but from talking with trial judges, I, at least, have a sense that this is not a trivial problem").

⁵See generally Fed. R. Evid. 402-404, 608 (relating to standards of admissibility of evidence).

⁶While many of the policy considerations are the same, this article does not address limitations on the discovery of consensual relationships as applied directly to plaintiffs or other "alleged victims" of harassment called on their behalf. See Fed. R. Evid. 412.

Numerous other authors have considered those issues. See, e.g., Richard C. Bell, Note, *Shielding Parties to Title VII Actions for Sexual Harassment from the Discovery of their Sexual History—Should Rule 412 of the Federal Rules of Evidence Be Applicable to Discovery*, 12 Notre Dame J.L. Ethics & Pub. Pol'y 285 (1998); Julie A. Springer et al., *Survey of Selected Evidentiary Issues in Employment Law Litigation*, 50 Baylor L. Rev. 415 (1998). In addition, the Federal Rules of Evidence contain specific protections for that category of witnesses, which are not available for defendants and the witnesses called on their behalf. See Fed. R. Evid. 412.

⁷*Meritor Sav. Bank*, 477 U.S. at 57.

⁸Lindemann & Grossman, *supra* note 3, at 746.

⁹See, e.g., *Meritor Sav. Bank*, 477 U.S. at 66.

¹⁰See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

¹¹524 U.S. 742 (1998).

¹²524 U.S. 775 (1998).

¹³*Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

¹⁴224 F.3d 1203 (10th Cir. 2000).

¹⁵*Id.* at 1214.

¹⁶See, e.g., *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) ("A co-worker's romantic involvement with a supervisor does not by itself create a hostile work environment"); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990) (noting that hostile work environment is not present where romantic relationship between co-worker and supervisor did not prevent plaintiff from being evaluated on grounds other than her sexuality); *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1370 (10th Cir. 1997) (refusing to extend Title VII "to include consensual romantic involvements"); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307 (2d Cir. 1986) (noting that there is no support for the contention that "a voluntary amorous involvement may form the basis of a Title VII claim"); *Becerra v. Dalton*, 94 F.3d 145, 149-50 (4th Cir. 1996) (adopting the holding set forth in *DeCintio*, 807 F.2d 304, in finding that preferential treatment of a lover does not constitute sexual harassment of other employees treated less favorably); *Womack v. Runyon*, 147 F.3d 1298, 1300-01 (11th Cir. 1998) (per curiam) (promotion of paramour not actionable sex discrimination).

¹⁷See *Drinkwater*, 904 F.2d at 862 (hostile work environment not present where romantic relationship between co-worker and supervisor did not prevent plaintiff from being evaluated on grounds other than her sexuality); *O'Patka v. Menasha Corp.*, 878 F. Supp. 1202, 1206 (E.D. Wis. 1995) ("[C]ases based on favoritism to a third-party paramour do not state Title VII claims of sex discrimination").

¹⁸See generally Fed. R. Evid. 404(b).

¹⁹*Id.*

²⁰See, e.g., *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 539 (10th Cir. 1994) (holding that as to evidence of manager's sexual relationship with his administrative assistant, "the potential for unfair prejudice is obvious"); see also *Doran v. Priddy*, 538 F. Supp. 454, 455 (D. Kan. 1981) (excluding evidence of defamation plaintiff's extramarital affairs as irrelevant and "highly prejudicial").

²¹See 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6118 (2d ed. 1993) ("[W]here specific instances evidence has a potential for embarrassment or harassment comparable to that produced by evidence of sexual history or religious belief, that evidence is a candidate for exclusion").

²²*Lucero v. Donovan*, 354 F.2d 16, 22 n.7 (9th Cir. 1965) (citations omitted).

²³As nonparties, these witnesses normally will make such arguments during the discovery phase in the context of seeking a protective order. See *infra* the discussion about restraints on the discovery of evidence of consensual sexual or romantic relationships.

²⁴See Fed. R. Evid. 608(b), advisory committee's note. The committee note explains that because

the possibilities of abuse [under Rule 608(b)] are substantial. . . . [S]afeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite. . . . Also, the overriding protection of Rule 403 requires that probative value not be outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, and that. . . Rule 611 bars harassment and undue embarrassment.

Id. (emphasis added).

²⁵However, it is important to note that Rule 608(b) cannot be read so broadly as to exclude evidence that is otherwise probative of a material issue in the case, or that may operate to impeach a witness by contradiction or bias. For example, in *Cadena*, 224 F.3d at 1206-08, 1213-14, the court ruled it was not error to permit testimony that was relevant to rebut a material issue, the *Burlington/Faragher* defense, even if the evidence was seemingly elicited solely for the purpose of attacking credibility.

²⁶See *United States v. Devery*, 935 F. Supp. 393, 407-08 (S.D.N.Y. 1996), *aff'd sub nom. United States v. Torres*, 128 F.3d 38 (2d Cir. 1997) (noting that case law interpreting Rule 608(b) makes clear that not all prior bad acts are admissible to impeach a witness, but only instances of conduct that bear on a witness's propensity for truthfulness or untruthfulness).

