

ROWE v. PACIFIC QUAD, INC.

Trial Advocacy Problems

Defendant Version

Sixth Edition



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INTRODUCTION

The problems in this book are intended to simulate realistic courtroom situations. Advance preparation is essential to their successful utilization as instructional materials.

All years in these materials are stated in the following form:

YR-0 indicates the actual year in which the case is being tried (i.e., the present year);

YR-1 indicates the next preceding year (please use the actual year);

YR-2 indicates the second preceding year (please use the actual year), etc.

DIRECT, CROSS-, AND REDIRECT EXAMINATION

Problem 1. Alice Rowe

Assume that the case is in trial and Alice Rowe has been called as the plaintiff's first witness.

- a) On behalf of the plaintiff, prepare Ms. Rowe for trial.
- b) On behalf of the plaintiff, conduct a direct examination of Ms. Rowe.
- c) On behalf of the defendant, conduct a cross-examination of Ms. Rowe.
- d) On behalf of the plaintiff, conduct any necessary redirect.

Problem 2. Gloria Warner

Assume that the case is in trial and the plaintiff calls Gloria Warner to testify.

- a) On behalf of the plaintiff, prepare Ms. Warner for trial.
- b) On behalf of the plaintiff, conduct a direct examination of Ms. Warner.
- c) On behalf of the defendant, conduct a cross-examination of Ms. Warner.
- d) On behalf of the plaintiff, conduct any necessary redirect.

Problem 3. Stanley Schmit

Assume that the case is in trial and Stanley Schmit has been called as the defendant's first witness.

- a) On behalf of the defendant, prepare Mr. Schmit for trial.
- b) On behalf of the defendant, conduct a direct examination of Mr. Schmit.
- c) On behalf of the plaintiff, conduct a cross-examination of Mr. Schmit.
- d) On behalf of the defendant, conduct any necessary redirect.

Problem 4. John Walsh

Assume that the case is in trial and the defendant has called John Walsh to testify.

- a) On behalf of the defendant, prepare Mr. Walsh for trial.
- b) On behalf of the defendant, conduct a direct examination of Mr. Walsh.
- c) On behalf of the plaintiff, conduct a cross-examination of Mr. Walsh.
- d) On behalf of the defendant, conduct any necessary redirect.

IMPEACHMENT AND REHABILITATION OF WITNESSES

Problem 5. Letter from Walsh to Cunningham, April 2, YR-1

- a) Assume that John Walsh has testified on direct examination and in his deposition, with no reference to his letter of April 2, YR-1, to Annie Cunningham. For the plaintiff, use the letter to impeach his testimony.
- b) On behalf of the defendant, oppose the use of the letter and conduct a redirect examination to rehabilitate any impeachment.

Problem 6. Letter from Walsh to Rowe, February 16, YR-1

Conduct the examinations described in Problem 5, using both the April 2, YR-1, letter from Walsh to Cunningham and the February 16, YR-1, letter from Walsh to Rowe.

- a) Represent the plaintiff.
- b) Represent the defendant.

Problem 7. Letter from Mills to Jacobs, July 22, YR-2

Assume that Anna Mills has testified on direct examination as she did in her deposition, except that she made no mention of the July 22, YR-2, letter to Saul Jacobs.

- a) On behalf of the defendant, conduct a cross-examination of Mills using the letter.
- b) On behalf of the plaintiff, oppose the use of the letter and conduct a redirect examination rehabilitating Mills.

Problem 8. Letter from Mills to Jacobs, July 22, YR-2

Assume that Anna Mills has testified on direct examination as she did in her deposition, including her explanation given there of the July 22, YR-2, letter to Jacobs.

- a) On behalf of the defendant, conduct a cross-examination of Mills using the letter.

- b) On behalf of the plaintiff, oppose the use of the letter and conduct a redirect examination rehabilitating Mills.

Problem 9. Letter from Mills to Jacobs, July 22, YR-2

Assume that Anna Mills has testified on direct examination as she did in her deposition, but has added the following:

Q: What did you mean by the phrase “the possibility of another misunderstood encounter with a man is very real”?

A: To fully explain that, you must understand that one of the most disheartening phenomena among victims of sexual abuse is the tendency to blame themselves. Not only is the victim assaulted, but the harm is then exacerbated by her assaulting herself, feeling responsible for what happened. Overcoming this misperception is at the core of our therapy. In Alice’s case, she, like many other women in her position, felt responsible for what Stanley Schmit did to her. She felt she should have never taken the job, or she should have quit the first day. She understood her remaining there as an invitation to be abused. I consider this a terrible misunderstanding. Despite all our progress in therapy, I was afraid that if she were again abused or harassed, she would again blame herself—that she would again misunderstand. I wanted to alert Saul Jacobs to this concern.

