Protect clients' private health records

In employment cases, knowing how and when to release medical records keeps irrelevant information out of court and protects your client's privacy.

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Among the many challenges confronting plaintiffs, few are as disconcerting as releasing medical records—including those pertaining to mental health—to the defense.

Many people feel an acute sensitivity about their medical records and treatment history, which can be violated by any disclosure. The feeling of violation is increased dramatically by forced disclosure to an adversary. This concern is particularly acute in employment discrimination cases. In most personal injury cases, medical records logically are sought as directly relevant to the claims, but in employment discrimination cases, they may be tangential.

Further, the plaintiff has a prior relationship with the alleged wrongdoer and may have continuing relationships with supervisors, colleagues, and subordinates. He or she may be unwilling to share private medical information with the very employees who perpetuated the original injury. Also, the unavoidable stigma of mental health treatment may color how a judge and jury assess the plaintiff's credibility. In fact, because of that stigma, employers may choose to seek medical records during discovery.

Plaintiff lawyers have several options to counter this tactic. Arguments concerning privilege and relevance, as well as procedures for obtaining protective orders and in-camera review, can be used to defeat a discovery request, reduce its scope, or limit its exposure before trial. Although courts often will require some medical records to be produced, the lack of uniformity in the case law provides ways to limit disclosure.

Both the federal and state governments have passed antidiscrimination laws, giving plaintiffs a choice of forum. Although the typical plaintiff lawyer rarely views the protection afforded to medical records as crucial in choosing a forum, his or her choice will nonetheless decide the scope of protection.

In federal-question cases—and in cases involving claims under both federal and state law—federal courts apply the federal common law on privilege to the entire case. However, federal courts sitting in pure diversity cases, as well as state courts, apply the pertinent state privilege laws.[1]

Mental health records

Protection of mental health records varies, particularly because it is often decided by trial judges and magistrates handling discovery. Almost all courts require disclosure of mental health records when a plaintiff claims intentional infliction of emotional distress, asserts damages from a specific psychological symptom or condition, or plans to offer the testimony of a treating psychotherapist at trial. Where the injury is less specific, such as a "garden variety" claim for pain and suffering or generalized humiliation or distress, courts are more likely to protect the privacy of mental health records.

In *Jaffee v. Redmond*, the U.S. Supreme Court recognized a privilege for communications between a patient and psychotherapist (including licensed psychologists, psychiatrists, and social workers) for purposes of treatment.[2] Since then, courts have disagreed about when and how a plaintiff may waive this privilege.

Generally, theories of waiver can be divided into "broad" and "narrow" views. Most courts have adopted the broad view that a plaintiff who puts the state of his or her mental health at issue in a case waives the psychotherapist-patient privilege.[3] But courts have not reached consensus about exactly what types of injuries and requested relief put the plaintiff's mental state at issue.

A few courts have held that even a "garden variety" claim of emotional distress damages waives the privilege. But many other courts have held that a garden-variety claim for emotional dis-

