Combatting the Harvey Weinstein defense
THE TOP FIVE DEFENSE ATTACKS IN SEXUAL-HARASSMENT AND SEXUAL-ABUSE CASES AND WAYS TO ADDRESS THEM

Many attorneys and folks around the world followed the case and trial of Harvey Weinstein. He was a powerhouse of the entertainment industry and the Goliath of the #MeToo movement. His history of predatory behavior finally caught up to him and brought him down.

Weinstein was tried in New York for one count of rape in the first degree and one count of rape in the third degree (related to a 2013 assault on Miriam Haley [previously “Mimi Haleyi”]), one count of criminal sexual act in the first degree (related to a 2006 assault on Jessica Mann), and two counts of predatory sexual assault (related to both incidents). On February 24, 2020, Mr. Weinstein was convicted of two counts – criminal sex act and third-degree rape (the two lesser charges of the five).

Many have lauded the skill of Mr. Weinstein’s criminal-defense lawyer, Donna Rotunno, in her zealous advocacy for Weinstein. Many have condemned her tactics, criticisms of the survivors, comments about how sexual assaults occur, and her interactions with the media. One thing is clear. While her arguments were skillfully made, they are not new. For as long as there has been sexual assault and survivors brave enough to object publicly – defendants and their lawyers have made the same arguments. These arguments can be effective and persuasive, in part, because the average person does not understand the mindset of a sexual-assault survivor. Also, because not every survivor responds the same way. Unless one is a survivor or works closely with them, some things don’t make much sense at first glance.

Throughout this article we refer to the plaintiff or survivor as “she/her” for continuity and ease of reference because the survivors in the Harvey Weinstein trial were all women. Men and non-binary folks are also survivors of sexual harassment and assault, and the use of “she/her” is in no way meant to undermine or question the struggles or harms done to male or non-binary survivors. Sexual violence is not a “women’s issue;” it is a human issue.

The focus of this article is to address the differing attacks and arguments made by Weinstein’s legal team in his sexual assault/rape trial, educate attorneys so we can be better advocates for survivors, and emphasize ways to address these defense attacks effectively. I pulled quotes from news articles that were either about the trial or interviews given by Ms. Rotunno about the trial to highlight these arguments. These exact words will be uttered by many defense lawyers in your next case.

The attacks of the Harvey Weinstein defense

The main arguments made by Ms. Rotunno, and most defense lawyers, typically fall into five different categories:
(1) A friendly relationship with the perpetrator before and/or after the assault/harassment; (2) “personal accountability”; (3) the “why didn’t you fight back harder?” defense; (4) how long a survivor waits to complain; and (5) alternative motivations for bringing the claims.

If this evidence comes in despite your best efforts to educate the judge, your next step will be helping the jury understand the survivor. As with all “bad” evidence, the first step is owning all your warts and getting in front of the defendant – you don’t want your jury wondering why you “hid” something from them. If you’re doing mini-openings, bring it up. Voir dire? Bring it up. Opening statement? Bring. It. Up.

A friendly relationship with the perpetrator

Maintaining a relationship following harassment or assault

In the Weinstein criminal trial, CNN reported that “Rotunno said Haley’s allegation of forced oral sex one day ‘doesn’t make sense’ when you consider all the other things she did with Weinstein. Haley acknowledged having consensual sex with Weinstein in the weeks after the alleged assault in 2006 and keeping in touch with him for years after that. Rotunno said Mann had a consensual relationship with Weinstein in which she told him at times that she missed him and reached out to give him her new phone numbers several times over the years.” (Lauren del Valle, Harvey Weinstein’s defense lawyer tells jury that prosecutors presented an ‘alternative universe,’ CNN (February 13, 2020) <https://www.cnn.com/2020/02/13/us/harvey-weinstein-defense-closing-argument/index.html> [as of March 27, 2020].)