- a) On behalf of the defendant, conduct a cross-examination of Mills using the letter.
- b) On behalf of the plaintiff, conduct a redirect examination rehabilitating Mills.

Problem 10. Pre-Complaint Questionnaire, March 23, YR-1, and Cunningham Note to File, May 3, YR-1

Assume that Alice Rowe has testified as she did in her deposition regarding the details of Schmit’s alleged harassment.

- a) For the defendant, conduct a cross-examination using the March 23, YR-1, pre-complaint questionnaire and the May 3, YR-1, Cunningham note to file.
- b) For the plaintiff, oppose the use of documents and rehabilitate Rowe on redirect examination.

Problem 11. Nita State University Complaint Form, October 27, YR-4

Assume that there has been no motion in limine regarding the October 27, YR-4 NSU complaint and

that Alice Rowe testified as she did in her deposition except that she did not refer to the complaint at all.

- a) For the defendant, conduct a cross-examination of Rowe using the complaint form.
- b) For the plaintiff, oppose any questioning regarding the complaint and any use of the complaint form and, if necessary, rehabilitate Ms. Rowe on redirect.

Problem 12. Nita State University Complaint Form, October 27, YR-4

Assume that there has been a motion in limine and the court has ruled in a pretrial order that “the fact that a complaint of sexual harassment was made may be established, but the details of the complaint and its resolution may not be.” Assume Rowe’s direct examination testimony was the same as in Problem 11.

- a) For the defendant, cross-examine Alice Rowe regarding the NSU complaint, making use of the complaint form, while complying with the court’s order.
- b) For the plaintiff, oppose any use of the complaint form and, if necessary, rehabilitate Ms. Rowe.

Problem 13. Nita State University Complaint Form, October 27, YR-4

Assume the same facts as in Problem 12 except that Rowe briefly mentioned the complaint in her direct examination testimony.

- a) For the defendant, cross-examine Alice Rowe regarding the NSU complaint making use of the complaint form, while complying with the court’s order.
- b) For the plaintiff, oppose any use of the complaint form and, if necessary, rehabilitate Ms. Rowe.

ADVERSE EXAMINATION

Problem 14. Pacific Quad, Inc. Personnel List, Resumes, and Emails

- a) On behalf of the plaintiff, conduct an adverse examination of either Stanley Schmit or John Walsh in which you introduce or use as a demonstrative aid the Pacific Quad, Inc. personnel list, Schmit's handwritten notes on applicants' resumes, and/or Schmit's emails to Pacific Quad employees that contain sexual jokes. Be prepared to defend your choices regarding which witness you used and whether you offered the list.
- b) On behalf of the defendant, oppose the offer or use of the documents and conduct an examination of the witness.

USE OF VISUAL AIDS

Problem 15. Diagram of Pacific Quad Office

- a) For the plaintiff, conduct an examination of Alice Rowe in which you either introduce the diagram of the Pacific Quad office or use it as a visual aid.
- b) For the defendant, oppose the offer or use of the diagram and, if the diagram is used or admitted, conduct a cross-examination of the witness in which you diminish its impact.

Problem 16. Chart Listing Requested Damages (Pretrial Conference)

- a) On behalf of the plaintiff, prepare a chart listing your requested damages and disclose at a pretrial conference that you intend to use it in your final argument.
- b) On behalf of the defendant, oppose the use of the chart.

Problem 17. Chart Listing Requested Damages

Assume that the court has permitted the plaintiff to use the Problem 16 chart in her closing.

- a) For the plaintiff, conduct that part of the closing in which you use the chart.
- b) For the defendant, conduct that part of your closing argument in which you discuss damages.

Problem 18. Alice Rowe's Application for Employment

- a) For the plaintiff, examine Ms. Rowe regarding the events surrounding her applying to work at Pacific Quad. You may, but need not, use her application for employment.
- b) For the defendant, represent your client during the direct examination. Then conduct a cross-examination on the limited topic of Ms. Rowe's having applied to work at Pacific Quad, and the events surrounding her doing so. You may, but need not, use the application for employment.
- c) For the plaintiff, represent your client during the cross-examination. Then, if necessary, conduct a redirect examination on the limited question explained in parts (a) and (b). You may, but need

not, use the application for employment.