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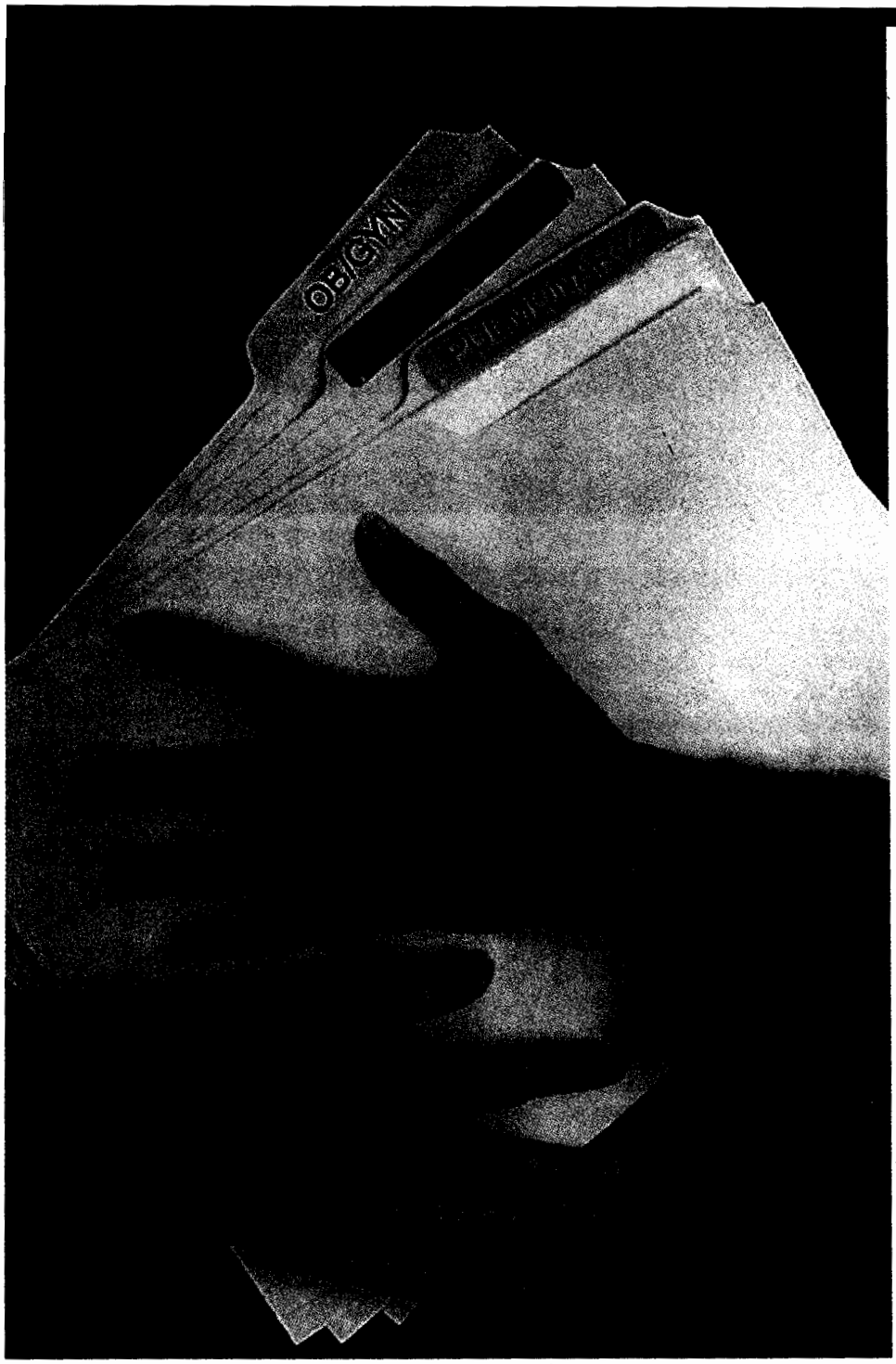

tress damages does not do so.

Garden-variety claims have been characterized as those "incidental" to, or the "simple or usual" result of, discriminatory treatment—including emotional pain and suffering, inconvenience, and mental anguish. These harms are distinguished from psychological disorders or their symptoms or conditions. Extreme emotional distress usually falls outside the garden-variety category, so that filing a distinct claim for intentional infliction of emotional distress will waive a plaintiff's privilege under the broad view. A court is also more likely to deem the privilege waived when the plaintiff intends to call his or her psychotherapist as a trial witness.[4]

A few courts have adopted the narrow view of waiver, which holds that a plaintiff must do more than put his or her mental state at issue to waive the privilege: A waiver occurs only if the plaintiff either seeks to offer the psychotherapist's testimony to support a claim for emotional damages, or testifies about communications with the therapist.[5] In other words, a plaintiff must make affirmative use of privileged communications to waive the privilege.

In persuading a court to accept this view, the plaintiff lawyer should stress that the defense has less intrusive ways to challenge the claim of mental or emotional injury, including cross-examining the plaintiff about other stressors in his or her life, citing treatment dates before the alleged wrongdoing to undermine causation, and obtaining testimony from lay witnesses concerning the plaintiff's behavior.[6]

Predicting which theory of waiver a court will adopt is difficult. Because magistrate judges managing discovery decide many privilege issues, there may be little uniformity even within a single jurisdiction. Even when a court adopts the broad view of waiver, the plaintiff lawyer should argue for the more limited view of broad waiver.