²⁷No. 99-0339-CV-W-3, 2000 U.S. Dist. LEXIS 4644, at *2-3 (W.D. Mo. Apr. 6, 2000).

²⁸*Id.* at *7 (citations and internal quotations omitted).

²⁹*Id.* at *7-8.

³⁰See, e.g., *United States v. Collins*, 90 F.3d 1420, 1429 (9th Cir. 1996) (affirming exclusion of cross-examination concerning witness's alleged lies to friends; although defendant sought to attack witness's credibility, he "could not explain how this alleged incident was connected with his case").

³¹*United States v. Sellers*, 906 F.2d 597, 602 (11th Cir. 1990).

³²See 19 F.3d at 534, 537.

³³*Id.* at 539; see also *United States v. Lopez*, 611 F.2d 44, 45 (4th Cir. 1979) ("Courts should have the power to protect witnesses against cross-examination that does little to impair credibility but that may damage their reputation, invade their privacy, and assault their personality") (citations and internal quotations omitted).

³⁴*Alford v. United States*, 282 U.S. 687, 694 (1931).

³⁵*Plaisance v. Beef Connection Steakhouse*, No. Civ. A 97-0760, 1998 WL 214740, at *1 (E.D. La. Apr. 30, 1998) (quoting former Fed. R. Civ. P. 26(b)(1)); see also *Wheeles v. Human Res. Sys.*, 179 F.R.D. 635, 637 (S.D. Ala. 1998) (noting that a party seeking discovery is granted "a very wide path down which he may foray, in search of all information favorable to his case"); see also Fed. R. Civ. P. 30(d)(3) (allowing party or nonparty deponent to stop deposition to file motion seeking the protections provided under Rule 26).

³⁶*Plaisance*, 1998 WL 214740, at *1 (quoting former Fed. R. Civ. P. 26(b)(1)).

³⁷*Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2*, 197 F.3d 922, 925 (8th Cir. 1999) (citations and internal quotations omitted).

³⁸Fed. R. Civ. P. 26(c).

³⁹See *Stalnaker v. Kmart Corp.*, No. Civ. A. 95-2444-GTV, 1996 WL 397563, at *2 (D. Kan. July 11, 1996) (adding that to establish good cause, the party must submit "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements") (citations and internal quotations omitted).

⁴⁰See, e.g., *id.* at *2, 4 (finding that defendant had demonstrated good cause to bar discovery of voluntary romantic and sexual activities of four nonparty witnesses to extent they had no relationship to allegations against the company and were irrelevant to any issue in action); see also *Wheeles*, 179 F.R.D. at 637-39 (balancing plaintiff's need for information against witnesses' privacy interests).

⁴¹See *Stalnaker*, 1996 WL 397563, at *4 (agreeing that inquiry into any voluntary sexual activities between nonparty witnesses would be irrelevant to sexual harassment litigation); *Wheeles*, 179 F.R.D. at 640 (holding that nonparty witnesses would not be required to answer questions about their sex lives except whether they currently have a relationship such that "a reasonable person might doubt the veracity" of their testimony); compare *Cadena*, 224 F.3d at 1213-14 (allowing plaintiff to question nonparty witness about witness's affair with alleged harasser because of its relevance to material issue in case: company's *Burlington/Faragher* defense).

⁴²Fed. R. Civ. P. 26(b).

⁴³*Stalnaker*, 1996 WL 397563, at *3 (citations omitted).

⁴⁴See *Miscellaneous Docket Matter #1*, 197 F.3d at 925.

⁴⁵See *Wheeles*, 179 F.R.D. at 637.

⁴⁶See *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (citations omitted) (providing list of factors that may be considered, but noting that factors are neither "mandatory nor exhaustive").

⁴⁷197 F.3d at 926-27 (noting that a court should not neglect its "power to restrict discovery where justice requires [protection for] a party or person from annoyance [or] embarrassment," and adding that "discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public") (alteration in original and citations and internal quotations omitted); see also *Stalnaker*, 1996 WL 397563, at *4 (evidence regarding consensual relationships, especially sexual relationships, is "potentially embarrassing and annoying" and should therefore be limited through protective order).

⁴⁸*Wheeles*, 179 F.R.D. at 640.

⁴⁹See *Stalnaker*, 1996 WL 397563, at *2, 4.

⁵⁰*Id.* at *4; cf. *Plaisance*, 1998 WL 214740, at *3-4 (refusing to bar questions related to whether a "defendant sexually harassed" nonparties, because the court found the distinction unworkable given that it allowed the defendant to "choose what questions he must answer by allowing him to classify which relationships were consensual").

⁵¹See, e.g., *Plaisance*, 1998 WL 214740, at *4 (ordering discovery obtained on the issue of consensual relationships to be filed under seal); *Jackson v. Entergy Operations, Inc.*, No. Civ. A. 96-411, 1998 WL 46822, at *3 (E.D. La. Feb. 4, 1998) (denying motion for protective order, but considering answers to questions about consensual relationships to be confidential under protective order already in effect).