DISCOVERY DEPOSITIONS

Problem 19. Deposition of Susan Robinson

Assume that Susan Robinson has been called as a defense witness and testifies that she cannot recall what condition the correspondence was in nor how much work was waiting for her when she began work at Pacific Quad.

- a) For the defendant, attempt to refresh Robinson's recollection. You may, but need not, use her deposition.
- b) For the plaintiff, oppose any refreshing of Robinson's recollection.

Problem 20. Deposition of Susan Robinson

Assume that defense counsel in Problem 19 could not refresh Robinson's recollection.

- a) For the defendant, establish the proper foundation and offer Robinson's deposition testimony as evidence of the condition of the office upon her arrival at Pacific Quad.
- b) For the plaintiff, oppose the use of the deposition and, if necessary, cross-examine on this question.

Problem 21. Deposition of Susan Robinson

Assume that in the attempt to refresh Robinson's recollection in Problem 19 she concluded, and testified, that there was no backlog and no disorder when she arrived at Pacific Quad.

- a) For the defendant, continue the examination. You may, but need not, use Robinson's deposition.
- b) For the plaintiff, oppose any use of the deposition and, if necessary, cross-examine Robinson on this question.

EXPERT WITNESSES

Problem 22. Anna Mills

Assume that Anna Mills has been called as a witness for Alice Rowe.

- a) For the plaintiff, conduct an examination in which you offer Mills as an expert witness.
- b) On behalf of the defendant, oppose Mills' testifying as an expert. Then, cross-examine her testimony.
- c) For the plaintiff, conduct a redirect examination.

Problem 23. Anna Mills

Assume that the court has heard Mills' qualifications and determined that she does not have sufficient expertise to give her opinion about 1) whether there was actually any harassment; 2) the cause of any distress Alice Rowe may have suffered; or 3) Rowe's psychological problems.

- a) For the plaintiff, continue your direct examination.
- b) For the defendant, conduct a cross-examination.
- c) For the plaintiff, conduct a redirect examination.

MOTIONS IN LIMINE

Problem 24. Prior Complaint of Harassment

- a) For the plaintiff, argue in a motion in limine that all evidence of the NSU complaint and its resolution be excluded. Prepare an order for the court's adoption.
- b) For the defendant, oppose the motion.

Problem 25. Gloria Warner

- a) For the defendant, argue in a motion in limine that Gloria Warner should not be permitted to testify regarding the way Stanley Schmit looked at her or the statements she overheard him make. Prepare an order for the court's adoption.
- b) For the plaintiff, oppose the motion.

JURY SELECTION

Problem 26. Jury Selection in Rowe v. Pacific Quad

Select a jury for one of the parties in the case. To permit an in-depth interrogation and analysis of each juror within a limited time frame, only four jurors will be selected. Each side will be limited to one peremptory challenge. Use the following jury information sheet.

JURY INFORMATION SHEET

Please assume the role of a person you know well, so you will be able to answer voir dire questions in that role. Please be realistic. Try to pick a role that will be commonly represented on jury panels and not the role of an eccentric. Taking an eccentric role would seriously impair the realism and benefit of the exercise for your classmates, both those who serve as counsel and those who observe the exercise.

Please fill in the following form and be prepared to use it at the class session on jury selection. You may be asked to deliver it to the instructor in advance of the class or during the class session.

Your real name: _____

Information about you in your assumed role: _____

1. Name: _____

2. Age: _____

3. Address in Nita City: _____

Characterize the neighborhood: _____

4. Length of residence in Nita City: _____

5. Occupation: _____

Duties in that occupation: _____

6. Marital status: _____

7. Number and ages of children: _____

8. Number of years of education: _____

9. Other relevant information: _____

OPENING STATEMENT

Problem 27. Opening Statements in *Rowe v. Pacific Quad*

- a) For the plaintiff, give an opening statement of up to seven minutes in length.
- b) For the defendant, give an opening statement of up to seven minutes in length.

CLOSING ARGUMENT

Problem 28. Closing Arguments in *Rowe v. Pacific Quad*

Assume that all six witnesses testified and that their testimony was unchanged from their depositions, except that Anna Mills explained her letter to Saul Jacobs as she did in Problem 8, and that there was no testimony regarding the substance or resolution of the NSU complaint against Professor Melvyl. Assume that all exhibits were admitted except the NSU complaint and NSU grievance board decision.