Moreover, a plaintiff always has some control over access to psychological records. Although the privacy of these records may not be a compelling reason to forgo a claim for more than garden-variety emotional damages, plaintiff lawyers can consider crafting the complaint to avoid exposing the records to discovery.

In *Santelli v. Electro-Motive*, for instance, the plaintiff defeated a motion to compel production of her psychotherapy, alcohol and drug treatment, and HIV testing records by limiting her claim for damages to the "negative emotions" she experienced from her employer's conduct, as opposed to claiming damages for specific psychological disorders.[7]

The lawyer should also pay close attention to the language describing the categories of relief available under relevant law. Under the District of Columbia Human Rights Act, for example, a plaintiff may recover for "embarrassment, humiliation, and indignity." One court has allowed a plaintiff to pursue such relief without waiving her privilege, under the theory that these damages differ from damages for emotional distress.[8]

If a plaintiff does not prevail on the

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privilege issue, his or her lawyer should use common discovery techniques, such as relevancy arguments, to limit the scope of the employer's discovery. For instance, some courts limit the time frame for discovery of mental health records: Depending on the case facts, a court may limit discovery to the period of employment or to a period of years before the events giving rise to the lawsuit.

In *Fox v. Gates Corp.*, for example, the plaintiff claimed that the emotional distress she suffered because of the defendant's conduct had ceased by the time she sought counseling for an unrelated event. A district court judge denied discovery of the psychological records related to that event because the plaintiff had sought emotional distress damages only through a certain, earlier date.[9] This may be an effective strategy for plaintiffs who are participating in ongoing psychological treatment and may not want their relationships with current therapists made public.

A plaintiff may also request that a court conduct an in-camera review to limit the discovery and use of psychological records. Many busy judges dislike this option, however, because it may take more time than they want to devote to a discovery dispute. If the court determines that psychological records must be produced, the plaintiff lawyer should almost always request a protective order under Federal Rule of Civil Procedure 26(c) to limit use of the documents.[10]

Medical records

In employment discrimination cases, defendants often seek medical records when a plaintiff claims disability discrimination. Although federal common law does not recognize a physician-patient privilege for medical records, federal courts recognize that patients have a privacy interest in their records. In particular cases, however, this interest may be outweighed by the search for truth in the judicial process.[11]

To promote comity and consistency for health care providers and patients, federal courts also try to keep their findings in line with privilege law in the state where the case is being tried.[12] Most states have statutes protecting the confidentiality of medical records; many of those statutes include a provision—or have been interpreted to include one—authorizing disclosure in cases where the plaintiff puts his or her medical condition at issue.[13] Plaintiff lawyers may use relevancy arguments to limit the time period or the type of medical records that must be produced in these states.

Some courts limit the time frame for discovery of mental health records to the period of employment or to a period of years before the events giving rise to the lawsuit.

For example, where no physical injuries are claimed, courts have been careful to distinguish between medical records that may bear on the plaintiff's psychological condition and those that do not. As one court has stated, "The fact that plaintiff has claimed general emotional distress damages does not give defendant carte blanche to peruse plaintiff's medical history."[14] Thus, a court may limit a defendant's access to medical records that are not related to the plaintiff's emotional or psychological condition.[15]

Relevancy arguments are less successful in disability discrimination cases. Under the Americans with Disabilities Act (ADA), a plaintiff is required to show that he or she is a "qualified person with a disability," an inquiry that turns on the plaintiff's physical or mental impairments.[16] Because plaintiffs' medical conditions are central issues in ADA cases, courts give defendants wide access to their medical histories. One court has stated that, like a medical malpractice plaintiff, an ADA plaintiff waives "all privileges and privacy interests" related to the claim and that "full and complete access" to his or her medical records is required.[17]

Even so, plaintiff lawyers should try to limit discovery requests to the parameters of the plaintiff's alleged disability. For example, where the disability is physical and the plaintiff has not claimed emotional distress damages, his or her psychological records should not be produced without a court order.

