Sexual HARASSMENT in the Workplace

High-profile sexual harassment cases in the 1990s—such as the Tailhook scandal—became the call to arms for civil rights activists decrying sexual harassment in the workplace. In 1998, one case showed how courts can help balance the power in favor of sexual harassment victims when a California jury returned a $7.1 million punitive damages verdict against the world's largest law firm at the time.[1]

While the Equal Employment Opportunity Commission reports that the number of sexual harassment charges filed has declined from 15,889 in 1997 to 7,256 in 2013,[2] sexual harassment still comprises a significant percentage of all civil rights claims. For example, the California Department of Fair Employment & Housing published statistics showing that sexual harassment claims make up nearly 22 percent of the total claims made to the agency in 2009.[3]

When taking on one of these claims, you will have to start gathering evidence from the initial client meeting, be prepared to weed out the bad facts that can harm your client, and learn ways to confront and rebut typical defense arguments.

Many sexual harassment victims have been harassed or abused previously. A psychological expert can help you understand your client's situation by evaluating and explaining his or her mindset and background. Often, sexual harassment victims wait to come forward, usually out of fear of losing their jobs, and this is one of the primary hurdles you must overcome. Victims' behaviors, attitudes, and reluctance to complain immediately may be explained by Stockholm syndrome, which describes a situation in which the victim bonds with or identifies with the abuser. Four situations lay the foundation for Stockholm syndrome:

> the presence of a perceived threat to one's physical or psychological survival and the belief that the abuser would carry out the threat; the presence of a perceived small kindness from the abuser to the victim; isolation from perspectives other than those of the abuser; [and] the perceived inability to escape the situation.[4]

Explaining the victim's emotional distress may require significant time and effort, and you may need to hire an expert depending on the nature and extent of the injury. For example, you might want to retain a forensic psychiatrist or psychologist to explain why your client delayed reporting the harassment. The expert can offer reasons

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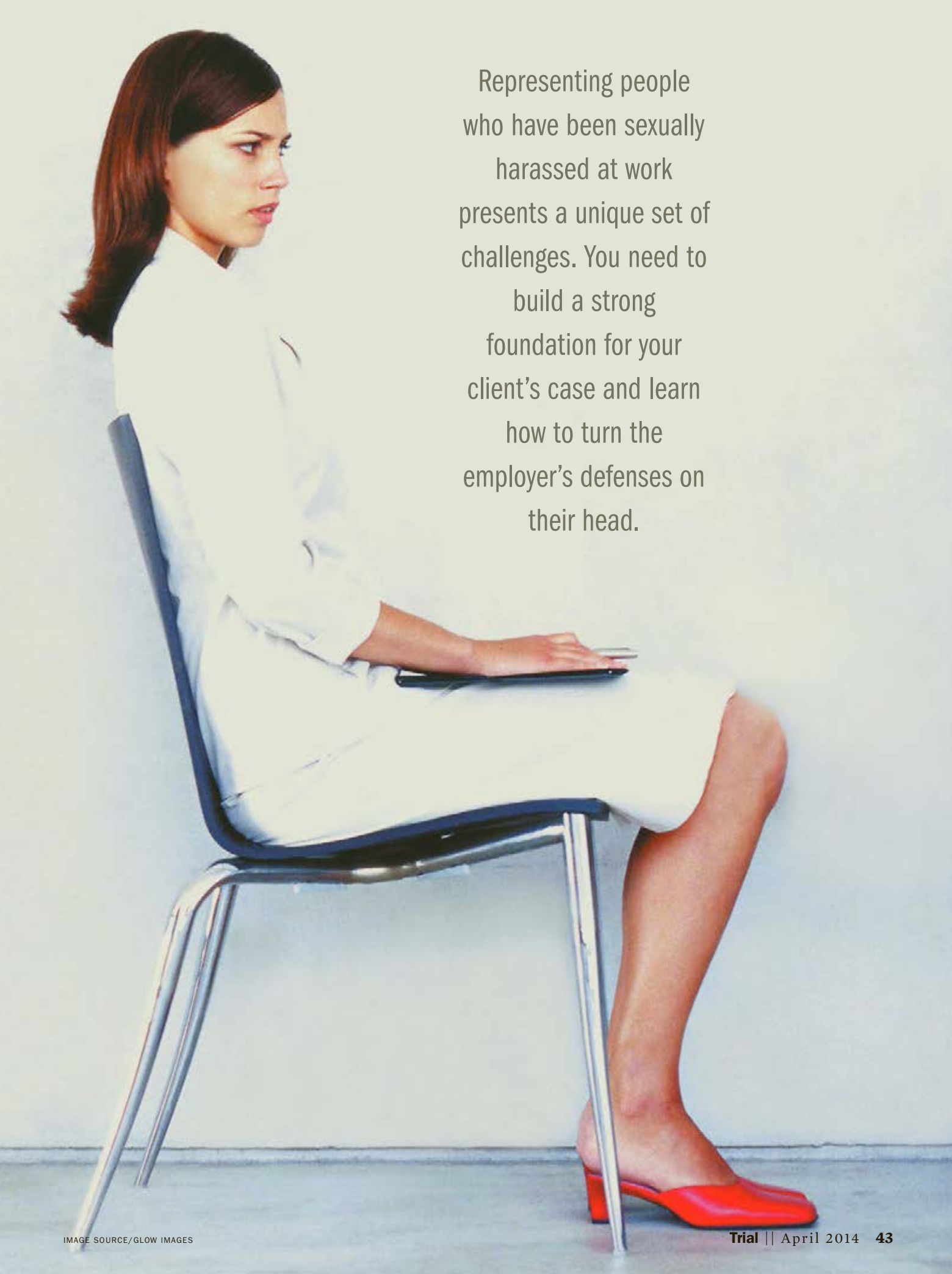


