MWELA Annual Conference
March 9, 2007

Discovery Depositions

by

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I. Developing a Strategy

A. The Tactical and Financial Background

We can only take limited discovery. There are presumptive limits on discovery, and practical limits on what our clients can pay or we can advance.

Depositions are very expensive.

The most effective depositions are videotaped, and those are more expensive.

Depositions we take can be wasted if taken too early.

Depositions we take can be wasted if taken too late.

Our depositions of defense witnesses can make or break the case, preclude or facilitate a successful summary-judgment motion by either side, motivate either side's settlement positions, rehearse both sides for their testimony at trial, and have to be prepared for as intensively as we prepare for trial testimony.

Defendants' depositions of our witnesses can also make or break the case, preclude or facilitate a successful summary-judgment motion by either side, motivate either side's settlement positions, rehearse both sides for their testimony at trial, and have to be prepared for as intensively as we prepare for trial testimony.

Our depositions of witnesses the other side intends to call at trial might make it possible for the other side to put on their trial testimony by deposition if their witness becomes unavailable for trial.

B. The Judicial Background

Some judges do not understand what we have to do to put together a case.

Some judges are too willing to come up with excuses to rationalize away evidence of pretext.

Some judges are more reluctant than others to allow depositions beyond the presumptive limits.

Defendants can file summary-judgment motions before the end of discovery, and judges may deny Rule 56(f) motions for additional discovery—or even to postpone our oppositions to summary judgment while we take the discovery presumptively allowed—if we have not been diligent in pursuing discovery.

As a result, we have to plan the entire discovery regime with an eye to developing a case immune to summary judgment, and create a record of diligence that will make judgment calls in our favor look like the best exercise of discretion, and judgment calls against us look like an abuse of discretion.

C. The Client Background

Clients come to us because they think something is not right, but usually have not subjected their perceptions to a rigorous logical analysis.

It is often hard or impossible to win a case if we pursue it based on the client's initial perceptions, but far easier to win the case based on a hard, logical analysis of our strong points and the other side's weak points.

Educating our clients about the more and less plausible aspects of their perceptions often produces previously-undisclosed aspects of the situation that can alter the case for good or bad.

II. Pre-Discovery Deposition Planning

A. The Utility of Trying to Narrow the Issues

We do not have to spend precious depositions on topics that will not be material issues at trial. If we can preclude the defendant from raising specified matters, or maneuver defendants into situations in which raising such matters will trigger our rights to additional discovery, we can make the most effective use of the limited discovery we can take, while preserving our freedom of action on late-arising contentions.

If we can show that we were diligent and tried to narrow the issues but the defendants insisted on keeping all their options open, we are in a much better position to argue for a relaxation of the presumptive limits on discovery, or for a Rule 56(f) motion for additional discovery.

B. Narrowing the Issues through the Pleadings

Successful attorneys are like gardeners: they plan what sorry-looking clump of facts can be used to grand effect later, they select their themes, and they prune mercilessly.

Unlike gardeners, however, we can shape the field of future battle by framing our pleadings in a way that makes it difficult for the defense to take certain positions. We can plead specifics in a way that requires the defendant to take a specific position, or to avoid taking it for fear of looking foolish or for fear of the risk inherent in taking the position.

Example of a narrowing allegation in a pleading: "In every job category, defendant's black employees have the same interest in promotion, and are as qualified for promotion, as defendant's white employees." Such questions are even more important in gender discrimination cases, because they get stereotypes into the open. If the defendant admits the allegation, depositions can be much shorter. If the defendant denies it, we have a specific ground to support an application for more extensive discovery if we need it.

C. Narrowing the Issues through the Rule 16(f) Conference

The Rule 16(f) conference is supposed to lay the foundation for discovery, and there is no better time to smoke out some of the defendant's contentions, or to obtain statements that certain things are not at issue.

It is critical that there be a record of the conference or a memorialized document agreed to by both sides and approved by the judge.

D. Narrowing the Issues through Less Expensive Discovery

Contention interrogatories are useful in narrowing the issues, boxing in the defendant, reducing deposition costs, and laying the groundwork for a motion in limine to bar any evidence contradicting the defendant's answer.

III. Integrating Depositions with Other Forms of Discovery

Staging the discovery is often critical, particularly where the other side cannot be trusted to be forthcoming.

It is often essential to get documents before we take depositions, so that we can read and understand the documents in advance, and avoid wasting our presumptive seven hours with the witness.

