

NBA

## Legal strategies for Derrick Rose, accuser ahead of rape civil trial

### QUICKLY

- Did Derrick Rose commit the civil equivalent of rape in 2013? His upcoming trial will answer questions regarding the Knicks star's case and perhaps keep him away from the court.

By **MICHAEL MCCANN** October 04, 2016

Did New York Knicks guard Derrick Rose commit the civil equivalent of rape when he had intercourse with an intoxicated woman back in August of 2013?

A yet-to-be-selected jury is poised to answer that question over the next several days. Barring a last-minute financial settlement reached between Rose and his accuser, Rose and two co-defendants, Randall Hampton and Ryan Allen, are scheduled to go trial at 8:30 am PT on Tuesday. Their case will be presided over by U.S. District Judge Michael Fitzgerald and heard in Courtroom No. 1600 of the U.S. District Court for the Central District of California, Western Division, in downtown Los Angeles. Rose is not obligated to appear in court on Tuesday as the jury selection process—which is run by attorneys for both sides and the judge—is expected to take up the day. As a result, Rose, who will turn 28 years old on Tuesday, can play in the Knicks preseason opener against the Houston Rockets.

Rose's accuser, whose identity is currently shielded by the pseudonym "Jane Doe" but will become known at trial, seeks \$21.5 million in damages as part of a sexual battery lawsuit. She contends that Rose, whom she previously dated for a couple of years, and his two associates, broke into her Los Angeles apartment while she was inebriated. Doe maintains that the three men then had non-consensual intercourse with her. For his part, Rose insists that Doe was not nearly as drunk as she now claims and that she invited the

three men into her apartment, where, they say, they had consensual sex with her.

## **THE ROSE TRIAL IS A CIVIL MATTER, NOT A CRIMINAL ONE**

As emphasized throughout our coverage of the Rose case, this is a civil litigation. If Rose loses, it would mean that the jury found it “more probable than not” that he committed civil harm and is liable to Doe. The jury would then determine an appropriate amount of money that Rose owes Doe, and judge Fitzgerald would impose a civil order requiring Rose to pay it.

A finding of liability should not be confused or equated with a criminal conviction. There is no prosecutor in this case. The jury is tasked with finding liability, not criminal conduct, and the relevant burden of persuasion is preponderance of evidence, not much higher than the “beyond a reasonable doubt” standard found in a criminal prosecution. Put another way, Rose being found liable for sexual battery does not necessarily mean that he would be convicted of rape—they require different elements and command different burdens of persuasion.

That said, Rose could eventually face criminal charges. A letter recently authored by LAPD detective Nadine Hernandez to Doe’s attorney makes clear that the LAPD considers the investigation open. Further, under California law, there is a six-year statute of limitations for charging a defendant with rape. This means that Rose could be charged at any time until August of 2019. To be clear, it is extremely unlikely that Rose will be charged. The LAPD has already investigated the incident, compiled evidence and interviewed witnesses—and still not sought charges against Rose. Still, the LAPD will be watching the trial closely to see if new evidence or witness testimony surfaces that alters the trajectory of their criminal investigation.

## **JURY SELECTION DYNAMICS IN THE ROSE TRIAL**

Jury selection is often a difficult process and will certainly be challenging in the Rose trial. An ideal jury is one that is comprised of impartial, concerned and hardworking persons. The ideal is often hard to obtain. Along those lines, prospective jurors sometimes admit to, or unintentionally exhibit, a bias that casts doubt on their ability to be fair. Such a bias could relate to the

race, ethnicity, gender, sexual orientation or professional backgrounds of the plaintiff and the defendant, or to the type of facts found in the case. Judge Fitzgerald will dismiss any prospective jurors who fall into this category.