Representing people who have been sexually harassed at work presents a unique set of challenges. You need to build a strong foundation for your client's case and learn how to turn the employer's defenses on their head.

IMAGE SOURCE/GLOW IMAGES

for the delay, such as fear of reprisal; shame; a sense of being responsible for what happened; reluctance to confront perpetrators in any venue, including a courtroom; trauma that may preclude recognition that a problem exists; poor self-esteem; and fear regarding loss of income, status, and employment.

Employer investigation. Sometimes when you send a demand letter or bring harassment to the employer's attention before litigation, the employer will investigate your client's allegations. If this happens, you should set parameters for the investigation and your client's interview, especially because most investigators work for the employers, which can undermine their objectivity. Try placing limits on the topics that the company can question your client about. Insist that any interview with your client is at your office while you are present. Restrict the interview's scope to the harassing conduct so that the employer does not get information about your client's emotional distress or medical conditions before litigation. Consider limiting the interview's length and prohibiting the use of tape recorders to protect fragile clients.

Protect the identities of witnesses who might be subjected to retaliatory conduct by the employer. When you have witnesses who support your client's allegations, obtain their statements before the investigator so that the investigation does not taint the evidence. If the investigation finds that harassment occurred, that goes a long way toward settling your case. Finally, try to ensure that your client gets a copy of the investigation's results.

Sexual desire need not be proved. In *Oncale v. Sundowner Offshore Services, Inc.*, the U.S. Supreme Court ruled that sexual desire is not an element of a sexual harassment case.[5] The conduct at issue does not have to be sexual to create a hostile work environment based on sex, and the conduct can be a mixture of sexual and nonsexual conduct.[6] Keep this in mind during your case investigation and throughout litigation.

IMAGE SOURCE/GLOW IMAGES

In one decision, a California appellate court went to the opposite end of the spectrum and upheld summary judgment in favor of the defendant because the plaintiff could not prove the harasser had sexual desire for the victim.[7] The California legislature recently passed a law that overturned this anomalous and misguided opinion and stated that "sexually harassing conduct need not be motivated by sexual desire."[8]

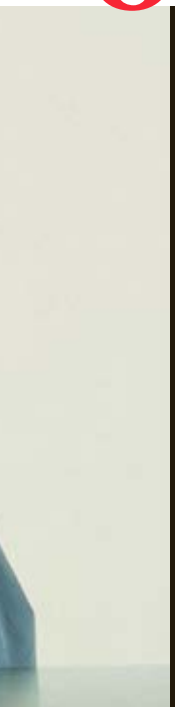
Assemble the Building Blocks

Trial lawyers face many challenges in sexual harassment cases due to the sensitive nature of the alleged conduct and the trauma it inflicts on our clients. When a client first comes through your door, a sympathetic ear is important. But the initial client meeting is also an opportunity to start gathering the evidence you will need to build a strong case.