Through counsel, when we have a lot of documents to use with a witness, we should ask the deponent to review the documents in advance. If the witness refuses to do so and we start to run out of time, we have grounds for asking the court to allow a deposition exceeding seven hours. The opportunity to review the documents in advance also makes it harder for the deponent to claim afterwards that his or her damaging answers in a deposition should be ignored because he or she did not have time to appreciate fully the significance of the documents before answering. Refusal to take advantage of the opportunity, and then making such a complaint, would damage the witness a great deal.

We should always ask each manager who is a witness about what documents they have seen that would bear on the matters we have been talking about, and then go through a list of the topics covered in our Rule 34 Requests for Production. If they identify documents that were not produced, we have the grounds for a successful motion to compel discovery. Even better, we have the opportunity to ask at deposition and at trial if the witness is aware that this was withheld from us, and if the witness has personal knowledge of why it was withheld from us. Jurors get very focused when they hear such questions.

IV. A Valuable Resource

An extremely useful resource is "Surviving and Thriving in the Process of Preparing a Witness for Deposition," by Katherine James, The American Society of Trial Consultants, 87 AmJur 1 (2007). She's an actor who has worked with attorneys in preparing thousands of witnesses, and has many interesting things to say about the different learning styles of witnesses. She strongly recommends rehearsing questions and answers, looking at documents, and the like, as a model useful for many witnesses.

V. The Eleven Commandments of Tactics and Strategy

The Partgood case is a perfect example of a high-risk case that could readily lead to a grant of summary judgment to the defendant, to a defense verdict, or to a judgment for defendant as a matter of law, all of which could be affirmed on appeal. Nowhere, in any book of holy writ, is it written that this case shall succeed. It is not a case that will go ahead and win itself. What we do, in a case like this, makes all the difference.

First Commandment: Strategize Before the Depositions. The client's view of the case may be very easy for defendant to attack, but we can often articulate the claims in a way that makes them much harder to defend.

- For example, harassment often becomes worse in scope as time goes on. If there were no prior complaints by others and no complaint by our client, it is hard to win as to the first few minor instances. If we claim relief for on the first few minor instances, we wind up allowing defendant to focus the case on the failure to complain, and that can wind up prejudicing the judge and jury, and dooming a more serious instance of harassment. If we focus on a narrower claim that begins after the first instances in which plaintiff complained or defendant's officials saw objectionable conduct without interfering, we give up little of value, and require a focus on more serious conduct after the defendant knew or should have known of the harassment by observation or complaint.

Second Commandment: Figure Out if There Are Unknown Facts That Could Rescue a Seemingly Doomed Claim: If such facts are conceivable in the context of the defendant and its officials, a major aim of the deposition is to find out if there are such facts.

Third Commandment: Drop Claims That Are More Likely to Make Plaintiff Look Bad than to Result in Meaningful Relief. Sometimes, a plaintiff can win on one or more claims, but not if the defendant and jury learn of facts—relevant only to a different claim—that make the plaintiff look unlikable or excessively greedy. We can trim our own disclosures, make discovery much less likely, and can sometimes get a protective order, if we plead the case so as to avoid such claims, or drop such claims before disclosures or discovery.

Fourth Commandment: Cross-Question and Probe Our Clients Before Defendant Does. See the discussion below on "Doing Our Own Cross-Questioning of the Client."

Fifth Commandment: Drop Truly Unwinnable Claims: There is no point in wasting our time and money, or defendant's time and money, on unwinnable claims. One bad claim can so poison the atmosphere that settlement becomes much harder for the good claims, and the defendant's expenditures on defeating the bad claim can reduce the amount available in settlement.

Sixth Commandment: Keep Our Eyes on the Goal: Our goal in taking and defending depositions in a case like this is to advance our case but, more importantly, to frustrate every plan and stratagem of the other side by strewing caltrops[1] across every avenue[2] of their attack

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[1] "A caltrop (calthrop, jack rock, star nail) is a weapon made up of two (or more) sharp nails or spines arranged in such a manner that one of them always points upward from a stable base (for example, a tetrahedron). Caltrops serve to slow down the advance of horses, war elephants, and human troops." Darius used caltrops against Alexander the Great at Gaugamela in 331 B.C./B.C.E. The Scots used them against English cavalry at the battle of Bannockburn in 1314. WIKIPEDIA, visited on February 27, 2007.

[2] Darius used caltrops only where he thought Alexander's cavalry would go. Alexander was a master at going where no one thought he would go, did, avoided all the caltrops, and won. Robert W. Reid, "Weaponry: The Caltrop: Diabolical in its simplicity, the ancient, durable caltrop remains an effective defensive weapon today," HISTORY NET, http://www.historynet.com/wars_conflicts/weaponry/3805676.html, visited on February 27, 2007.

and retreat. Sometimes, a couple of well-placed questions and their answers can make it impossible for the other side to move for summary judgment.

