

Harvey Weinstein's Dream Jury Is Conservative, Traditional, Skeptical

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(Bloomberg) -- Opening arguments in Harvey Weinstein's rape trial are more than a week off, but his lawyers are fighting for his freedom now, and the jury they select is the key to it. The defense may want older women skeptical of a female victim in a sexual encounter, as prosecutors likely seek younger women and men raised to believe no means no.

"The defense will be looking for jurors who will be receptive to the argument that, while Harvey Weinstein is no angel, and he may have flexed his power in Hollywood to 'entice' women, the sexual encounters were consensual and did not cross the line into the realm of criminal conduct," said **Cheryl Bader**, a former federal prosecutor who teaches criminal defense at Fordham Law School.

Lawyers for Weinstein, who is also charged with predatory sexual assault, "will seek to capitalize on an unfortunate but well-entrenched myth that if a woman was truly unwilling to engage in sex, she would have found some way to extricate herself from the situation," Bader predicted. "Even women fall prey to this myth, thinking 'I would never let this happen to me.' "

Blaming the victim is a longstanding strategy for defense attorneys, and it may still work. But it's trickier amid the #MeToo movement, which Weinstein himself -- accused by more than 80 women of abuse or assault -- has the dubious distinction of galvanizing.

"How the attorneys approach trying to find an impartial jury after the #MeToo wave, with such a known accused party, is the most important part of the trial, and the most challenging," said **Michelle Simpson Tuegel**, a Dallas lawyer who represented victims of the USA Gymnastics team doctor **Larry Nassar**.

Jury selection is always challenging, but cases involving allegations of sexual violence are among the most fraught, lawyers say.

The evidence is "going to be very, very powerful," said Bennett Gershman, a professor at Pace Law School in White Plains, New York, who has served as an assistant district attorney in Manhattan and a defense lawyer. "You want jurors who can move back from the emotional impact and be able to carefully determine credibility on this critical issue of consent."

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In sexual assault cases without eyewitnesses, it's common for the accused to claim the encounter was consensual, as Weinstein's lawyers maintain. Weinstein has hired two jury consultants to advise his lawyers as they seek jurors who may be receptive to his defense.

"For the defense, that means conservative, traditional men and women, not young, progressive individuals, or fathers with daughters," said **Lara Yeretsian**, a criminal defense lawyer in the Los Angeles area whose former clients include Michael Jackson.

Weinstein's lawyers declined to comment, as did prosecutors.

Weinstein, 67, is accused of raping a woman in a Manhattan hotel room in 2013 and of performing a forcible sex act on another in 2006 in his SoHo apartment. He faces five counts and, if convicted, could get life in prison.

His team seems to have chosen the "casting couch" defense, veteran New York defense lawyer Gerald Lefcourt said.

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"It appears the defense is using the argument that everybody knew what was going on, that these women came to the producer, sat on the couch and hoped he'd go to bat for them, that everybody knew what he expected in return," Lefcourt said. "But there's no question that in the wake of #MeToo, the defense is going to have a harder time with this argument, and prosecutors will de-select those who are sympathetic to this argument, while the defense wants them."

About 500 Manhattan residents have been summoned to court for jury service. Together with New York State Supreme Court Justice James Burke, prosecutors and Weinstein's lawyers will select a panel of 12 plus six alternates. After four days of initial screening, only about 90 people were asked to return to court Thursday for individual questioning.

More than 200 potential jurors were dismissed after the first week. Some said they couldn't be fair because they'd read about the case and formed an opinion or because they were victims of sexual assault or knew someone who was, and would be prejudiced in weighing the evidence. Others simply couldn't sit on a trial that may stretch into March.

"I read every article, and it's gonna be very hard for someone who's been assaulted multiple times," one young woman said Wednesday. Another said she had "a very close friend who had an encounter with the defendant in his hotel room."

Complicating the task of finding an impartial jury, Los Angeles prosecutors charged Weinstein with the sexual assault of two women, announcing the charges on Jan. 6, the day he appeared for his New York trial.

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"Can he even get an unbiased jury?" asked Yeretsian. "It will be an uphill battle to weed out 'stealth' jurors, those whose minds are already made up but who profess to be unbiased."

For prosecutors, it isn't as simple as trying to get a lot of women in the jury box, said **Neema Rahmani**, a former federal prosecutor who also handled sex crimes as a Los Angeles County prosecutor and is now in private practice.

"Generally speaking, women jurors are harder on women when it comes to sex-abuse cases," Rahmani said, because they put themselves in the victim's place and think they would never let that happen to them.

"Often, especially when the acts occurred years ago, you don't have a lot of corroborating evidence," he added, "so it's really the credibility of the victim and the accused that determines guilt."

Many jurors in a sex crimes case look for corroboration beyond the alleged victim's testimony, such as a contemporaneous reporting of the incident. In Weinstein's case, prosecutors say they will call four women, in addition to the two in the indictment, to establish a pattern of "prior bad acts."

"I've talked to jurors who've said, 'I don't believe that a single person's testimony is sufficient,' even though under the law it is," Rahmani said. "Weinstein is looking at a life sentence for some of these crimes, and that could give some jurors pause."

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