



 NOT FOR REPRINT
ANALYSIS

 **Some Important Tips on How to Win a #MeToo Case**

 I had the privilege of being part of the team that recently won a \$10 million jury verdict in a rape case against two-time Oscar-winning writer and director, Paul Haggis. It was the first-ever case tried under the New York City Victims of Gender Motivated Violence Protection Act. From this and many other #MeToo cases in my firm's practice, here are some tips on how not just to threaten a #MeToo case, but to win one.

  May 10, 2023 at 11:03 AM

 Civil Rights
By Ilann M. Maazel | May 10, 2023 at 11:03 AM



The explosion of #MeToo cases in the last few years has finally brought some measure of accountability to perpetrators of sexual assault. Though the vast majority of these cases resolve before a civil complaint is filed, any serious plaintiffs lawyer should be prepared, if necessary, to file and litigate a case to verdict.

I had the privilege of being part of the team that recently won a \$10 million jury verdict in a rape case against two-time Oscar-winning writer and director, Paul Haggis. It was the first-ever case tried under the New York City Victims of Gender Motivated Violence Protection Act. From this and many other #MeToo cases in my firm's practice, here are some tips on how not just to threaten a #MeToo case, but to win one.

Steel Your Client

Coming forward to report sexual assault is exceedingly difficult. Even coming forward to a therapist, friend, or lawyer is often an enormous challenge, and can take years or decades, if it happens at all. This can be true for people of all genders, ages and cultures. These challenges are greatly magnified in the context of litigation. Litigation often involves expansive discovery into every aspect of the client's life, physical and mental health, and sexual history. It may involve one or more examinations by forensic experts for both sides, a deposition, an appearance in front of a jury, and an unpleassant cross-examination. The client needs to understand the process and be ready for it.

On the other hand, coming forward, standing up for oneself, and potentially holding a perpetrator accountable can be empowering and even life-affirming. The point is: prepare your client at the beginning for what is to come.

Expect the Unexpected

Allegations of sexual assault are personal and incendiary. They may impact the defendant's family, reputation, professional life, finances, and even liberty. A potential defendant may react emotionally, impulsively, and aggressively. In my firm's practice, I have seen defendants and their counsel publicly out a sexual assault survivor by name before a case was filed; sue a survivor for intentional infliction of emotional distress for making an upsetting settlement demand; and attempt to convert routine settlement discussions into a claim of criminal extortion, going so far as to attempt to persuade a district attorney to prosecute a survivor for pursuing her claim.

Some advice: Do not be intimidated or deterred by outrageous defense tactics. Expect ethically challenged counsel potentially to be recording your conversations. If defense counsel cannot be trusted, be prepared not to discuss settlement at all except through a formal mediation process, or at minimum to conduct all settlement discussions in writing. Above all, steer well clear of any ethically problematic lines: for example, never threaten publicity or to go to law enforcement if a perpetrator does not settle. It is of course perfectly acceptable to speak with reporters or a district attorney, but such activity should not be used as leverage in a civil settlement discussion.

The Importance of Therapy

Survivors may not seek therapy for many reasons, such as denial, shame, fear, self-blame, or the pain of confronting trauma. But therapy is important. First, most survivors need therapy. Health, including mental health, should always come before any legal case. Second, therapy records are important evidence, for both liability (see outcry evidence, *infra*) and damages. A well-documented therapy history may be critical to a mediator, to defense counsel in a settlement context, or to the jury. Finally, even the most experienced lawyers are not formally trained on sexual trauma. Clients are more likely to reveal the details and extent of a sexual assault to an experienced therapist than to a lawyer. Therapy can help the lawyer learn and analyze the facts of the case.

The Importance of Outcry Evidence

Prior consistent statements of a party are generally inadmissible hearsay when introduced by that party. However, in New York State and elsewhere, "evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place." "Whether a complaint is sufficiently prompt so as to fall within the exception is not a matter of precision and depends upon the facts of a given case." Even delays of over four years have been considered "prompt." Prior consistent statements may also be admissible for other reasons, for example to rebut a defense claim of recent motive to fabricate.