Documents and information. When you first meet with the client, request copies of all employment-related documents, including pay stubs, employee handbooks, and the sexual harassment policy and other policies. Advise your client to preserve any pictures, cellphone records, text messages, emails, IMs, cards, handwritten notes, and journals that might document the harassing conduct. Find out what social media accounts your client has and whether they contain information that might be relevant. Make sure he or she preserves that information.

Because many sexual harassment victims need psychological counseling, you should obtain any medical records from treating therapists and psychologists. These records bolster your client's emotional distress claim.

Conducting a background check of the harasser can reveal other instances of abusive conduct or sexual harassment, either at the company or at a prior employer that the defendant company either knew about or should have known about. Also investigate the defendant to see if other employees have filed sexual harassment complaints.



Often, SEXUAL HARASSMENT VICTIMS WAIT TO COME FORWARD, USUALLY OUT OF FEAR OF LOSING THEIR JOBS, AND THIS IS ONE OF THE PRIMARY HURDLES YOU MUST OVERCOME.

Witnesses. Gathering witness statements is critical in a sexual harassment case. Obtaining statements from coworkers or other witnesses as early as possible helps prevent an employer from locking witnesses into statements that distort the truth. This transforms your "he said, she said" case into a pattern and practice of harassing conduct.

If your client was fired, demand a copy of any documents or records from the state agency that provides unemployment benefits to employees.[9] These documents are usually created before litigation begins, and employers may make contradictory statements in conjunction with these unemployment appeals hearings, which can help you show that the employer had conflicting excuses for termination. In one case, an employer claimed in litigation that the employee had quit, but during the unemployment proceedings, the employer contested unemployment, indicating that the employee was terminated for cause.

Finally, press hard in discovery for the names of other potential victims or for prior incidents of sexual harassment at the company. Employers often hide this information under the guise that disclosing it would violate the privacy rights of third parties. This is a clue that other victims are out there, and if you locate and depose them, they can support your client's punitive damages claim.

Probe for bad facts. Unearthing bad facts is almost as important as discovering good ones. Thoroughly question your client about his or her workplace conduct, including any relationships or sexual conduct that occurred at work or with other employees. Find out how your client responded to the harassment: Did he or she complain to management in writing or orally, and when? Recent focus group data confirms that jurors expect harassment victims to speak up about the harassing conduct.[10] A failure to put an employer on notice of the harassment may provide a defense to the case.[11] However, this defense is not available if the victim suffered an adverse job consequence as a result of the harasser's actions.[12] Also ask your client whether the sexual conduct was consensual at any time.

Once you have clear answers to those inquiries, ask whether your client has any prior criminal history, instances of domestic abuse, or bankruptcies.[13] Knowing as much as possible before litigation enables you to prepare in advance for defense arguments that attack your client's history or character, and this will be invaluable as you move ahead with the case.

The Usual Defenses

Although both federal and state sexual harassment laws and case law have made the legal landscape for sexual harassment cases more favorable to plaintiffs since the early 1990s, defendants continue to use the same defenses, perhaps with certain nuances. They vilify the plaintiffs, blaming them for their attackers' assaults, and try to paint female sexual harassment victims as promiscuous women who invited the conduct. Here are predictable defenses and ways you can combat them.

The plaintiff welcomed the conduct. A plaintiff must establish that the harassing conduct was unwanted or unwelcome; he or she did not solicit or invite the conduct and regarded it as undesirable or offensive.[14] Defendants typically argue the plaintiff welcomed the conduct by having amorous designs on the harasser, or the victim's behavior suggests that he or she was not offended or was using sex to get ahead in the workplace.

