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PERSPECTIVE

Successful defense of Kevin Spacey was a case study in trial preparation

By David Houston

Editor-In-Chief

Jennifer L. Keller, Chase A. Scolnick and Jay Barron knew when they sketched out their defense of allegations Kevin Spacey sexually assaulted another actor in 1986 that it would normally be considered malpractice to depose the plaintiff before having reviewed any discovery or deposing other witnesses.

But hundreds of hours of preparation had convinced them they already knew there were problems with two key elements of Anthony Rapp's story: that he was inspired to tell his story after reading Lupita Nyong'o's gripping account in the New York Times of her encounter with Harvey Weinstein while a student at Yale; and that the layout of the apartment where the alleged assault took place wasn't as Rapp had described.

"We knew that the allegations were false and the only way out of this was a jury trial," Scolnick said. "So we used discovery to set up all the impeachment and lock Anthony Rapp into his lies – and there were many – and we were able to expose those lies at trial through Anthony Rapp and through other witnesses that were able to reveal the inconsistencies through cross examination."

On Oct. 20, a federal jury in Manhattan took less than an hour to find Spacey was not liable for a charge of battery stemming from Rapp's allegations. U.S. District Judge Lewis A. Kaplan threw out two other counts before the case went to the jury.

Rapp's lawyer, Richard Steigman, did not respond to a request for comment on this story. Rapp —



Jay Barron, left, Chase Scolnick and Jennifer Keller in their Irvine office. | Justin L. Stewart / Special to the Daily Journal

an actor and singer who has appeared on Broadway, in movies such as "Rent," and in the current TV series "Star Trek: Discovery" — spoke Saturday for the first time since the verdict at an event at the Brooklyn Museum.

"A courtroom is not a safe space for trauma, that is for sure. So I also deeply understand why some people don't pursue that angle," he said, according to media reports. "What is proof? How do you prove things? Part of the movement is so much about honoring a story, listening, being a mirror, being, holding, healing. You speak about these things. Those things aren't necessarily anything that a courtroom is at all interested in."

Keller and Scolnick of Keller/Anderle LLP in Irvine, recently talked to the Daily Journal about their experience successfully de-

fending Spacey. Keller was the lead trial lawyer, Scolnick conducted much of the background research and Barron did the law and motion work.

The lawyers' story is a lesson on how to approach a case when a client is scorned in the media – at least 24 men have accused Spacey of sexual misconduct and Rapp said he was 14 when the alleged assault occurred – and how to practice in a courtroom that isn't on your home turf before a judge who tightly controlled voir dire.

More than any of that, it is a story about the value of muting outside voices who loudly express opinions about the case and how it should be tried.

"We had people saying we were making a mistake taking an all-or-nothing approach," Keller said. "Well, how do you not do that

when your client says, 'It didn't happen'? And all the facts seem to prove it didn't happen? Of course, you're going to take an all-or-nothing approach."

Keller is a veteran of high profile trials. She drew national attention when she was brought in at the last minute to try MGM Entertainment's case with Mattel Inc. over the "Bratz" doll line and won a \$170 million verdict. But she drew on the defense of Michael Jackson against sexual abuse allegations as she mapped out her course in defense of Spacey.

"I still remember when the pundits were measuring Michael Jackson for his jail cell," she said. "They were shocked! Shocked! when the jury came in with a not guilty."

Perhaps the most controversial part of the Spacey defense strat-

egy was the decision to confront an alleged victim of sexual assault head on by calling him a liar.

Moreover, Spacey was not a sympathetic figure. The actor became famous playing villainous characters like the lying, scheming Frank Underwood in Netflix's "House of Cards," and the duplicitous and cruel Roger "Verbal" Kint in "The Usual Suspects" movie. Going into the trial, he stood accused by two dozen men of groping them or making other unwanted sexual advances.

Keller and Scolnick pointed out in the interview that some of those accusations had fallen apart and others never led to criminal charges or a lawsuit – although Spacey still faced criminal charges in London that he assaulted three men, and more charges were added this week. The attorneys said their goal was to focus on Rapp's allegations and trust that the jury wouldn't believe him.

"The courtroom is its own little crucible," Keller said. "I think lawyers spend way too much time thinking about how the jurors are going to be affected by the outside publicity and not enough time thinking about that crucible."

"If you get people who really try their very best to be impartial and are intelligent people with common sense, they are going to try their best to ignore everything that occurred before," she added.