It’s all about credibility. “Well, why didn’t she just quit if he really did that to her?” “Why would she go to that meeting if she didn’t want to see him?” “If it was...
really rape, why would she go on a date with him afterwards.” These are the kinds of questions defense lawyers want jurors to be asking themselves while they are deciding the credibility of the survivor. They can worm their way into a juror’s brain and refocus the jury’s attention away from the conduct of the perpetrator and onto the actions of the victim. In every case, you want the jury paying the most attention to the bad acts of the Defendant.

Maintaining a relationship with the abuser can take place in either a workplace setting or socially. Continued contact in the workplace is the easier of these two issues to understand. Everyone needs to work. Finding a new job isn’t easy for everyone. Some people literally cannot afford even a short break in their pay. On the campaign trail, Senator Bernie Sanders has regularly touted that the average American cannot weather a surprise expense over $400. Sometimes you just have to be at work and do the best you can. People come into work with the flu or severe back pain, and a sexual assault is sometimes no different in the respect of coming into work when something is hurting you. These concepts are accessible to the average person.

For those who aren’t in dire straits or who see their abuser socially, it is much more difficult for the average juror to understand and will require an expert to explain to the jury. But first, the attorney must understand where their client is coming from and know to ask the right questions and be open and listen to the client. It comes down to power dynamics.

Sexual assault is often about power. When you are a high-powered woman like Megyn Kelly, and Roger Ailes asks you to “twirl” for him, the angst you feel is not about him looking at your backside. It’s about power. That he can turn you, the person who busted her butt through law school to become a well-known national news anchor, into an empty, child-like vessel upon which he can feast his eyes, is demeaning and demoralizing. It says, I am the puppet master and you are my doll. Your substance is meaningless. Less than meaningless. And you are left with a difficult choice between retaining your physical autonomy – holding on to your power – or protecting the career you worked for your entire life. To hold onto that power and sense of control makes all the difference when it comes to lasting harm. Spending time around your abuser after the event is akin to telling the abuser, “Look, I’m fine. You can’t hurt me.” It can speak to denial and/or, often, an attempt to retake the power that was lost.

Some survivors are reluctant to believe someone they trusted could violate them. In 80% of cases, the perpetrator is someone the survivor knew. (See Perpetrators of Sexual Violence: Statistics, RAiNN.org <https://rainn.org/statistics/perpetrators-sexual-violence> [as of March 27, 2020].) If the perpetrator and survivor are both part of the same peer group, the survivor can be reluctant to do anything that could turn the group against her.

Some survivors will not only spend time around the perpetrator but will go out on a date with them following the harassment or assault. They may even engage in a consensual sexual relationship following a rape. It’s not because they weren’t raped. It’s because the label of “victim” has so much power. It can be life altering. Defining. A loss of power so vast, there’s not enough power suits in the world to fill it up again. Going on a date afterwards says, “I am not your victim. I will not be defined by what you did to me.” While these truths are accessible for the survivors who endure them, most people struggle. Many lawyers don’t realize that this is not uncommon.

The best thing you can do is know about it so you can talk to your client and make sure they are seeing a therapist who specializes in sexual assault or harassment. Only your expert can explain this objectively to a jury.

Text messages or emails with the perpetrator

Rotunno read ostensibly affectionate emails from Mann to Weinstein during the trial and told jurors they’re “not words you say to your rapist.” (See, del Valle, CNN, supra; see also, Rose Friedman and Audie Cornish, Harvey Weinstein Defense Makes Closing Arguments, The New York Times (February 7, 2020) <https://www.nytimes.com/2020/02/07/nyregion/harvey-weinstein-defense-makes-closing-arguments.html> [as of March 27, 2020].)

These arguments are made to paint all the interactions between the parties as consensual relationships. How can it be that one day you’re assaulted but next week you have lunch together? Mann even acknowledged having a three-year “relationship” with Weinstein that alternated between consensual and nonconsensual sex. These arguments muddy the waters and make criminal prosecutions very difficult where reasonable doubt is the standard.