It is critical, long before filing a case, to conduct a thorough investigation of all potential outcry evidence. This should include a search of all emails, texts, messages, and social media of your client, preferably conducted by counsel or a vendor than by the client themselves. It may include medical and therapy records. An outcry investigation also includes interviewing everyone your client communicated with after the assault, including both outcry witnesses and others to whom your client did not report the assault. Only after reviewing this evidence can you make an informed decision whether to take the case, what settlement posture to take, and whether to file the lawsuit.

Know Your Claims

This section is worthy of its own column, but in brief, thoroughly research all potential legal claims. You may have federal, state or city claims. You may have claims that were revived for a certain period of time and that may expire on a certain date. You may have claims that were equitably tolled. Consult an experienced lawyer in sexual assault cases in your jurisdiction—nothing is worse than missing a claim or, even worse, a statute of limitations.

The Importance of Press

It is hard enough for a survivor to file a lawsuit, but even harder to be in a highly public lawsuit. Not many survivors want to be known for being a sexual assault survivor. Yet public attention to a case can lead other survivors to learn about the case and come forward, which can be extremely important evidence. I have almost never encountered a perpetrator who assaulted “only” one person. Most have assaulted many people. But as a lawyer for the plaintiff, how are you supposed to learn the identity of other survivors? Discovery is a powerful tool, but one cannot necessarily count on the honesty of a rapist to reveal all of the people they assaulted. Press, however, calls public attention to a case. When survivors realize they are not the only one, when they see someone brave enough to hold their own perpetrator accountable in court, sometimes they will come forward as well.

The Importance of Other Survivors

Why does this matter? First, other survivors can offer psychological support and comfort to your client. Second, other survivors may have admissible testimony. Evidence of prior sexual misconduct is admissible under the well-established “intent exception” to the general rule precluding prior bad acts. “[P]roof of intent is often unobtainable except by evidence of successive repetitions of the act.” Intent evidence is particularly critical where, as often happens, the defense raises a consent defense, because prior bad acts “reduce the likelihood of [a defendant’s] innocent intent on the particular occasion in question.”

If you have multiple, credible survivors testifying against the defendant at trial, this will only help your case.

Retain a Rape Myths Expert

It is virtually guaranteed that a perpetrator and their counsel will perpetrate one or more rape myths during the course of the case, and likely to the jury. Why didn’t she go to the police? Why didn’t she fight back? Why didn’t she run away or try to escape? Why didn’t she file the case earlier? Why didn’t she get medical attention? Why did she write friendly messages to the rapist after the rape? Why did she have a sexual relationship with the perpetrator after the assault? Why isn’t she crying on the stand?

I hear these sorts of questions all the time, not just from defense counsel, but from reporters, friends, and even plaintiff’s lawyers. Even if well-intentioned, the questions are often seriously misguided. Only 22% of rape survivors go to the police, a majority do not fight back or try to escape, and many continue to have overtly friendly or even sexual relationships with their rapist, whether as an attempt to normalize the assault or reclaim control, or as a means of psychological denial, or because of professional, reputational or psychological pressure.

It is critical to have a well-regarded rape myths expert dispel these and other myths before a jury. Such evidence is “widely accepted by courts as a proper subject of expert testimony.” Expert testimony “may be admitted to explain behavior of a [rape] victim that might appear unusual or that jurors may not be expected to understand,” for example, “to dispel misconceptions that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack,” or “to explain why a victim who knows the perpetrator may delay reporting out of fear.”

Be Prepared for a Long, Hard Fight

From the beginning, steel yourself and your client for a long, hard fight. But though the fight may be hard, is anything worth doing ever easy?

NOT FOR REPRINT