Picking a jury presented its own stresses. Kaplan conducted the voir dire questioning and used the "struck" method in which each side is blind to the other's strikes. Lawyers can end up having overlapping strikes and it removes a lot of the strategizing from jury selection. Most California state courts and many federal courts use a six-pack method in which each side goes back and forth striking panelists.

The New York court called 170 potential jurors for the Spacey case and the 11-member jury was picked in roughly two hours from the first group of 50.

"Most of the time you would excuse anyone who had read up on the case and formed an opinion," Keller said. "But in this case, Judge Kaplan took the position that as long as they believed they could be fair, that was the end of the story."

Scolnick, a longtime federal defender who spent five years prac-

ticing in the Southern District of New York, was more accustomed to using the "struck" method, and said he thought it worked especially well in this case.

"For this complex jury selection, with all of the issues that we had, it was remarkable how effi-

apply them to the facts. "That was different for me but Chase had warned me," Keller said.

"Wherever you go [to an unfamiliar court], you have to try to familiarize yourself with the local rules and habits and practices," she said.



Kevin Spacey leaves a federal courthouse in Manhattan, during his civil trial on charges of battery and intentional infliction of emotional distress, on Oct. 13. | New York Times News Service

cient it was. I think Judge Kaplan did a great job picking a jury," he said.

The jury turned out to be highly educated. Ten of the 11 were college graduates. Most had graduate degrees. The foreperson was a dean at Columbia University. There was a lawyer, someone who had a doctorate in mechanical engineering from the Massachusetts Institute of Technology, an MBA holder and the head of human resources for the Port of New York and New Jersey. The panel was also racially and ethnically diverse.

"I just kept thinking, only in Manhattan," Keller said.

Jury selection was just one reminder that even in federal courts there are often idiosyncratic local rules or customs in districts or before a particular judge that a lawyer should know to effectively try a case. Another was that some judges in the Southern District of New York do not allow attorneys to put up the jury instructions and argue to the jury how they should

Keller and Scolnick believe their case was won by carefully drawing out Rapp in his deposition to recount statements that they were sure were not true.

Perhaps most crucial was his public statements repeated in the deposition that he was moved to come forth with the Spacey allegations after reading Nyong'o's Oct. 19, 2017 oped in the New York Times in which she described Weinstein's lecherous wooing of her while she was a university student.

"[S]he wrote so beautifully and eloquently about what the experience was like for her," Rapp told one podcast. "Coupled with it was the knowledge that that had been going on for decades to so many people, and that I knew for a fact several people in my own circle who had had experiences with Kevin Spacey, that it was like that was when the penny dropped, and I had to do something."

The lawyers said they strongly suspected that the article Buzz-Feed published on Oct. 29, 2017,

had been in the works for more than 10 days. Turns out, text messages they got in discovery showed Rapp reached out to the reporter eight days before Nyong'o's article was published. "That was devastating," Keller recalled. "Particularly, I think,

the two Black women on the jury were just sitting there like, 'Wow! This woman, this hero in our community, her story has been misappropriated by this guy for his own personal gain.' It's got to have had a familiar ring to it."

Then there was the apartment on 66th Street in Manhattan.

Rapp described in public and in his deposition attending a party in Spacey's one-bedroom apartment, becoming bored and going into the bedroom to watch TV. He said he discovered all the other partygoers had left when Spacey entered the bedroom, where he said an assault took place.

Spacey moved a lot during those years and only lived a few months in the apartment in question, Keller said. But he kept leases and letters his parents sent him there. Turns out, the apartment was a studio with no separate bedroom. Scolnick found the apartment, which is still owned by the same family that rented it to Spacey, and got a floor plan. In his deposition, Spacey's lawyers got



The actor Anthony Rapp, right, leaves a federal courthouse in Manhattan on Oct. 13. | New York Times News Service

Rapp to repeat that the apartment had a bedroom and even draw a floor plan as he remembered it.

"We knew that locking him in to the fact that this was a one-bedroom was critical before he knew it was a studio," Keller said. "I told the jurors in closing arguments that the star witness was this, and pointed to the diagram of the studio apartment. It couldn't have happened."

"It was an integral part of his story that there were guests there and that he was shocked to see that they had left because he had been in the bedroom," she added.

The lawyers said they were able to find other inconsistencies between Rapp's public statements and evidence they gathered. Rapp wrote an autobiography and has given many interviews over the years that they mined.

"It was an exhaustive process," said Scolnick, who estimated that he listened to the audio version of Rapp's biography 15 times. "It was just hours and hours of leaving no stone unturned and only when you do that kind of work can you be that confident going into trial."

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