To support this defense, employers typically search through Facebook, Twitter, and other social media sites to discover personal information that can be twisted, taken out of context, and used against your client. One way to stifle this fishing expedition is to instruct your client to download and backup his or her Facebook page and then close the account.[15]

It is important to preserve the evidence—a court may later order its production, and you want to avoid being accused of spoliation. In one case we worked on, an attorney was sanctioned a significant fee for spoliation of Facebook evidence. But once your client's Facebook page is deactivated, you can make a compelling argument that the defendant is not entitled to this evidence.

Numerous courts have prevented employers from reaching too far into the victims' private lives, holding that a plaintiff's sexual activities outside the workplace have no bearing on the question of unwelcomeness.[16]

For example, evidence that a plaintiff is "sexually insatiable, engaging in multiple affairs with married men, is a lesbian, and is suffering from a sexually transmitted disease" should be precluded from being admitted under Federal Rule of Evidence 412.[17] Some courts have precluded

discovery regarding marital relations.[18]

You can also seek to exclude evidence of the client's sexual conduct with people other than the harasser by claiming undue prejudice under Rule 403. The argument is that it will unduly prejudice the jury into thinking that the conduct is welcome. Courts typically allow distinctions between conduct that is welcome and conduct that is not.

Mental instability. How many times have defendants demanded and conducted defense medical/psychological exams to attempt to establish that your client is a malingerer or is not correctly perceiving reality? These exams drive up litigation costs (because you end up hiring your own expert), and they create distractions in the lawsuit.

Federal Rule of Civil Procedure 35 permits a party to conduct a mental examination for "good cause" where the plaintiff's mental condition is "in controversy." Defendants argue that an emotional distress claim satisfies these requirements. However, many courts have rejected this approach, ruling that a claim for emotional distress damages, by itself, is not sufficient to place the plaintiff's mental condition in controversy for purposes of Rule 35(a).[19] Ordering plaintiffs to undergo defense medical exams merely because they have asserted an emotional distress claim would "not only run afoul of FRCP 35(a), but it would also subject innumerable plaintiffs to mandatory yet unnecessary psychiatric examinations."[20]

Other courts have distinguished between "garden variety" emotional distress claims, such as anxiety and grief, and the types of claims that might justify a compulsory psychiatric examination.[21] At least one federal court has concluded "there is a difference between more serious emotional distress that might be diagnosed and treated as a disorder by a psychiatrist and the less serious grief, anxiety, anger, and frustration that everyone experiences when bad things happen. Plaintiffs may recover damages for either type of distress."[22]

Most courts

> will not require a plaintiff to submit to a medical examination unless, in addition to a claim for emotional distress damages, one or more of the following factors is also present: [the] plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; [the] plaintiff has alleged a specific mental or psychiatric injury or disorder; [the] plaintiff has claimed unusually severe emotional distress; [the] plaintiff has offered expert testimony in support of [his or] her claim for emotional distress damages; and [the] plaintiff concedes that [his or] her mental condition is 'in controversy' within the meaning of [Rule] 35(a).[23]

Digging for gold. This defense fits right into the tort "reform" rubric: Your client is seeking a big payday or is litigious. Whether your client has filed other unrelated lawsuits or sexual harassment claims before is irrelevant to the current litigation. Such evidence usually can be excluded as unfair character evidence or because the prejudicial value far outweighs the probative value.[24]

Employers have endeavored to come up with myriad defenses to sexual harassment cases that contort the facts to the detriment and even embarrassment of victims. But fierce advocacy and thorough preparation can rebuff these defenses and make for strong cases that advance justice for employees subjected to sexual harassment. T

