

COMMENTARY

## **A victim of sexual assault or domestic violence retracts a recantation. Is their credibility compromised?**

To an outside observer, it may appear as erratic flip flopping. More often, it's a symptom of the traumatic experience the survivor went through. Still, how much has the vacillation damaged the credibility of the victim/survivor and their legal case?

**Daniel Pollack and Helene M. Weiss | September 6, 2022**



Your client is a victim of a single sexual assault or many such assaults that took place over a long period of time. The event(s) may have happened recently or years ago. Finally, the client discloses. Then, for any number of reasons, the client recants. Upon further reflection, the recantation is retracted. Now the client stands firm and says the assaults really did occur. To an outside observer, it may appear as erratic flip flopping. More often, it's a symptom of the traumatic experience the survivor went through. Still, how much has the vacillation damaged the credibility of the victim/survivor and their legal case?

There are three aspects to investigate: the initial disclosure, the recantation, and the retraction.

## **The Initial Disclosure**

Sexual assault can take a horrible toll on a person. It is well known that calling out the person responsible for the assault—often a person the survivor trusted greatly—is extraordinarily difficult. Especially if the abuse took place when the victim was a child, delayed disclosure is common. Family, friends, potential jurors, and even judges who are unfamiliar with the impact trauma can have, may not appreciate why a victim may wait to report sexual abuse and then backtrack. Disclosure of such memories may flower slowly, sometimes referred to as “layered reporting.”

## **The Recantation**

We are used to seeing stories about people who have recanted. Recent attention-grabbing headlines include:

- Peng Shuai Not at All Suspiciously Recants Sexual-Assault Accusations
- Don Lemon Accuser Recants Assault Accusations, Drops Lawsuit

There is no singular reason why victims choose to recant. Often, because of the very intimate relationship the parties have, this may prompt the victim to decide not to jeopardize that relationship. The victim may also feel coerced into recanting so as not to endanger children who may be involved. Unseen intimidation or threats by the accused or their associates may also be happening.

## **The Retraction**

The common definition of retraction is to assert that something that a person previously said or wrote is really not true. Many states have retraction statutes that apply to newspapers or other media. For instance, Florida's statute reads:

770.02 Correction, apology, or retraction by newspaper or broadcast station— (1) If it appears upon the trial that said article or broadcast was published in good faith; that its falsity was due to an honest mistake of the facts; that there were reasonable grounds for believing that the statements in said article or broadcast were true; and that, within the period of time specified in subsection (2), a full and fair correction, apology, or retraction was, in the case of a newspaper or periodical, published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared and in as conspicuous place and type as said original article or, in the case of a broadcast, the correction, apology, or retraction was broadcast at a comparable time, then the plaintiff in such case shall recover only actual damages.

(2) Full and fair correction, apology, or retraction shall be made:

(a) In the case of a broadcast or a daily or weekly newspaper or periodical, within 10 days after service of notice;

(b) In the case of a newspaper or periodical published semimonthly, within 20 days after service of notice;

(c) In the case of a newspaper or periodical published monthly, within 45 days after service of notice; and

(d) In the case of a newspaper or periodical published less frequently than monthly, in the next issue, provided notice is served no later than 45 days prior to such publication.

Of course, retractions of recantations of assertions of sexual assault or domestic violence may be similar, but they are not the same as those in a newspaper.

## **Implications**

People are credible if they exhibit the quality to elicit belief, to be truthful. A subjective term, credibility is the key determination a court, jurors, law enforcement officials, and attorneys need to constantly make. When a victim recants in a criminal case, such recantation—whether written or recorded—must be turned over to the defense. Recantations are viewed in the eyes of the law as something that inherently affects a witness's credibility, and is therefore an automatic disclosure that prosecutors are required to make when made aware of any recantation by their complaining witness. When a recantation takes place in a criminal case, prosecutors may still decide to move forward with prosecution if they have enough available evidence to support the charges. A prosecutor may choose to rely on 911 calls, police reports, statements made by eyewitnesses, medical records, and more. However, once a jury hears that a victim has at one point recanted, their credibility may be permanently affected.

A retraction of a recantation presents further issues. While it can be somewhat easily understood by a jury that recantations typically occur with victims who are terrified of their abuser, a retraction of a recantation is a bit more complex. Now a jury must grapple with the

reasoning for the victim's initial recantation, as well as the reason for the victim's subsequent retraction. More often than not, fear and intimidation play a role in a witness's motivation for recanting and retracting a disclosure.

Of course, defendants are allotted an opportunity to confront their accuser in court during cross-examination. In cases where a recantation and/or retraction occurs, a thoughtful cross-examination will undoubtedly focus on a victim's recantation. Any piece of evidence that may damage a complainant's credibility should be an expected topic during cross examination, and recantations fall neatly into that category. However, this doesn't necessarily mean that a victim's credibility will be absolutely destroyed. Prosecutors can attempt to rehabilitate their complainant with a careful re-direct examination to provide the jury insight into why the recantation occurred.

Civil cases with recantations and retractions will play out much differently. Although prosecutors have an ethical duty to disclose information that will impact their witnesses' credibility, plaintiffs have no such ethical duty. Theoretically, a victim could recant and retract to their attorney several times and such information may not be shared with a finder of fact. However, this does not mean that such retractions and recantations reflect favorably for the client. Unlike a prosecutor, a civil attorney may choose to voluntarily withdraw from their representation of a client if they do not believe they can pursue the client's claims in good faith.

A victim of sexual assault or domestic violence is not traumatized only momentarily. Their trauma and sense of vulnerability is open-ended.

Consequently, great care and consideration must be given in properly assessing their history of divulging, recanting, and reaffirming their abuse. Coercion, intimidation, and fear all play into the context in which the initial and subsequent complaints were made. Indeed, context is everything.

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