Friendly or even flirtatious exchanges before an assault are common. It’s no accident that sexual assaults often occur between people who know each other. Many abusers will test the boundaries of the target slowly and methodically. See what they can get away with. How far they can go without raising too much alarm. This method allows for escalation and can lead the victim to feel that they brought the assault on themselves. In some ways it’s like the frog in boiling water. If you try putting a frog directly into a boiling pot, it will fight and flail and try to escape the water. If you place a frog in a pot of tepid water and slowly raise the temperature, the frog will boil to death without much fuss.

Similar to in-person contact with an abuser, written communications after an assault are often an attempt to retake
power that was lost. Regain a sense of control. Repeat offenders often work to gain the trust of those they target and appear non-threatening. This makes it easier for them to gain enough trust from their target to get them into a situation where the assault can take place. Maybe even position it so that it’s more difficult for people to believe that the interaction was non-consensual because “we saw you being friendly with Mr. Predator at the cocktail hour – you were probably into it or you would’ve walked away” (and other lies people use to shame each other).

A sexual history with the perpetrator

A similar “consent” argument is often made if there’s a sexual history between the parties. At some point in the past, there was a consensual relationship between the victim and the perpetrator. The argument being, “well you consented in the past, why should we think you didn’t consent this time?” This argument is appealing because it’s simple and goes to old notions of consent as a one-time-covers-all proposition that existed before marital rape laws (which started in the 1970s and were only officially on the books in all 50 states as of 1993, yet with many loopholes still existing to this day). (See Briana Bierschbach, This Woman Fought To End Minnesota’s ‘Marital Rape’ Exception, And Won, NPR (May 4, 2019) <https://www.npr.org/2019/05/04/719635969/this-woman-fought-to-end-minnesotas-marital-rape-exception-and-won> [as of March 27, 2020].)

In the Weinstein trial, Rotunno pressed both Mann and Haley on their history with Weinstein. These abusers are best understood in a domestic-violence framework. The abuser makes promises, acts good and sweet at times, creates a level of dependence or fear between himself and the abused partner, and after acting badly, acts contrite and promises to do better next time.

These arguments can be hard to combat because we all think, “Well, I wouldn’t act that way. I would just walk out.” And maybe you would. But abusers usually pick targets and work on them over a period of time in order to ingratiate themselves and create the dependence they need in order to be successful. Some people can never imagine themselves on the receiving end of an abusive relationship until they finally realize they’re in one.

“Personal accountability”

The main argument made by Rotunno in the Weinstein trial was that the women put themselves in these positions, when they could have said “no.” (The New York Times (2020), supra.) They don’t take responsibility for their actions. They knew it was likely he would make sexual advances and they went with him to a secluded location anyway. She argues that choosing to appease Weinstein for fear of his influence over their careers is still a choice and that women need to own our choices. Essentially, it’s another form of “consent” argument: she agreed to it, she just didn’t enjoy it.


These arguments can be effective because they speak to our American ideals of independence, autonomy, and accountability. The lawyers are asking the jury to hold “this man” responsible, but what about “the woman” owning her decisions? Conceptually this can be appealing to jurors, but it’s riddled with problems.

Above all, it wholly ignores the power imbalances between men like Weinstein and the women he targeted. These power imbalances are both physical – size and strength matter in all physical alterations – and social.

Most women live in a world that most men are not aware of. It’s a world filled with dark corners where almost every man might be a threat. Louis C.K. (ironically) had a bit about the dangers women face, asking: “How do women still go out with guys, when you consider the fact that there is no greater threat to women than men? We’re the number one threat! To women! Globally and historically, we’re the number one cause of injury and mayhem to women. We’re the worst thing that ever happens to them! ... If you’re a guy, imagine you could only date a half-bear-half-lion. ‘Oh, I hope this one’s nice! I hope he doesn’t do what he’s going to do.’” While funny, it’s also painfully apropos.

Yet, women must live in the same world as men and not be completely hypervigilant balls of anxiety at every moment. We must make choices that come with risk and hope that our social mores and criminal laws keep us safe.