- a) For the plaintiff, give a seven-minute segment of your closing argument.
- b) For the defendant, give a seven-minute segment of your closing argument.
- c) For the plaintiff, give a three-minute rebuttal to a defense argument.

NEGOTIATION

Problem 29. Settlement Negotiation

This problem consists of three parts. Part 29.1, contained here, states the facts known to all sides on the eve of a settlement negotiation session. Parts 29.2 and 29.3 contain the facts known only to the plaintiff (29.2) and defendant (29.3). They should be distributed to their respective counsel when the problem is assigned.

Part 29.1. Facts Known to All Parties

You are two weeks from trial. There has been no publicity regarding this case in the media. There has been no substantial change in circumstances, financial or otherwise, for either Rowe or Pacific Quad since the depositions.

A study of jury verdicts in the State of California (which is similar to Nita) reports that in 1998 and 1999, there were seventy-eight jury verdicts in sexual harassment cases where a man was accused of harassing a woman. The plaintiff won fifty-two of the seventy-eight cases (68 percent), with a median verdict of \$210,000. In 7 percent, the verdict was over \$1 million. See David B. Oppenheimer, "Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities," 37 U.C. Davis L. Rev. 511 (2003). An updated study of verdicts from 2007-2008 reports that in twenty-one sexual harassment cases in California, the plaintiff only won once, but in 186 verdicts in sex discrimination (not harassment) cases, the plaintiff won 53.2 percent of the time. Overall, the median 2007-2008 verdict in employment discrimination cases was \$205,000; in sex discrimination cases, it was \$177,000. See Gary Blasi & Joseph W. Doherty, *California Employment Discrimination Law and Its Enforcement* (UCLA Law – Rand 2009), at pages 60-64.

Numerous settlements of sexual harassment cases have been reported, ranging from \$35,000 to \$900,000. The median settlement reported has been \$148,000. Plaintiffs' counsel are more likely to report settlements than are defense counsel, however. Most observers suspect that most cases are actually being settled for less than the reported median.

Rowe's lost wages now total \$21,315.84. The most recent calculation of her therapy fees expended was \$8,175.

Utilizing the case file, the facts known to all parties, and the confidential facts known only to your side, attempt to negotiate a settlement of the case.

Part 29.3. Confidential Facts for Defendant

You are being paid by your client's insurance company, although it denies any liability under the policy for sexual harassment and reserves the right to seek repayment of all its costs in defending the action. The question of coverage is murky. If the policy does apply, it is subject to a \$10,000 deductible. You have informed the carrier that your fees from now through pretrial conference (set for next week) and trial are likely to be \$15,000 to \$25,000. The carrier has agreed to contribute \$45,000 toward a settlement.

John Walsh feels strongly that he has done nothing wrong. He finds it incredible that he should pay anything to an employee of two weeks' tenure. But the cost of being out of the office sitting through a trial for several days could be staggering. (He suggested that Stanley sit in for the company at trial but you insisted that Walsh be present himself.) And, the possibility of negative publicity has him very upset. He has reluctantly agreed to match the insurance company contribution of \$45,000.

Walsh insists that any settlement be confidential. He is willing to provide a letter of reference for Ms. Rowe. You have mentioned that in these cases companies are often asked to adopt an anti-harassment policy and train its employees regarding their rights and obligations. He has no objection to a policy but does not want any outsiders coming in to train his employees. If you want to come in personally and explain the new policy, however, he is agreeable.

Problem 30. Court Supervised Settlement Conference

Assume all of the facts of Problem 29, including the same confidential facts. Attempt to settle the case at a court-supervised settlement conference.

Problem 31. Mediation

Assume all of the facts of Problem 29, including the same confidential facts. Attempt to settle the case through mediation.

Problem 32. Settlement Negotiation/Attorney Fees

Assume all of the facts of Problem 29. Assume further that last month the plaintiff moved to amend her complaint to ask for attorney fees, which are available to the prevailing party in an action under the Nita Fair Employment and Housing Act. The defendant objected to the amendment, but the court permitted it. The defendant's counsel has since stated that she is prepared to negotiate a settlement that includes a fee for plaintiff's attorney or one in which plaintiff's attorney has waived all fees, but she will not settle the plaintiff's claim and submit the fee matter to the court. The plaintiff's attorney has informed defense counsel that she has agreed with her client to take as her fee only that

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which the court awards or the parties agree to as an attorney fee, separate from the plaintiff's award or settlement.