In most cases, the jurors do not know anything about the parties or the facts. But that is not true in cases involving persons whom prospective jurors know about or that involve allegations reported on by the media. The Derrick Rose case features both: he is a public figure, known especially well to NBA fans, and his case has been the subject of media attention, including in the Los Angeles market from where jurors will be selected. A prospective juror who is aware of Rose's background or this case will not be immediately disqualified. However, he or she must convince the attorneys and judge Fitzgerald of their ability to be fair. A prospective juror who gushes about Rose's playmaking skills or who recalls with sadness Rose's knee injury in 2012 is certain not to make the cut. Conversely, a prospective juror who describes Rose as an overrated player or who draws attention to allegations Rose had someone else take his SAT exam also won't be picked.

The formal selection of jurors for Rose's trial will occur through a process known as "voir dire." Voir dire will take place on Tuesday and perhaps Wednesday, too. During it, attorneys for Rose and Doe will ask each prospective juror various questions to assess their capacity to be fair. The attorneys also will have a limited number of "peremptory challenges," where they can ask judge Fitzgerald to remove a prospective juror without providing an explanation.

Both sides have likely retained jury consultants. These consultants supply expertise on how prospective jurors from different backgrounds tend to view the relevant legal and factual issues. Obviously, Rose's attorneys want jurors who are likely to be skeptical of the allegations against him and who might be inclined to favor Rose because he's a celebrity and an NBA star. Attorneys for Doe, on the other hand, want jurors who are likely to believe that Rose is dishonest and a rapist.

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## THE TRIAL

After the jury is selected, the trial will begin in earnest. An attorney for Doe will deliver an opening statement, followed by an opening statement by an attorney for Rose. Thereafter, Doe's attorney will call witnesses to the stand and introduce evidence that favors the plaintiff. The witnesses will answer questions on direct examination by Doe's attorney and then face cross-examination by attorneys for Rose.

After Doe's case has been presented, Rose's attorney will likely make a motion for a directed verdict and argue that Doe has failed to establish by a preponderance of evidence that Rose is liable. Judge Fitzgerald will almost certainly deny this motion, particularly since Fitzgerald's previous written orders suggest that he believes both sides have viable cases. Rose's attorney will then present his case, with accompanying witnesses, evidence and examination by each side's attorneys.

The four most important witnesses in the Rose trial will be these parties: Doe, Rose, Hampton and Allen. Ultimately, jurors will decide the case based on whether they find Doe's account or the three men's account more believable.

## DOE'S LEGAL STRATEGY

Doe will testify first as part of the plaintiff's case-in-chief. She will retell the incident as best as she recalls. Jurors will evaluate how credible Doe seems. In making that assessment, they will likely consider how specifically and precisely Doe remembers the incident and whether her account is internally consistent. Her recollection and purpose in bringing the case will be tested on cross-examination. Rose's attorneys will try to direct her to say that her account is motivated by a desire to become a millionaire. They will highlight how frequently she and Rose engaged in consensual sex once they started dating in 2011, and they will draw attention to Doe not seeking medical attention or altering law enforcement following the alleged rape.

After Doe testifies, her attorneys will call other witnesses to the stand. Those witnesses will include Jessica "Kendra" Groff, Doe's friend who accompanied her to Rose's home on the night of the alleged rape. Groff is expected to

testify that she and Doe consumed large amounts of tequila and other alcohol that evening—this a critical point because if jurors believe Doe was very inebriated, they are more likely to believe that she could not have lawfully consented to sexual intercourse. Groff is also anticipated to testify that co-defendant Ryan Allen insisted that Groff take her clothes off while the two were at Rose's house. This point may indicate to jurors that Rose and his two friends were adamant about having sex that evening.

Doe's roommates at that time, sisters Claudia Carleo and Marcella Carleo, are also expected to testify. Claudia Carleo was in the apartment when the alleged rape took place. She is expected to tell jurors that one of the defendants ran at her after he left Doe's bedroom and, out of fear, Carleo then locked her bedroom door to prevent him from entering. The two sisters are also expected to tell jurors that Doe described being raped in the hours after the incident.

On cross-examination, Rose's attorneys will likely highlight how Claudia Carleo apparently did not hear any unusual noises or screams at the time of the incident (this would be a risky point for Rose's attorneys to make since if Doe was very intoxicated, she may not have been able to scream). Rose's attorneys also expect that Carleo will admit there was no damage to the apartment complex door or to Doe's apartment door, thus suggesting that perhaps the three men did not break in.