In addition, courts have held that when the plaintiff claims that an employer mistakenly "regards" him or her as disabled, medical records are not relevant to the employer's mistaken belief, and discovery should not be allowed.[18]

New privacy law

Because covered providers had until April 2003 or April 2004 (depending on the provider's size) to comply with rules protecting the privacy of medical information under the 1996 Health Insurance Portability and Accountability Act (HIPAA), the act's effect on discovery of medical records is still unclear.[19]

Generally under HIPAA, health care providers may not disclose protected health information except as provided in the rules,[20] which recognize exceptions for disclosures required by law and as part of judicial and administrative proceedings.[21] Although the Seventh Circuit has held that HIPAA does not create a new federal privilege for medical records, the act does specify the minimum procedures for formal discovery of this information.[22]

A health care provider may disclose health information in response to discovery, and without a court order, only upon receiving satisfactory assurance from the requesting party that

- the plaintiff has received notice of the request and had the opportunity to have his or her objections resolved, or
- the disclosure is subject to an adequate protective order.[23]

HIPAA leaves intact state laws protecting the privacy of medical information that are "more stringent" than

HIPAA's standards, while preempting less restrictive ones.[24] Whether litigating in state or federal court, plaintiff lawyers should educate themselves about the evolving interpretations of HIPAA that can be used to limit discovery of a plaintiff's health care information.

Ex parte interviews

One issue that probably has been affected by HIPAA is whether defense counsel can conduct ex parte interviews with treating physicians. Before HIPAA, courts were divided on this issue. Some courts disallowed the practice without the plaintiff's consent, emphasizing the risk that privileged information unrelated to the litigation might be disclosed.[25]

Moreover, the courts worried that a physician who is not trained in the law of privilege is not well equipped to protect privileged information. That physician risks a lawsuit for breach of a plaintiff's confidentiality by talking with defense attorneys.

Other courts have permitted ex parte interviews.[26] In these jurisdictions, it was unclear how active plaintiff lawyers could be in advising the treating physician that he or she was not required to speak with defense counsel outside of formal discovery.

Two courts have now held that HIPAA bans ex parte interviews.[27] Accordingly, although the cases are still unfolding, plaintiffs should invoke HIPAA to prevent ex parte interviews. Presumably, under the statute, plaintiff lawyers may also remind treating physicians of their obligation not to disclose protected medical information without an authorization that complies with HIPAA. Thus, it is likely that HIPAA has ended the practice of ex parte interviews of treating physicians without the plaintiff's formal authorization.

If a prohibited interview does occur, courts have a remedial option. The court may bar a defendant's attempt to introduce, either by affidavit or testimony, damaging evidence obtained during the interview. Sanctions or disqualification of counsel are also possibilities in cases where there has been a deliberate violation of a known prohibition and,

perhaps, some form of dishonesty.

An ex parte interview that is conducted in violation of a protective order may result in a contempt citation.[28]

Sexual misconduct claims

Federal Rule of Evidence 412(b)(2) sets forth an exception to discovery regarding sexual conduct; this exception applies to civil cases, including sexual harassment cases. A plaintiff's medical records may include documentation regarding his or her sexual history or conduct, particularly if treatment was sought in that area. Under the rule, evidence regarding sexual behavior is generally inadmissible in employment discrimination cases. Such evidence is admissible only if it is relevant and probative to both the issue of a hostile work environment and damages:

> 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.[29]

The advisory committee's notes explain that while Rule 412 governs the admissibility of such evidence at trial, it should also be considered during the discovery process:

> In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to [Federal Rule of Civil Procedure] 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 [shows] that the evidence . . . 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-workplace conduct will usually be irrelevant.[30]

The principle that emerges from the developing case law is that Rule 412 ordinarily will not bar evidence of a plaintiff's sexual conduct in the workplace or

with the alleged harassers. However, evidence of a plaintiff's sexual activities with people unconnected to the workplace will generally be excluded.[31]

The application of Rule 412 to evidence of the plaintiff's actions with respect to others in the workplace who are not accused harassers remains unsettled. In *Howard v. Historic Tours of America,* the plaintiff prevailed when the court prohibited discovery of the plaintiff's sexual affairs with nonharassing coworkers; evidence of sexual conduct outside the claim in question could not be introduced.[32]

Plaintiff lawyers are less likely to be able to stop discovery if the evidence the defendant seeks is not clearly related to sexual conduct. For example, in *Janopoulos v. Harvey L. Walner & Associates,* the plaintiff lost a motion in limine under Rule 412 to exclude mention of her marital status. The court held that Rule 412 did not apply because one's marital status is not "sexual behavior."[33]

