

# Practical Pointers for Defending Claims Under New York's Adult Survivors Act

By Helene R. Hechtkopf | February 26, 2024

On Nov. 23, 2023, the one-year statute of limitations extension for claims based on sexual offenses provided by the New York's Adult Survivors Act expired. By that time, more than 3,000 civil claims had been filed under the act. Those lawsuits include claims against celebrities (Bill Cosby, Axl Rose, Sean Combs), politicians (Donald Trump, Andrew Cuomo, Eric Adams), state agents (corrections officers, police officers, judges), doctors (Robert Hadden, Darius Paduch), business executives (Leon Black of Apollo Management, Mike Jeffries of Abercrombie) and companies of all kinds (art museums, healthcare systems, religious institutions, etc.). Even more claims continue to trickle in, based on tolling agreements between potential plaintiffs and defendants after their private negotiations did not result in a settlement.

While it is hard enough to defend a civil sexual assault claim under normal circumstances, as there are often no witnesses to the event and the timeline can be muddled by different individuals' recollections, claims filed under the Adult Survivors Act come with extra difficulty—both to prosecute and defend—because many of these claims related to allegations that are years, if not decades, old.

Because of the age of these claims, it can be difficult or impossible to obtain medical records from the time when the offense was alleged to have occurred. Most doctors' offices only keep medical records for seven years, and this is even more true of the old paper records that were in use at the time of many of these claims occurred. Many of the witnesses to the events may have died or moved out of state. If text messages, emails or letters about the event existed, they may no longer exist.

It can even be hard to pin down exactly when an offense was alleged to have occurred, based on only a victim's memory. Juries, though, appear willing to accept an approximation of the year or decade (see, for example, E. Jean Carroll's testimony about when Donald Trump assaulted her. Carroll was unable to recall the exact year that she was attacked by Trump when she testified, but nevertheless prevailed on the sexual assault claim).

For a lawyer in the position of trying to defend against an ancient sexual assault allegation, here are some suggestions on how to collect the evidence necessary to defend a case of this nature:

## Collect Evidence Early

Even before discovery formally begins, it is worthwhile to spend time with your client and plumb the depths of their memory to see what they remember at the outset. Given the age of some of the allegations, the client may not be in a position to be particularly helpful in the defense of the case. And if you wait until the decision on a motion to dismiss and the initiation of discovery until you begin to find out what your client

knows, their memory may have faded even further—or the accused may not even still be alive to assist in the defense.

So, preserve whatever memories they have now. If you are taking depositions, consider taking de bene esse depositions—depositions intended to be used at trial if the witness is unavailable. If your witnesses are elderly and unlikely to be able to testify at a trial several years away, videotaped de bene esse depositions could be your only hope of the jury “hearing” from that witness directly.

### **Photographs Are Your Friend**

Travel back in time—seek photographs of what the plaintiff looked like at the time of the alleged assault, so you can ask your client whether he or she actually knew the plaintiff, by face if not by name. Also, seek photographs of the location of the alleged assault from the era when the assault was alleged to have occurred. These will be useful at deposition to determine if the plaintiff can accurately describe where the assault took place based on how it looked at the time, not how it looks now.

They will also be key at trial—these are your future jury exhibits and may prove valuable on cross-examination, allowing the jury to imagine the scene of the event, what the individuals at the time looked like, and—if the plaintiff’s memory of the event is sketchy—allowing for a powerful cross-examination.

### **Be Creative in Identifying Potential Witnesses**

It may be impossible to identify eyewitnesses to an event that can’t be pinned down to a particular year, let alone a particular day. Think big: try to identify any witnesses to your client’s general activities in that timeframe.

For example, if your client worked in an office, try to identify the other office workers from that year. While in an ordinary case, you would likely focus on the individuals who were actually present on the day the alleged event occurred, in cases like this, you will probably have to cast a wider net. If you find the other people who worked in the office that the event was alleged to have occurred in, you can get testimony from them about the defendant’s usual demeanor, whether they had a reputation for sexual harassment, whether there were other complaints against them, or whether the witness remembers any unusual events occurring in the timeframe that the assault was alleged to have occurred.

### **Seek the Plaintiff’s Contemporaneous Records**

Does the plaintiff have any sort of contemporaneous written records that can show (or disprove) that the alleged assault happened when they say it did? Seek the plaintiff’s medical records, written correspondence, diaries, journals, or day books from the months or years surrounding the date on which the event allegedly took place.

Christine Blasey Ford kept a calendar: what does your plaintiff have to prove that the he or she was actually in the location where the event allegedly occurred.

### **Press Your Client Hard**

Now is not the time to mollycoddle your client. Press hard for their memories of what happened—and whether anything similar to the allegations (consensual or not) had ever happened before or since.

### **But Also Look Hard at the Plaintiff’s History**

Before you even take the plaintiff’s deposition, a background check is in order to find out whether they have filed other, similar claims against other defendants.

### **Conclusion**

Defending old sexual assault allegations is challenging, but need not be like fighting with both arms tied behind your back. Remember that the burden of proof remains on the plaintiff in these cases, and use a critical eye when evaluating their evidence.

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