- Example: In an FLSA retaliation case, defendants claimed they could not have retaliated against plaintiff because they did not know he was the employee who had complained to the U.S. Department of Labor. Defendants had obtained a summary-judgment motion schedule in the scheduling order and planned to move for summary judgment on this issue, and on the issue that numerous defendants were not plaintiff's employer. No motion was ever filed, because the deposition of the HR official was very relaxed and chatty. The HR official was likeable, and plaintiff's counsel grinned every time the HR official had a dispositive answer for something. There was a sympathetic discussion of the fact that plaintiff had filed more grievances and outside complaints than any ten employees put together, and that she felt she was always responding to his forays. She was not asked if she knew who had filed the FLSA retaliation complaint, triggering the prepared responses, but only if the Wage & Hour Division had notified her of the identity of the complainant. Of course, they had not. It was clear that she was relieved this had been resolved so painlessly. The next question was on the order of: "But you had a pretty good idea that plaintiff had filed the complaint, didn't you?" She agreed. (When she tried to renege at trial, with the depo text blown up on the Elmo screen, it looked very bad.) As to the motion for summary judgment in favor of non-employers, she was led through all the corporate entities, got some mixed up, and testified that she was not sure which entity did what or had the final say on personnel matters.

    - Time spent: 10 to 15 minutes on both issues.

    - Time saved: No SJ motion, so we saved scores of hours in response, and avoided the danger. The company stipulated to joint employment before the trial, so we avoided further hassle on that issue.

    - Joy during cross-examination at trial, when the HR official attempted to renege: Incalculable.

Seventh Commandment: Pin Deponents Down and Exterminate their Wiggle Room at Trial. This needs no explanation, but in the thrust and parry of depositions it is easy to feel a point has been pinned down, or stampeded into a cul-de-sac, when there is an avenue of exit. If clients or a co-counsel are present, ask them in advance to be thinking of possible escape routes. We need to keep a monitoring portion of our minds immune to emotion and thinking logically of how the witness might find a way to bolt.

Eighth Commandment: Always Ask About Documents that Would Show Whether the Witness's Assertion is Correct. Sometimes, this is the only way to find out about documents not produced. Occasionally, defense counsel is also surprised by the answer.

- In a wage & hour case, it turned out that the defense and their counsel were trying to play straight with respect to earnings records but, unknown to them and counter to their interests, the head of the IT department was trying to make his own determination of whose records we wanted and who both sides thought were exempt.

Ninth Commandment: Ask Follow-Up Questions of Our Own Witnesses. This violates every rule of depositions taught to us in law school, by professors who do not litigate. We know that it will be very difficult to clarify or supplement our witnesses' deposition answers by a subsequent affidavit, if the questions got within miles of the topic at issue. We have to lay out some of the essentials of our case, in order to avoid summary judgment. There is no time as effective for doing so as during the deposition itself.

Tenth Commandment: Consider All Possible Uses of the Depositions. A good deposition can have several uses in addition to the usual:

- In some instances, it can become a trial deposition.

- In all instances, it can be useful in planning further discovery, in moving to compel discovery, in resisting discovery, in a plaintiff's motion for partial summary judgment, and the like.

- By presenting an unwounded plaintiff and wounded defense witnesses, it can be a powerful tool for forcing settlement on favorable terms.

The Eleventh Commandment: Distinguish Between Dreamers and Liars. Call me a dreamer, but I think most witnesses on both sides try to tell the truth as they recall it. Memories are often affected by wishes; and "the seeing is dimmest where the hopes are brightest," as someone once said. It is in human nature to remember the facts in a way that present us in a good light. That kind of unconscious bias affects most witnesses on both sides, and is not what I mean here.

People who try to tell the truth will still make mistakes. Whenever they do and get tripped up, they know they have a safe place of retreat: what they know is true. It is like a traffic island in the middle of a busy street. Liars just have to keep jumping, they cannot keep track of all the stories they have told and what made them abandon the stories, and have no safe place to rest and get their bearings.

Dreamers often convince themselves they remember something clearly, and are nonplussed when they cannot remember other things occurring at the same time that are equally or more memorable. They are often visibly abashed when they realize that their precise-sounding testimony is unlikely to be correct.