In *Barta v. City & County of Honolulu,* the court declined to apply Rule 412 to the identities of the plaintiff's social acquaintances because they might have information relevant to damages or defenses. However, the court prohibited defendants from inquiring into whether the plaintiff engaged in sexual relations or conduct with those persons.[34]

Rule 412 requires a balancing test to determine whether the probative value of the sexual-conduct evidence outweighs its harm and potential for prejudice.[35] In *Giron v. Corrections Corp. of America,* in which a former prison inmate alleged that a guard had raped her, the court applied Rule 412 to bar discovery of the plaintiff's prior sexual partners.[36]

Similarly, the court in *Robinson v. Canon U.S.A.* barred discovery of any extramarital affairs the plaintiff might have had with coworkers or customers, rejecting the defendant's argument that these relationships might constitute alternative causes of the plaintiff's emotional distress.[37]

The disclosure of medical records—including mental health records—is unsettling for plaintiffs in employment discrimination cases. Although a plaintiff in a disability case or one who seeks damages for emotional distress may be forced to disclose parts of his or her medical history, that disclosure can be limited.

Well-prepared plaintiff lawyers can prevent or minimize problems by strategically choosing the relief to be stated in the complaint and insisting on protective orders, which are almost always granted by the courts. ■

Notes

1. FED. R. EVID. 501; Hancock v. Hobbs, 967 F.2d 462, 466-67 (11th Cir. 1992).

2. 518 U.S. 1 (1996). Lower courts have subsequently held that this privilege does not protect evidence of the fact or dates of treatments, the identity of the provider, or billing information. *See, e.g.,* Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 557 (N.D. Ga. 2001); Fox v. Gates Corp., 179 F.R.D. 303, 305, 307 (D. Colo. 1998); Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 230 (D. Mass. 1997).

3. *See, e.g., Stevenson,* 201 F.R.D. 551, 557; Ruhlmann v. Ulster County Dep't of Soc. Servs., 194 F.R.D. 445, 450 (N.D.N.Y. 2000); Jackson v. Chubb Corp., 193 F.R.D. 216, 225 n.8 (D.N.J. 2000).

4. *Stevenson,* 201 F.R.D. 551, 557; *Ruhlmann,* 194 F.R.D. 445, 449 n.6; Lahr v. Fulbright & Jaworski, 164 F.R.D. 204, 210-11 (N.D. Tex. 1996). *See also* Javeed v. Covenant Med. Ctr., Inc., 218 F.R.D. 178, 179-80 (N.D. Iowa 2001).

5. *See Vanderbilt,* 174 F.R.D. 225, 230.

6. *Cf.* Fitzgerald v. Cassil, 216 F.R.D. 632, 638-39 (N.D. Cal. 2003).

7. 188 F.R.D. 306, 307-10 (N.D. Ill. 1999).

8. *See* Guidelines for Payment of Compensatory Damages, Civil Penalties, and Attorney's Fees Under the Human Rights Act of 1977, D.C. Mun. Regs., tit. 4, §211.1 (2004); Hannon v. Catholic Univ. of Am., No. 1428-97 (D.C. Super. Ct. 1998).

9. 179 F.R.D. 303, 306-07. *See also* Kirchner v. Mitsui & Co., 184 F.R.D. 124, 129 (M.D. Tenn. 1998); Vasconcellos v. Cybex Int'l, Inc., 962 F. Supp. 701, 709 (D. Md. 1997); Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997).

10. *See* Fritch v. City of Chula Vista, 196 F.R.D. 562, 570 (S.D. Cal. 1999).

11. *See Fox,* 179 F.R.D. 303, 305.

12. *See, e.g.,* Mem'l Hosp. v. Shadur, 664 F.2d 1058, 1061-62 (7th Cir. 1981).

13. *See, e.g.,* D.C. Stat. §14-307 (2001); Nelson v. United States, 649 A.2d 301, 308 (D.C. 1994); N.Y. C.P.L.R. 4504 (McKinney 2004); Dillenbeck v. Hess, 536 N.E.2d 1126, 1131-34 (N.Y. 1989).

