

## Lawyers discuss the challenges of sexual assault prosecutions

Following a week in which thousands of women posted “metoo” hashtags, Los Angeles City Attorney Mike Feuer released a statement encouraging victims of sexual harassment and abuse to come forward.

“We take allegations like these very seriously, and where the facts support conviction, we will prosecute,” Feuer’s Oct. 17 statement said. “Please come forward so that your cases — and justice — can be pursued.”

However, Feuer said in an interview this week that his office does not reach out to women who make claims of criminal sexual assault on social media, instead waiting for those cases, like other criminal matters, to be forwarded by the Los Angeles Police Department after an investigation. Feuer said his office handles harassment and abuse cases on a regular basis, and received a grant from the U.S. Department of Justice’s Office on Violence Against Women to fund an additional prosecutor position to deal with them.

If the cases do get to court, they can be challenging for both prosecutors and defense attorneys.

Frequently, sexual harassment takes place in private, without witnesses or physical evidence. It is not uncommon for women to delay reporting sexual harassment or abuse to police, which the defense will often seize on, said Deputy Los Angeles City Attorney Richard E. Kraft, supervising attorney of the Special Trials Unit.

“We have to look to what there is that rebuts the misimpression that crime is reported immediately,” he said. “Social, cultural, and religious norms all can shape how people respond.”

Instead of reporting to law enforcement, a woman may speak to or text a close friend or family member, and that person can serve as a witness, or their text messages may serve as evidence, Feuer said. “Often, a defense attorney will say, ‘You told your best friend, but you never told the police?’ But there are many ways to test the credibility of witnesses and undermine the cross examination that implies someone is being inauthentic.”

The nonexistence of witnesses has no impact on filing decisions, Kraft said. Workplace harassment cases might get help from security cameras, but often, the power dynamic of an employer-employee relationship coupled with a long employment history can bolster a victim’s testimony, Kraft said. For prosecutors, the issue may simply come down to credibility. “There are some cases where corroborating evidence is absent, and we still move forward, because we believe she’ll be most credible,” he said. “If we believe she is persuasive and has no reason for her to be lying, with a long history of employment, there’s no reason for a person to extend themselves.”

Conversely, the office will refuse a case when the surrounding circumstances suffer from inconsistencies. If the victim has a pending lawsuit against the company or a history of work complaints, that may reflect a bias on the victim's part, Kraft said. History of mental health problems, drug abuse or alcoholism may also hinder a case. "We take those into account, but that doesn't mean a person who has just had a drink. Victims will give statements to police, and we look to see consistency. . . . We have to be mindful of the impact on a person's ability to recall and the jury's impressions of witnesses."

If an accuser is coming forward years after the fact, as is the case with many of Weinstein's alleged misdeeds, that can complicate defense, said attorney David S. Kestenbaum of Kestenbaum Law Group. If a defendant was traveling during the time of an alleged act, for example, they may no longer have any documentation of the trip. As multiple accusers come forward, coming up with a defense for each one becomes progressively more difficult as older complaints bolster newer ones. Further, being a person in a position of power, like Weinstein, makes things "very tricky," Kestenbaum said. "It's not holding a knife to rape them, but they say, 'If you're going to be in my next movie, this is what you'll do.'"

A defense attorney has the problem that "the social stigma means your client is the least liked person in any room — including a jail cell," Kestenbaum said. "Rapists are not treated kindly in custody." A defense attorney is obligated to attack the accuser's credibility, but in the Weinstein case, he said, the more successful actresses will have greater credibility, making them tougher targets.

Strategically, the most important thing the defense can do is a very intensive investigation, said attorney Nina Marino of criminal defense firm Kaplan Marino PC. That means investigating the circumstances under which the accusations took place, and whether or not allegations were reported to law enforcement immediately, Marino said. If they weren't, it doesn't look good for the prosecution. "To build on that, you'd want to speak to as many people in the vicinity, who had knowledge of meetings, that could bolster the defense position that what is alleged to have occurred did not occur."

In the Weinstein case, Marino said the greatest challenge is trying get a global resolution across three jurisdictions. "It doesn't do him any good to resolve in L.A. without addressing New York or London." But in all jurisdictions, Marino said, "This is a he-said, she-said kind of case, and those are always challenging."

Though there are multiple investigations in progress in the Weinstein case, those don't always result in filing of criminal charges, and any good defense attorney is going to want to explore how to resolve accusations before charges are brought, Marino said. That could be by plea bargain, or some sort of diversionary disposition. "It depends on the strength of evidence," Marino said. "I would hope the investigative agencies would cooperate with defense counsel because doing so fosters a better chance of resolution for all parties, for the accusers and for the accused."

Electronically stored information — text messages, emails, social media — is critical on both sides of sexual harassment or abuse cases, said Ben Meiselas of Geragos & Geragos APC, a civil attorney who represents plaintiffs and defendants. Such evidence may be used to corroborate or to impeach a victim.

In the workplace, a hurdle for victims is the error of thinking that human resources departments are safe places for employees, Meiselas said. “HR is more frequently the corporate protection department. They try to create an investigation pretext to defend what took place.”

Another hurdle is when a victim attempts to identify herself as a “Jane Doe,” but the defense counsel will want to expose her identity to the public. “The Jane Doe protections are important under civil code,” Meiselas said, but defense counsel recognize that it can be embarrassing for a person to have their name exposed, so that is a tactic they can use to make the case go away.

Meiselas expressed opposition to confidential handling of sexual harassment cases. “In today’s day and age, you would think sexual harassment would be a matter that should not be within confidential arbitration. But courts have consistently upheld workplace confidentiality agreements requiring people who are victims of sexual assault to arbitrate,” Meiselas said. “That’s a big barrier if you’re in front of a judge or arbitrator who might not have the same understanding that 12 people on a jury from diverse backgrounds might have.”

Meiselas said in terms of prevention, there should be an exception to confidential arbitration provisions for cases of sexual assault. Typically, he said, a workplace arbitration agreement will use language like “any workplace injury,” and sexual harassment and assault are included under that umbrella term. “That’s a barrier to victims,” Meiselas said. “To me it’s a no-brainer that this should be changed by the Legislature.”

On Oct. 19, Sen. Connie M. Leyva, D-Chino, announced that in January, she will introduce a bill to ban confidentiality provisions in settlement agreements in cases of sexual assault, harassment or discrimination cases. “Secret settlements in workplace and other settings can ultimately endanger the public by hiding sexual predators from law enforcement and the public,” Leyva’s statement said.

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