- A trial example makes the point. In one case, during a period in which there were no records of applications broken down by race, a Personnel Manager testified that African-American applicants were X% of total applicants. He said he saw it every week, and remarked upon it to himself. However, the man filled out reports to the State Department of Labor that contained a census of employees by race, and a census of skilled vs. unskilled workers, and a count of the total volume of applicants, and a count of new hires, and about six other things. Since these were submitted as official records, one would have thought they were memorable. I asked about each type of report, from the beginning of his multi-year employment in that position and from the end. He had no idea, within a very large fudge factor, what the right numbers or percentages were. Then I asked him one question referring separately to each of his dozen wrong or "no idea"

answers, and asked him how he could possibly remember the precise makeup of the applicants. He was so upset at his lack of memory that he just blurted out, "it seemed like a good guess at the time." Our motion to strike the bulk of his testimony was granted before defense counsel managed to stand up to oppose it.

The Twelfth Commandment: Remember the Ways of Liars. Liars tend to share two useful traits: they care more about winning than anything else, and they lack proportion and self-discipline. The combination of these trait is useful, because liars will take every opportunity to say what they think at the instant will improve their odds of winning, and their sense of what will help improve their odds changes frequently. What they thought was best in the plant or office will have changed by the deposition, and what they thought was best at the deposition will have changed by trial. They often lie to defense counsel, saying whatever they think best at the time. What they thought was best under the friendly breezes of direct examination often changes under the stiffer gale of cross-examination. In severe cases, what they think is best can change several times on cross-examination. They will lie about things we cannot disprove, and about things we can readily disprove.

Let no one say a word against them. Dealing with them binds our client to us and the judge and jury to our cause. They can do far more for our case than any set of facts could possibly accomplish.

In depositions, the goal is usually to pin them down as tightly as the Lilliputians tied down Gulliver. Apart from summary-judgment questions, what they say is much less important than that they are pinned down saying it.

VI. Depositions in the Hypothetical Case

A. Our *Modus Operandi*

We should plan the depositions carefully, even to the extent of writing out questions and varying approaches to answers. I often have typed outlines when I start a deposition, running from three to thirty pages in length. The outline should include all the documents to be used, and all the documents that may be used.

The next step in a successful deposition is not to follow the outline. This is very important. Preparing the outline has forced us to organize our thoughts. Once organized, we can swarm the witness with questions on any topic, and follow up on every nuance and connotation of an answer. If we do not deviate from the outline, we are surrendering the great advantage of cross-examination, because we are choosing not to chase the witness's evasions or exploit the witness's openings.

We should consult the outline from time to time, to make sure we have asked all the needed questions on a topic, and that we have hit all the topics, and for the wording of question that have to be asked in a precise way.

The key is to remember that the case is like a shape-shifting animal we are riding, changing shape and form with every answer, and that we really do need to stay on top of whatever it is we are riding at the moment. Mythology is full of tales of wrestling with shape-

shifting animals, because the ancients were grasping for a way to develop cross-examination and wanted to express their thoughts and urges.

B. The Decision-Makers

1. Jane Jump

Jump is the formal decisionmaker, and her deposition will be important. We will want to show that in making her decisions, Jump relied substantially on the input of Roughshod, Mover, and Shaker. We also want to show whether she was aware of past problems with Roughshod, whether she did do anything different with respect to Roughshod's input than with respect to the input of Mover and Shaker, that she could have used objective criteria or taken actions to determine whether Roughshod's input, and that of Mover and Shaker, were fair or reflected some non-merits agenda, and that she did not take any such actions. We also want to find out whether she was aware of any other sexual harassment complaints or comments as to Roughshod, Mover, or Shaker.

If the facts support it, one goal is to resist defendant's future motion for summary judgment by trying to analogize Partgood's situation to that of Ann Hopkins in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). There, the Court held defendant liable under Title VII because some of the input on the partnership decision consisted of sexually stereotyped comments, and defendant did nothing to prevent reliance on such comments when making its decisions. The closer we can bring Partgood to this theory, the better off she will be.

In handling Jump, my assumption would be that she is intently focused on the bottom line, and very reluctant to let HR policies get in the way of her bottom line. Depending on how she answers on other topics, I might want to draw her out on her knowledge of the company's HR policies, whether she thought it was proper for a senior manager to react negatively to a complaint before the investigation, whether any harassment can ever be found if no third party witnessed it, whether the morale of lower-paid employees is as important as the morale of higher-paid employees, whether the existence of an independent earlier complaint of harassment not witnesses by a third party made a subsequent complaint of harassment not witnessed by a third party more credible, and her notions of the appropriate remedies for a serial harasser.

It will be important to establish all the reporting relationships in the office, and to go through all the evaluations beforehand, to find instances in which newly-installed supervisors had input on evaluations, and to find out exactly whose idea it was that only Mover and Shaker have any input on Partgood's evaluation.