This argument that “she knew what would happen if she went with him” also does a disservice to men. It ignores the reality that a man is capable of reining himself in, as most men do most of the time, and makes them seem like mindless, thrusting baboons. It says that a man’s lusty desires cannot be kept in check and therefore a woman should expect to be grabbed, groped, assaulted, or raped if she finds herself alone with a man. That, even if they planned a meeting to discuss work, she should be prepared for aggressive sexual advances. If she really doesn’t want those things, she’d better stick to the buddy system all times. This messaging is unfair to everyone involved, and while women do need to be mindful of the risks they face, creating a social construct of male sexual uncontrollability is harmful to society as a whole. Expectations often create, or at the very least inform, reality.

The “why didn’t you fight back harder?” defense

Rotunno asked Annabella Sciorra why she didn’t try to scratch Weinstein orpoke his eyes out if it was really an attack. (Michelle Mark, The ‘ultimate feminist’ defending Harvey Weinstein, Insider (February 5, 2020) <https://www.insider.}

See Ward, Next Page
com/donna-rotunno-harvey-weinstein-lawyer-profile-feminism-2020-2> [as of March 27, 2020].) These arguments play into the narrative that rape is only rape if it’s at gun/knife-point in a dark alley by a complete stranger. This is appealing because it used to be partly true and is the easiest way to visualize a concept in black and white that, in reality, has a lot of grayer areas. (See e.g., Model Penal Code (1962) published by the American Law Institute.)

Shaila Dewan of the New York Times said it best: “When people are mugged or robbed, they are not asked why they did not resist. Yet, in sexual-assault cases, men and women both tend to compare a victim’s actions with what they think they themselves would have done in a similar situation, and research shows that their imagined response usually involves aggressive resistance – even when the attacker is larger and stronger. In their heads, suddenly they know kung fu.”

However, “Neurobiological research has shown that the so-called fight-or-flight response to danger would more accurately be called ‘fight, flight or freeze.’ And even after that initial response, victims can be rendered involuntarily immobile, becoming either paralyzed or limp as a result of the brain and body’s protective response.” (Shelia Dewan, *She Didn’t Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct Victims*, The New York Times (November 30, 2017) <https://www.nytimes.com/2017/11/30/us/sexual-harassment-weinstein-women.html> [as of March 27, 2020].)

**How long a survivor waits to complain**

Actress Annabella Sciorra testified in the Weinstein trial to show Weinstein’s history of predatory behavior. When Rotunno cross-examined Sciorra about Weinstein raping her in the early 1990s, she asked “why Sciorra had never gone to the emergency room, called the police, or confronted her doorman about letting Weinstein inside.” (Insider, *supra.*

The argument is made that the more time that passes, the more likely it is that the woman just regrets what happened and is “relabeling” or “misremembering” the interactions. Complaining immediately is also another vestige of a bygone era in laws on sexual violence. The Model Penal Code used to suggest that a woman report an assault within three months in order for her claim to be viable. (See also, Barbara Bradley Hagerty, *American Law Does Not Take Rape Seriously*, The Atlantic (January 28, 2020) <https://www.theatlantic.com/ideas/archive/2020/01/american-law-rape/605620/> [as of March 27, 2020].)

However, waiting to report an assault is directly in line with the experiences of most survivors. It can take years for the victim to process what happened to them. The shame and confusion must be confronted along with the acceptance that someone they trusted had violated that trust. Because women often make risk assessments about who they allow close enough to harm them, they may question whether they are flawed, why their assessment was so wrong. They wonder if they can trust their own judgment moving forward or whether life must be lived on another level of fear and mistrust heretofore unknown.

