

Past imperfect

Has Colorado's rape shield law been violated by attorney in Kobe Bryant case? Clearly, no

By Daniel Recht and Richard Kornfeld Rocky Mountain News Point/Counterpoint

Last week, Kobe Bryant's lawyer, Pamela Mackey, ignited a firestorm of controversy at her client's preliminary hearing when, during cross-examination of Eagle County Sheriff's Detective Doug Winters, she asked whether vaginal injuries found on the alleged victim could have been caused by prior sexual activity with two other men in the days immediately before the alleged assault by Bryant.

Pundits throughout the country condemned Mackey for asking this question. Yet, the question was perfectly appropriate, clearly ethical and did not in any way violate Colorado's Rape Shield Statute.

Decades ago, courts admitted evidence in sexual assault cases of the alleged victim's character and reputation for chastity, i.e., whether she was sexually active. The Rape Shield Statute, passed in Colorado (and in many other states) in the 1970s, was appropriately enacted to change that situation and protect victims of rape and other forms of sexual assault from embarrassing public "fishing expeditions" into their past sexual conduct.

The Rape Shield Statute precludes the introduction of evidence of the alleged victim's prior sexual conduct if it is going to be used by the defense to attack the victim's character or reputation.

Importantly, however, the Rape Shield Statute does not preclude the introduction into evidence of specific instances of prior sexual conduct when the evidence shows the source of physical injury or semen and is offered to establish that the rape was not committed by the accused.

Make no mistake: these exceptions to the Rape Shield Statute protect innocent, wrongfully accused people. Because the crime of rape is one of the most heinous crimes committed against another human being, nothing is more frightening and earth-shattering than a false rape allegation and conviction which would not only sear a stigma and scar on the accused, but also lead to a long and harsh prison sentence.

Many an innocent person has avoided such a wrongful rape conviction by being able to show that the victim's injuries were inflicted by someone else. Imagine the injustices that would occur, and the innocent people who would end up in prison, if the Rape Shield Statute prohibited the introduction of such evidence of innocence.

If you, or someone close to you, were wrongfully accused of the horrendous crime of rape you would certainly want defense attorneys to be allowed to show that the alleged victim had sex with another person, let alone two other people, in the preceding 72 hours, and therefore, that her injuries may have been inflicted by someone else.

While such evidence might embarrass or even humiliate the victim, our judicial system thankfully values the protection of innocent people over the risk of embarrassment or humiliation.

In the Bryant case, despite the initial condemnation of Mackey, it was perfectly appropriate for her to ask questions and elicit answers regarding the alleged victim's sexual conduct in the 72 hours prior to her contact with Bryant. And after reviewing the law, Judge Frederick Gannett obviously agreed that it was appropriate. At the continuation of the hearing on Wednesday, Gannett specifically allowed Mackey to ask questions about the young woman's sexual conduct prior the alleged assault. Why? Because, as discussed above, the sexual conduct of the young woman prior to her interaction with Bryant is directly relevant to the issue of the origin of the young woman's physical injuries (which themselves were underwhelming).

Furthermore, the questions regarding the alleged victim's sexual activities in the 72 hours preceding the incident with Bryant was the type of zealous representation required of defense attorneys by the Colorado Rules of Professional Conduct. In fact, after Wednesday's hearing, Gannett expressed his approval of the way the lawyers conducted themselves.

The Rape Shield Statute was rightfully enacted to change the prior law that allowed evidence of the alleged victim's prior sexual conduct simply to attack the victim's character and reputation. However, the Rape Shield Statute has never prohibited the introduction of evidence of prior sexual conduct to show an alternative person was the cause of a physical injury. This is a serious and important distinction without which many innocent people might well end up wrongfully convicted, suffering the living nightmare of an extended prison sentence and their lives needlessly ruined.

If you are in need of an experienced business litigator or criminal defense attorney, please call Recht & Kornfeld today.

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