It is important to know if Jump, Mover, and Shaker had any preparation sessions that overlapped in whole or in part. Since Mover and Shaker are not managers and representatives of the company, defendant has waived work-product privilege:

- As to the preparation of Mover in that group sesssion, and as to all subject matters discussed in that preparation, by having Shaker present;

- As to the preparation of Shaker in that group sesssion, and as to all subject matters discussed in that preparation, by having Mover present;

- As to the preparation of Jump in that group sesssion, and as to all subject matters discussed in that preparation, by having either Mover or Shaker present.

This will inspire a lovely little fight that is worth taking to the judge. If there was a waiver, Jump should be ordered to reveal what Mover and Shaker said, and each version of what they said, and any coaching that took place. Jump should also be ordered to reveal what Jump herself said in all its versions, and any coaching that took place, in any common session.

2. Mover and Shaker

Our theory should be that Mover and Shaker were decisionmakers, because they provided input critical to the decision, because Jump assigned them exclusive control over Partgood's evaluation, to the exclusion of Connie Closem for whom plaintiff performed the same functions, and because Jump did so after plaintiff had complained that Mover and Shaker were participants in Roughshod's harassment of her.

We will need different approaches, because defense counsel will figure that his or her only chance of being surprised is in the first of this pair of depositions and the first one will tip him or her off as to our strategy for the second, and allow detailed preparation of the second. It is both useful and enjoyable to surprise defense counsel as to the second witness as well.

The fact pattern suggests a weakness in Mover and Shaker: they are followers in bullying, not leaders. Their leader has been moved away, and like schoolyard bullies whose leader has been transferred against his will, they are likely feeling uncertain. The path to the truth probably lies in feeding their uncertainty without giving them a chance to erupt until we ask the critical question.

I would spend a fair amount of time with Partgood and any friends from the workplace, learning everything I can about Mover's and Shaker's interactions with others in the workplace. The goal is to flesh out my sense of their psychologies, figure out which is stronger and which is weaker, and tailor the different examinations accordingly. In addition, some of the workplace stories may be worth raising in response to an answer, to unsettle the deponent with what we know and make the deponent uncertain whether we can trap him if he shades the truth in response to upcoming questions.

Nothing produces more satisfactory answers than fear of being caught out.

C. The Human Relations Person

Of the many evil pleasures our calling allows us in the pursuit of virtue, few are as sweet as cross-examining the HR official. The contrast between sensible practices and practical implementation is often great.

My general practice is to be sweet at depositions of HR officials if I think they have not been rigorously prepared, get a lot of admissions in a conversational-type deposition, pin down everything imaginable, and be much firmer at trial when they try to tell a different story after a much more intensive preparation.

Once they are pinned down as to the inflexible and justifiable rigor of their actions, we can go hunting for all the contrary examples we can find in employment records.

D. Brushoff and Doolittle

A joint investigation creates the opportunity to depose them separately, and see what discrepancies result.

Both can be asked about what seems to be a tacit rule that uncorroborated allegations must always be rejected.

Both can be asked whether this rule makes sense the second time an independent complaint is made that the same high-flying employee has engaged in conduct where no one can see. Both can be asked how many women must independently complain before they conclude a complaint is well-founded.

Both can be asked about their standards for suspending or firing a successful salesman.

If there is any evidence that anyone has ever been suspended for even a day, or fired, it will likely have been a low-level employee. Both can be asked how many dollars of sales or dollars of pay it takes to be immune from discharge? To be immune to suspension?

This avenue of attack is only available where the company does in fact have a poor system of responding to complaints.

E. Senior VP Important and CEO Greedy

It is important to take these depositions, or at least one of them (the eighth and ninth of those presumptively allowed) to pin down that a report was made to them and that they endorsed the decision not to suspend or to fire Roughshod and not to take any protective action with respect to Partgood. This helps to establish the liability of the company for punitive damages.

They should be asked their views of Jump, in the hope that they will praise her for her undistractable focus on the bottom line.

The usual questions about assets, earnings, profits should be asked. This is usually unsettling.

They should be asked about every document in which they had a hand, emphasizing the importance of sales or giving a bonus or recognition to Roughshod, particularly after the Butey incident.

They can also be asked the same questions asked of Brushoff and Doolittle, but they will probably be prepared for this, and would need to be discomfited by the above questions before getting into these topics.

F. Betty Butey

If there is any question about her willingness to testify or about her willingness to provide a sworn statement, she should be deposed to pin down her testimony.

She makes the tenth and last of the allowed fact-witness depositions.