Other times waiting to complain is a simple matter of safety. This terrible thing has happened. The practical thing to do is not to report it at the moment. First, I need to find a new job, cut these mutual friends out of my life, or [insert other reasoning here]. Then life gets in the way and the victim wonders if it’s really worth putting themselves through the heartache of reporting it or whether they should just move on. They have family they don’t want embarrassed. They don’t want to have that label follow them. They worry that a lawsuit would appear in a background check for a new job. Criminal proceedings and civil matters take years before they go to trial. The emotional and physical toll these cases take on the survivor and the disruption of their life is tremendous. They think about how someone like Rotunno will drill through every part of their past and leave no skeleton buried, no stone unturned, no shred of privacy left to them. Why report at all when the survivor doesn’t have faith that anything will be done? Why should I re-victimize myself? These notions bump around in survivors’ heads and often take years of therapy or personal reflection to change.

**Alternative motivations for making claims**

According to a reporter from The Guardian, “[Rotunno] has deployed all the old shibboleths that have been used over decades to discredit sex crimes accusers. The witness was after the money, she was a serial liar, she may not have wanted sex with Weinstein but she did it anyway to get on in the film business – all those arguments and insinuations have been used by Rotunno and her henchmen.” (The Guardian, *supra.*

Arguments like these are made because everyone wants a motive. It’s a weakness of the human condition that if we are given a “why,” we are much more likely to accept a “who and how,” even when there are holes. When so much rests on the credibility of the victim, it’s natural for a juror to ask, “but why would she lie?” And the defense is always ready with a plethora of conjecture. Maybe she was mad about not being promoted. Maybe she was trying to get back at the company after she was fired (for refusing sexual advances). Various iterations of “the woman scorned” are popular.

Combatting these “ulterior motives” is mostly a matter of common-sense arguments and a case-by-case assessment. The best counterpoint is usually the Plaintiff telling her full story as clearly and earnestly as she can, because the defense will provide zero evidence to support their claims. Owning the warts and talking about them in the light of day takes away much of the defense’s power to cast the plaintiff as someone who would lie, cheat, or steal her way to fame and fortune.

It’s also good to remind jurors of the cost of coming forward with sexual assault or harassment claims. Dr. Christine Blasey Ford was dragged into national spotlight after reporting her high-school sexual
assault by (then prospective) Justice Brett Kavanaugh. For months following her public interrogation by the Senate, Dr. Blasey Ford could not live at home. She moved her family several times due to death threats. She wasn’t able to return to work. She had to hire a private security detail for herself and her family. (Tim Mak, Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say, NPR (November 8, 2018) <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say> [as of March 27, 2020].) Coming forward is never easy. Opening your life to violence and public shaming by accusing rich or powerful adversaries is terrifying. For your average person, their supervisor or abuser is equally as powerful and influential in their lives.

**Fighting back against the defense attacks**

The first line of counterattack is you, the advocate, understanding and empathizing with the survivor. In order to teach the judge, jury, and defense counsel, we must first understand. Spend time with your client – listen and hear them. Read stories, books, and articles to deepen your understanding, such as “Know my Name” by Chanel Miller. The section above tried to highlight some of these issues. Hopefully, after having read the first section above, there’s a greater understanding of these issues.

The second line of counterattack is the expert. At trial or in preparing for settlement, having an expert who can communicate to the jury that the actions of your client are normal and typical is essential. This can be a specialist brought in for their expertise at trial or, ideally, a treating therapist. As was done by the prosecution in the Weinstein trial, having an expert who has treated hundreds or thousands of survivors can teach the jury why they would continue the relationship, send emails or text messages to the perpetrator, and other behaviors.

After discussing their qualifications and why they’re there, an easy way to start with your expert is by asking her to give a general outline of her process, followed by a specific assessment in your case. That applies to both assessments for a particular diagnosis and common behaviors exhibited by survivors of sexual violence. The goal is to get all the pieces you need to frame your client’s testimony and to put your argument together for closing.