14. Gatewood v. Stone Container Corp., 170 F.R.D. 455, 460 (S.D. Iowa 1996).

15. *See, e.g.,* Simpson v. Univ. of Colo., 220 F.R.D. 354, 365 (D. Colo. 2004); *Fritch,* 196 F.R.D. 562, 570; *Fitzgerald,* 216 F.R.D. 632, 634.

16. 42 U.S.C.A. §§12102(2), 12112(a)

(West 2004).

17. Butler v. Burroughs Wellcome, Inc., 920 F. Supp. 90, 92 (E.D.N.C. 1996).

18. *Ruhlmann*, 194 F.R.D. 445, 448; Haiman v. Village of Fox Lake, 79 F. Supp. 2d 949, 954 (N.D. Ill. 2000); *Sarko*, 170 F.R.D. 127, 130.

19. 42 U.S.C.A. §1320d-1320d-8 (West 2004); 45 C.F.R. §164.534 (2004). *See also* Craig D. Tindall, *How to Obtain Medical Records After HIPAA*, TRIAL, June 2004, at 58.

20. 45 C.F.R. §164.502(a) (West 2004).

21. *Id.* §164.512(a), (e) (West 2004).

22. Northwestern Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 926 (7th Cir. 2004).

23. 45 C.F.R. §164.512(e)(1)(ii) (West 2004).

24. 42 U.S.C. §1320d-7 (1996); 45 C.F.R. §160.203 (West 2004).

25. *See, e.g.*, Benally v. United States, 216 F.R.D. 478, 480-81 (D. Ariz. 2003); Doe v. City of Chicago, No. 96 C 5739, 1998 WL 386352, at *1 (N.D. Ill. July 7, 1998); Horner v. Rowan Cos., 153 F.R.D. 597, 602 (S.D. Tex. 1994).

26. *See* Stewart v. Women in Cmty. Serv., Inc., No. CV-N-97-234-DWH (PHA), 1998 WL 777997, at *5 (D. Nev. Oct. 7, 1998).

27. Law v. Zuckerman, 307 F. Supp. 2d 705 (D. Md. 2004); Crenshaw v. MONY Life Ins. Co., No. Civ. 02-CV-2108 (LAB/RBB), 2004 WL 1149351, at *13 (S.D. Cal. Apr. 27, 2004).

28. *Law*, 307 F. Supp. 2d 705, 711-12; *Doe*, No. 96 C 5739, 1998 WL 386352, at *8 (barring use of psychotherapist's affidavit as a result of ex parte communication with defense attorney); *Horner*, 153 F.R.D. 597, 602 (substitution of counsel and sanctions as possible remedies); Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 971 (Ill. App. Ct. 1986) (upholding contempt citation for violation of protective order).

29. FED. R. EVID. 412(b)(2). *See* Dufresne v. J.D. Fields & Co., 85 Fair Empl. Prac. Cas. (BNA) 25 (E.D. La. 2001).

30. FED. R. EVID. 412 advisory committee's note (1994). The courts are split on whether Rule 412 applies in the discovery context. *Compare* Fitzpatrick v. QVC, Inc., No. 98-CV-3815, 1999 WL 1215577, at *3 (E.D. Pa. Dec. 7, 1999) (denying discovery of plaintiff's sexual orientation and relationships) *with* Muniu v. Amboy Neighborhood Ctr., Inc., No. 98CV2211FBJMA, 2001 WL 370226 (E.D.N.Y. Apr. 11, 2001) (allowing discovery on grounds that Rule 412 applies only to admissibility, not discoverability).

31. Barta v. City & County of Honolulu, 169 F.R.D. 132, 137 (D. Haw. 1996).

32. 177 F.R.D. 48 (D.D.C. 1997).

33. No. 93 C 5176, 1995 WL 107170 (N.D. Ill. Mar. 7, 1995). The court ultimately held that evidence of the plaintiff's marital history was not admissible based on Federal Rules 401 and 402.

34. 169 F.R.D. 132, 137 (D. Haw. 1996).

35. *See* Herchenroeder v. Johns Hopkins Univ., 171 F.R.D. 179, 181-82 (D. Md. 1997); Sanchez v. Zabihi, 166 F.R.D. 500, 501-02 (D.N.M. 1996).

36. 981 F. Supp. 1406 (D.N.M. 1997).

37. 82 Fair Empl. Prac. Cas. (BNA) 1129 (W.D. Mo. 2000).