G. Our Client's Deposition

1. Doing Our Own Cross-Questioning of the Client

Beginning at the outset of the case, we should warn our clients that we will throughout the matter turn on them without warning, and cross-question them the same way that an attorney would be entitled to cross-examine them at trial. We need to use all the tactics and sneaky approaches the other side might use, including subtle shifts in the meanings or connotations of words, so that they can recognize what is occurring and how to counter any unfair phrasings. When they sound unsure, we should pounce on it the same way defense counsel would. If they get angry, we should fan the flames higher so that they will remember that anger is a poor choice of emotion. We should go after everything of questionable logic, and keep after it until the client sees the cost of being illogical.

After each of these sessions, we should explain what the client did well, and what needs work.

The goal is that, after the client survives cross-examination at trial in relatively good shape, he or she can tell us that they had little fear of the cross-examiner after so much time dealing with us, and that cross-examination was not nearly as hard as the preparation.

2. F.R.E. 412

Federal Rule of Evidence 412, as amended in 1994, limits the admissibility of certain evidence of sexual history or proclivity in cases involving alleged sexual misconduct unless certain conditions are met. Rule 412(a) states as follows:

> (a) Evidence generally inadmissible.--The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> > (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> >
> > (2) Evidence offered to prove any alleged victim's sexual predisposition.

Defendants sometimes maintain that F.R.E. 412 does not apply to sexual harassment cases. The Ninth Circuit summarized the case law rejecting that view.

> Rule 412's coverage extends over sexual harassment lawsuits. Id. ("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."); see also *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000); *Excel Corp. v. Bosley*, 165 F.3d 635, 640–41 (8th Cir. 1999); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 855–56 (1st Cir. 1998); *Barta v. City and County of Honolulu*, 169 F.R.D. 132, 134–35 (D.Haw.1996); *Sheffield*, 895 F. Supp. at 109.

B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1104, 87 FEP Cases 1306 (9th Cir. 2002).

The trial evidence procedures of Rule 412(c) have no bearing on discovery. However, the Notes of the Advisory Committee on the 1994 Amendment state that the policy underlying the rule should be followed in discovery:

> The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26 (c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. Cf. Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962-63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

(Emphasis supplied.) In *Herchenroeder v. Johns Hopkins University*, 171 F.R.D. 179, 182 (D. Md. 1997), M.J. Grimm stated: "Thus, in determining whether the requested discovery in the present case is appropriate, I must look to both Fed.R.Civ.P. 26 and Fed.R.Evid. 412."

Rule 412(b)(2) applies a more stringent version of the balancing test than Rule 403, and reverses the presumption to require that the proponent of the evidence carry the burden:

> (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.

The Advisory Committee explained:

> The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it Reverses that usual procedure spelled out in

> Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Partgood's affair did not involve anyone at work, and some of the usual reasons advanced by defendants for enquiring into sexual activity are inapplicable. If Partgood mentioned the affair when speaking to Roughshod about her divorce, however, it will be difficult to keep out the testimony.

Defendant's best argument for allowing the discovery is that Partgood's damages claim requires the jury to separate the emotional distress caused by her divorce from the emotional distress caused by the harassment and her subsequent treatment, that the divorce was a direct consequence of her husband's discovery of her infidelity, and that her recognition of her own fault in the divorce must have deepened her distress.

Herchenroeder v. Johns Hopkins University, 171 F.R.D. 179, 182 (D. Md. 1997), ultimately held that there was some relevance to the requested discovery, but in light of defendant's representation that it only needed answers to two precise questions, required that the information be obtained by interrogatories under a confidentiality order.

VII. Deposition Conduct

I once defended a discovery deposition where defense counsel did not let a single second pass between the end of the answer to a question and her next question, so that there would always be a question pending and a break would be precluded. The way I handled it was by announcing a break, which she overrode by asking a question, and then said that there could not be a break because there was a question pending. I told her that it was fine for the witness to answer that last question before the break, but that there would be a break before the next question. She then tried the same maneuver after the answer to that question, so I observed on the videotaped record that her conduct was uncivil, unprofessional, and discourteous to the witness, and that any further incidents would be reported to the State Bar. There were no further incidents.

Never, ever, mix it up with defense counsel at depositions. Insist that they not instruct witnesses not to answer unless there is a problem of privilege.