It could look something like:

**Attorney:** Dr. Smith, when you’re assessing patients for PTSD, what do you generally look for?

**Dr. Smith:** Generally, I am looking for [number] symptoms or markers out of a list of different symptomologies.

**Attorney:** Will you please share with us what those different symptoms are that you’re looking for?

**Dr. Smith:** [Lists symptomology from the DSM 5]

**Attorney:** Did you do that kind of assessment in this case?

**Dr. Smith:** I did.

**Attorney:** And what did you find?

**Dr. Smith:** I found that Ms. Doe [suffers from PTSD, was hypervigilant, exhibited avoidance behaviors, showed signs of depression, flashbacks to the event based on certain triggers, etc.].

**Attorney:** And do you hold that opinion to a reasonable degree of medical certainty?

**Dr. Smith:** Yes, I do.

**Attorney:** I think you mentioned hypervigilance. What does that mean? … What led you to conclude that Jane Doe was hypervigilant? … [go through the list with Dr. Smith…]

**Attorney:** In dealing with a survivor of sexual assault, well, let me take a step back – why do we refer to them as “survivors” instead of “victims”?

**Dr. Smith:** (something like) it’s mostly about the power of the label. [explains more]

**Attorney:** What role does power or dominance play in sexual assault?

**Dr. Smith:** Oh, it’s a huge part of it. The exercise of power is a motivator for the predator and that loss of power – that feeling of genuine helplessness and violation – is often one of the most damaging aspects of sexual violence on survivors.

**Attorney:** We’ve heard a lot in this case about how Ms. Doe went to dinner with Mr. Predator after the assault took place; is that behavior odd to you?

**Dr. Smith:** No, it’s not uncommon in my professional experience.

**Attorney:** What do you mean by that?

**Dr. Smith:** [Expounds on how it happens all the time and what she sees]

The prosecution in the Weinstein trial called a forensic psychiatrist who has evaluated thousands of sexual assault victims and perpetrators, to explain to the jury that some victims pretend the assault never happened and continue to have a relationship with their attacker. (The New York Times (2020), supra.) Once your expert has explained these issues to the jury, your role is to help your client tell her story after the groundwork has been laid.

Your client needs to take the stand and do one of the scariest and bravest things they may ever have to do: tell twelve strangers the story of her assault and then face the perpetrator’s hired gun who will try to demean, disregard, and discredit her. She will have to describe in nail-biting detail what happened. What she felt. How he smelled. The sensations in her body and mind. How it affected her. Her fears. Her actions. Her reasons for those actions.

In the Weinstein trial both Mann and Haley testified extensively along with four other women whose cases were either outside the statute of limitations or did not take place in New York. Mann testified “that her years long relationship with Weinstein was abusive. ‘I know the history of my relationship with him. I know it is complicated and different, but it does not change the fact that he raped me.’” (del Valle, CNN, supra)

Before it gets to that climactic tension, however, most of the trial should be done. The arc’s outline was given by third parties or defendant employees. If you’re able to locate other survivors, it’s ideal to have them...
near the beginning or middle of your case in chief. The doctors have said their piece. By the time you get to your client, any other survivors should have already testified. The only thing left is a (preferably disinterested) damages witness or two – an ex-boyfriend, rabbi, sister, parent, best friend.

Now it’s time for your closing argument. Your opportunity to bring together all the different pieces into one cohesive format. We must give our jurors the reasoning they can use in the deliberation room to respond when those nagging questions come up. “To contrast sexual assault with other types of crime, [psychologist Veronique] Valliere said, she often shows a photograph of the Boston Marathon bombing. ‘We never said to the victims, ‘Why were you in that marathon, why did you put yourself in that position, why didn’t you run faster, why didn’t you run slower?’” (The New York Times (2017), supra.)

And in some sexual harassment or assault cases you need to confront the Big Question. And maybe it’s best left for rebuttal. But sometimes it’s best to look the jurors in the eye and ask them: “Do you believe her? Because if you believe her, the only verdict that the evidence supports and that justice demands is to find the defendant guilty/liable.”

If you need to speak with anyone about your experience with sexual violence, call National Sexual Assault Hotline at 800.656.HOPE (4673) or visit their website to receive confidential support.

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