Tommie McCaster, a co-worker of Doe at the time, is also expected to provide eyewitness testimony. He will likely tell jurors Doe was distraught after the incident. Depending on how well they testify, McCaster and other eyewitnesses could help Doe convince jurors that her account is true.

Group sex—and Doe's refusal to partake in it—will be addressed in witness testimony. Doe will say that Rose repeatedly asked her to participate in group sex. At least one witness, Deanna Duncans, is expected to testify on Doe's behalf to confirm both that Rose regularly solicits group sex and that Doe always refused to partake. This is an important point because on the night of the alleged rape, Doe had sex with three men—Rose, Hampton and Allen. Her attorneys will stress if Doe consistently refused to participate in

group sex, why would she suddenly agree, completely out of character, to partake in group sex that evening?

Rose will not be the only witness who has played in the NBA to testify. Doe is expected to call Rose's agent, former Chicago Bulls point guard B.J. Armstrong, to the stand. Armstrong's testimony will be centered on Rose's net worth, a point that would be relevant to jurors if they find Rose liable for the sexual battery.

## **ROSE'S LEGAL STRATEGY**

Rose's set of witnesses will include himself, Hampton and Allen. Consistency between the three men's accounts will be crucial—if they tell jurors different stories, jurors will be less likely to believe any of them. Rose could also face a difficult cross-examination. During pretrial testimony, he described his intentions that evening with the two-word expression “we men,” a phrase that suggests he sought sex. Rose has also delivered curious responses to other questions, such as claiming he does not know what the word “consent” means. The less credible Rose seems to jurors, the more likely he'll lose the case.

Rose's attorneys hope other witnesses advance his defense. Several witnesses will be called to describe their interactions with Doe in the hours and days leading up to, and following, the alleged rape. They will likely describe Doe as behaving not as someone who had been raped. Further, they may go so far as to say that Doe confided her sexual encounter with Rose was consensual.

Text messages are also expected to advance Rose's defense. Rose will highlight how, only hours after the alleged rape, Doe's texts seemed surprisingly fixated on being reimbursed for modest expenses from the previous evening. Rose's lawyers will contend that if Doe had been raped, the content of her electronic messages in the following hours would likely have indicated substantial distress about her well-being and not concern about taxi cab fares.

Rose's defense attorneys will also consistently ask jurors to wonder why Doe did not seek medical attention or why she waited two years to alert the Los

Angeles Police Department. The delay, Rose's attorneys will imply, should cause the jurors to question Doe's believability. The delay is also significant as a matter of evidence collection: the delay likely prevented the LAPD from, among other things, obtaining surveillance video from Doe's apartment building on the night in question. Such video might have revealed if Rose broke into her apartment or if, as Rose claims, Doe opened the building door to let him in. Without accompanying evidence, the case is largely a matter of which side jurors find more believable.

## **THE NBA AND ADIDAS WILL BE MONITORING THE TRIAL**

As I have explained in other Rose stories, both the NBA and adidas, which signed Rose to a \$185 million endorsement deal, will surely be monitoring the trial. Although the NBA and adidas realize that Rose's trial is a civil matter, how it plays out could significantly damage Rose's reputation. If the trial indicates that Rose likely raped a woman, NBA commissioner Adam Silver could invoke Article 35 of the NBA constitution and suspend Rose. Article 35 authorizes a suspension for "conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the NBA." Adidas could also take steps under likely "morals clause" language in its endorsement deal with Rose to suspend or even terminate payments.

On the other hand, if Rose exceeds expectations and testifies in a credible way, he is much less likely to face punishment by the NBA or adidas. Still, Rose not reaching a financial settlement with Doe prior to trial remains surprising, particularly given statements by Doe's attorneys that they are open to settlement talks. Perhaps a settlement will be reached at the last minute before the Rose trial begins. It has happened before in advance of trials, although time is running out for it to happen here.

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