Redwood v. Dobson, __ F.3d __, 2007 WL 397499 (7th Cir. Feb. 7, 2007), censured three attorneys, and admonished one attorney, for improper deposition conduct. Defense counsel asked thoroughly improper questions, and were sanctioned. Plaintiff's counsel should have stopped the deposition and sought relief from the court, but instead repeatedly directed the witness not to answer even though the question did not call for privileged information. The Federal claims in the case were frivolous, but their merit is immaterial. What is material is that, as the Seventh Circuit observed in beginning its opinion, "This case is a grudge match." Charles Danner and Jude Redwood represented plaintiffs Jude and Erik Redwood. Defendant Harvey

Welch was former counsel for Erik Redwood in a criminal matter ending in Redwood's conviction. Erik Redwood is white, Welch is African-American, and the two scuffled after Erik Redwood was convicted and called his criminal counsel a "shoe-shine boy." Redwood filed a State-court battery claim against Welch, who was represented by Marvin Gerstein. That case settled. With an unsuccessful hate-crime prosecution and Redwood's demand that Welch admit ineffective assistance of counsel so that Redwood could get his conviction overturned, things went rapidly downhill. The Redwoods brought § 1983 and § 1985 claims against Welch and Gerstein. The Redwoods also sued Elizabeth Dobson, an Assistant State's Attorney, and Officer Troy Phillips of the Urbana Police Department. Roger Webber represented Gerstein. Just to make things clear, Jude Redwood is Erik's wife, and is both a plaintiff—claiming loss of consortium—and counsel for Erik. And making things even more clear, they are jointly suing Erik Redwood's former counsel in the criminal matter (Welch), and counsel's counsel in the State-court battery case (Gerstein). To aficionados of crazy cases, it doesn't get much better than this. The court's opinion is well worth setting out:

> A profusion of motions and cross-motions for sanctions—and the conduct underlying some of these motions—demonstrates the extent to which counsel have allowed personal distaste to displace dispassionate legal analysis. Most depositions are taken without judicial supervision. Witnesses often want to avoid giving answers, and questioning may probe sensitive or emotionally fraught subjects, so unless counsel maintain professional detachment decorum can break down. That happened here; the results were ugly.
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> Gerstein's deposition was taken by Charles L. Danner on behalf of both Redwoods, though Jude Redwood attended and sometimes acted as counsel in addition to her role as a plaintiff. Gerstein's counsel was Roger Webber, though Gerstein himself peppered the transcript with legal arguments. The deposition began badly when Danner spent the first 30 pages or so of the transcript exploring Gerstein's criminal record-mostly vehicular violations. Danner made no effort to explain how these questions could lead to admissible evidence, and they got under Gerstein's skin. After Gerstein spontaneously refused to answer some of the questions (remarking "That's none of your business"), Webber began instructing Gerstein not to answer.
>
> [7] Webber gave no reason beyond his declaration that the questions were designed to harass rather than obtain information-which may well have been their point, but Fed.R.Civ.P. 30(d) specifies how harassment is to be handled. Counsel for the witness may halt the deposition and apply for a protective order, see Rule 30(d)(4), but must not instruct the witness to remain silent. "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." Fed.R.Civ.P. 30(d)(1). Webber violated this rule repeatedly by telling Gerstein not to answer yet never presenting a motion for a protective order. The provocation was clear, but so was Webber's violation.
>
> Danner then turned to Gerstein's troubles with the state bar, another topic whose relevance (or ability to lead to relevant evidence) has never been explained. Gerstein was

censured for misconduct in 1991 and suspended for a month in 2002. Although the reasons are matters of public record, Danner demanded that Gerstein confess them in the deposition; Gerstein professed inability to remember, and when Danner inquired whether Gerstein had been ordered to obtain psychiatric counseling or anger-management therapy, Webber again told him not to answer. Richard Klaus, representing Dobson, opined that Danner had committed a misdemeanor under Illinois law by asking questions about Gerstein's mental health.

***4** What happened next must be set out in full to be believed:

Q [by Danner]. Mr. Gerstein, have you ever engaged in homosexual conduct?

MR. WEBBER: Objection, relevance. MR. KLAUS: I join.

MR. WEBBER: I believe it violates Rule 30, and I'm instructing him not to answer the question.

A. I'm not answering the question. MR. KLAUS: I join the objection.

Q. Mr. Gerstein, are you involved in any type of homosexual clique with any other defendants in this action?

MR. WEBBER: Same objection. Same instruction.

MR. KLAUS: I join the objection.

Gerstein would have been entitled to stalk out of the room. Webber justifiably could have called off the deposition and applied for a protective order (plus sanctions). Fed.R.Civ.P. 26(c), 30(d)(3), (4). Instead he told Gerstein not to answer, which was untenable as no claim of privilege had been advanced. After a brief recess, Gerstein acquired "amnesia" and started playing word games.

Q. During the last recess that we had that we just reconvened from, did you consult with your attorney concerning this deposition?