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Notes

1. *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510, 514 (Cal. App. 1 Dist. 1998).
2. U.S. Equal Empl. Opportunity Commn., *EEOC & FEPAs Combined: FY1997–FY2011*, www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm; U.S. Equal Empl. Opportunity Commn., *Sexual Harassment Charges FY 2010–FY 2013*, www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.
3. *See* Phoebe P. Liu, Senior Staff Counsel, Cal. Dept. Fair Empl. & Hous. Webinar, slide 2 www.dfeh.ca.gov/res/docs/ppt/SexHarassWebinarPPL.ppt.
4. Joseph M. Carver, *Love and Stockholm Syndrome: The Mystery of Loving an Abuser*, Counselling Resource, www.counsellingresource.com/lib/therapy/self-help/stockholm.
5. 523 U.S. 75, 80–81 (1998).
6. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463–64 (9th Cir. 1994); *Miller v. Dept. of Corrects.*, 115 P.3d 77, 87 (Cal. 2005).
7. *Kelley v Conco Cos.*, 126 Cal. Rptr. 3d 651 (Cal. App. 1 Dist. 2011); *but see Taylor v. Nabors Drilling USA, LP*, 166 Cal. Rptr. 3d 676, 686 (Cal. App 2 Dist. 2014).
8. Cal. Govt. Code Ann. §12940(j)(4)(C) (West 2014).
9. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–48 (2000).
10. We recently conducted a focus group in a sexual harassment case where the mock jurors questioned why the plaintiff waited so long to complain. Once we explained that the client had a chronic condition and needed her medical insurance, the jurors were much more sympathetic to her waiting to report the harassment.
11. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 764–65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806–07 (1998) (employers are strictly liable for harassment by supervisors unless the employee failed to use the employer's reasonable and effective complaint procedures).
12. *See Burlington*, 524 U.S. at 766.
13. Employers often use these types of events to argue that your client had alternative stressors that were the real cause of his or her emotional distress.
14. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986); *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 997–98 (9th Cir.

MORE ON SEXUAL HARASSMENT LITIGATION

Visit the Web pages below for additional information.

AAJ SECTION

Employment Rights
www.justice.org/sections

LITIGATION PACKET

Sex Discrimination and Sexual Harassment
www.justice.org/litigationpackets

2010); *Paraohao v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1359 (S.D. Fla. 2002).

15. *See* My SK Mezanul Haque, Technology Guide.Org, *How to Backup Your Complete Facebook Profile,* www.mytechguide.org/8578/backup-complete-facebook-profile.
16. *See e.g. Wolak v. Spucci,* 217 F.3d 157, 159–61 (2d Cir. 2000); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 962–63 (8th Cir. 1993).
17. *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 855–56 (1st Cir. 1998); *but see Wilson v. City of Des Moines,* 442 F.3d 637, 639 & 643 (8th Cir. 2006) (statements in the workplace regarding conduct outside the workplace are admissible).
18. *See e.g. Tylo v. Super. Ct.*, 64 Cal. Rptr. 2d 731 (Cal. App. 2 Dist. 1997).
19. *See e.g. Ford v. Contra Costa Co.*, 179 F.R.D. 579 (N.D. Cal. 1998); *Turner v. Imperial Stores,* 161 F.R.D. 89 (S.D. Cal. 1995); *Johnson v. Peake,* 273 F.R.D. 411, 412 (W.D. Tenn. 2009).
20. *Ford,* 179 F.R.D. at 580.
21. *See e.g. Turner*, 161 F.R.D. 89; *see also EEOC v. Serramonte*, 237 F.R.D. 220, 224 (N.D. Cal. 2006). Be careful about stipulations relating to "garden variety" emotional distress. Some defendants have used such stipulations to limit damages through motions in limine. We suggest not using the term when stipulating that your client is not seeking extraordinary emotional distress damages or that emotional distress is no longer in controversy.
22. *Ricks v. Abbott Labs.*, 198 F.R.D. 647, 649 (D. Md. 2001); *see also Johnson,* 273 F.R.D. at 413.
23. *Fox v. Gates Corp.*, 179 F.R.D. 303, 307 (D. Colo. 1998); *Johnson*, 273 F.R.D. at 412.
24. In general, information about lawsuit settlements is excludable as unduly prejudicial. *See e.g. Hose v. Chi. N.W. Transp. Co.*, 70 F.3d 968, 976 (8th Cir. 1995). In addition, the Jury Bias Model, outlined by David Wenner and Gregory Cusimano, provides ample examples of how to combat this typical defense tactic. *See* www.jurybias.com.