Instead of asserting the attorney-client privilege, a genuine reason not to answer (though perhaps consultation would have violated an order that the deposition be conducted without such conferences), Gerstein played dumb.

A. I don't understand the question.

Q. We just had a recess.

A. I understand that.

Q. Do you understand that? During that recess period, did you take that time to consult with your attorney regarding this deposition?

A. I don't know what you mean by the word consult.

Q. Did you speak with your attorney regarding this deposition?

A. I don't think so. I don't know.

Q. Do you know how-did you write anything to your attorney during that recess?

A. Write anything?

Q. Correct.

A. No.

Q. Did you speak with your attorney during that recess?

A. I had words with my attorney. We exchanged a conversation.

Q. Were those conversations—or strike that. Did any of the comments in that conversation or those conversations refer to any aspect of this deposition?

A. I can't recall.

The deposition fills a further 98 pages of transcript, unedifying to the end. At one point Danner asked whether the secretary who had typed the letter in which Gerstein offered to ask Dobson to dismiss the criminal prosecution was married; Webber instructed Gerstein not to answer. Danner asked whether the secretary had children; before Webber could leap in, Gerstein replied that she did. What this-indeed, what most of Danner's questions-had to do with the legal proceeding against Gerstein is unfathomable. Plaintiffs say that Gerstein once gave Danner "the finger," and though the transcript does not reflect that gesture the proceedings were heated enough that this could well have happened. (Gerstein does not deny this accusation; a video tape of the deposition was made, but we have not consulted it.)

***5** [8][9] Danner's conduct of this deposition was shameful—not as bad as the insult-riddled performance by Joe Jamail that incensed the Supreme Court of Delaware, see *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 52–57 (Del. 1994), but far below the standards to which lawyers must adhere. Gerstein, Webber, and Klaus were goaded, but their responses-feigned inability to remember, purported ignorance of ordinary words (the "consult" episode was not the only one), and instructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order-were unprofessional and violated the Federal Rules of Civil Procedure as well as the ethical rules that govern legal practice.

At one point, after Jude Redwood said that, because this was a deposition rather than a trial, Danner was entitled to fish for evidence whether or not the answers would be admissible, Klaus replied: "[T]his is not a discovery deposition. There's no such distinction or dichotomy under the federal rules. Everything that is asked here must meet the standard of the federal rules of evidence." Klaus either did not know, or did not care, that discovery may be used to elicit information that will lead to relevant evidence; each

question and answer need not be one that could be one that would itself be proper at trial. But Danner's questions had ventured so far beyond the pale that overstatement on the other side was inevitable.

When the Redwoods sought sanctions in the district court, the judge declared that everyone had behaved badly and that, because Danner was the greater offender, no sanctions would be appropriate. The district judge remarked that it was "ludicrous" for the Redwoods to argue that lawyers may not instruct witnesses not to answer. Given Rule 30(d)(1), however, the Redwoods had (and have) a meritorious position on this issue.

Mutual enmity does not excuse the breakdown of decorum that occurred at Gerstein's deposition. Instead of declaring a pox on both houses, the district court should have used its authority to maintain standards of civility and professionalism. It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control.

Sanctions are in order, but they need not be monetary. See Fed.R.Civ.P. 30(d)(3), 37(a)(4), (b)(2). Because the arguments pro and con have been fully ventilated in this court, and none of the attorneys has asked for a hearing under Fed. R.App. P. 46(c), we see no need to drag out this controversy with a remand. Attorneys Danner, Gerstein, and Webber are censured for conduct unbecoming a member of the bar; attorney Klaus is admonished. (We differentiate in this way because a censure is the more opprobrious label, see *In re Charge of Judicial Misconduct*, 404 F.3d 688, 695-96 (2d Cir.2005), and Klaus's misconduct is substantially less serious than that of the other lawyers.) Any repetition of this performance, in any court within this circuit, will lead to sterner sanctions, including suspension or disbarment.

***6** [10] We are not done with motions and cross-motions for sanctions and other relief. Gerstein has asked us to penalize the Redwoods under Fed. R.App. P. 38 for taking a frivolous appeal. As we have explained, the Redwoods' principal arguments on the merits were frivolous, but their appeal with respect to discovery sanctions has been successful. Although we have the discretion to award Rule 38 sanctions issue-by-issue as well as appeal-by-appeal, we elect not to do so because fault is widely distributed. It should be plain to the Redwoods from what we have said, however, that any effort to resume this spite contest under another legal theory would not be in their financial interest (and would jeopardize Jude Redwood's future ability to practice law in federal court).