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## The Legal Case Against Weinstein's Suppression Efforts

By **Lynne Bernabei and Kristen Sinisi** (January 16, 2018, 12:38 PM EST)

For decades, disgraced film producer Harvey Weinstein succeeded in silencing his victims. Authorities in three different countries are now considering whether to bring criminal charges against him, but will he have the same success burying information in the courts as he did on the job?

More than eighty women have spoken up publicly about Weinstein's pattern of sexual assault spanning more than three decades. A recent report from The New Yorker substantiated the fear Weinstein's victims faced in coming forward. The Hollywood mogul did not limit his retribution to empty threats. Weinstein engaged private intelligence companies — Kroll and Black Cube — to dig up dirt on his sexual accusers and the media members who threatened to air victims' stories. Weinstein leveraged the information to keep his victims quiet, and until recently, it worked.

An alarming number of victims have come forward about the sexual assault and harassment they faced at the hands of Weinstein, but questions remain about the judicial system's ability to serve justice. In the United States, many of the public claims against Weinstein are likely time-barred. Authorities in London who are investigating Weinstein with respect to nearly a dozen victims there may fare better, given that it does not have a strict statute of limitations for serious sex crimes.

Another question about the limits of the judicial system concerns evidence that prosecutors may be able to collect from Weinstein's former attorney, David Boies. Initially, Boies's involvement with Weinstein was thought to be limited to helping him negotiate a new employment contract with The Weinstein Company when his contract came up for renewal in 2015. At that time, Boies negotiated terms that enabled Weinstein to keep his job despite his criminal misdeeds (in the absence of a criminal indictment or verdict or fraud against the company).

As if that weren't enough, The New Yorker's report revealed that Boies's involvement in the Weinstein web ran deeper than previously known. In July 2017, as The New York Times, then another Boies client in unrelated litigation, prepared to release a story about the allegations against Weinstein, Boies took steps to bury the stories.

He personally executed an agreement retaining the services of Black Cube, a



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business intelligence company comprised of a "select group of veterans of elite units in the Israeli intelligence community," on behalf of Weinstein. The agreement's primary objectives included "[p]rovid[ing] intelligence which will help [Weinstein]'s efforts to completely stop the publication of a new negative article in a leading NY newspaper."

Black Cube defined "success," entitling it to a \$300,000 "success fee," as "stop[ping] the Article from being published at all in any shape or form." Although Boies released a statement in which he said that he engaged Black Cube merely to vet the accuracy of the Times' article, the express contract provisions he signed contradict that claim.

Boies went on to say that he declined to represent Weinstein with respect to the alleged sexual assaults for which Weinstein hired other counsel and that he told Weinstein "the Times story could not be stopped through threats or influence." Boies further stated that Weinstein and the counsel he engaged selected private investigators to assist him and drafted a contract, which Weinstein asked Boies to sign. Although Boies signed the agreement, he denied selecting the investigators or directing or controlling their work, tasks which Weinstein and his lawyers did, according to Boies.

This sets out another problem for Weinstein and Boies: can Boies be compelled to provide evidence about his communications with Weinstein because this contract had nothing to do with providing legal advice?

Because Boies denied that he represented Weinstein in a legal capacity when he executed the contract on his behalf, and the plain language of the contract shows that Boies hired Black Cube to suppress a news story, not for any purpose related to the provision of legal advice, it seems his communications with Weinstein would not be privileged. Boies also would not be able to shield the Black Cube's investigative materials under the work-product doctrine, which protects materials an attorney prepares in anticipation of litigation.

Assuming the privilege applies and was not waived, prosecutors still may be able to compel evidence of his communications with Weinstein about the Black Cube contract under the "crime-fraud" exception to the attorney-client privilege, which refuses to extend protection to communications made in furtherance of a crime or fraud. A recent lawsuit in the Southern District of New York alleged that a wide network of individuals engaged in a criminal conspiracy to stop Weinstein's victims from coming forward.

Although the lawsuit does not name Boies as a defendant, it alleges that law-firm participants including Boies and his law firm participated as unnamed co-conspirators in a criminal enterprise created by Weinstein, his company and its board of directors, "to tamper with victims and witnesses of Weinstein's sexual misconduct in order to prevent the publication, prosecution or reporting of Weinstein's sexual misconduct and to destroy evidence."

This is not the first time Boies Schiller Flexner LLP has used questionable tactics in a case involving harassment, intimidation and abuse. In a Dec. 1, 2017 article, The New Yorker reported that in February 2017, Boies and his firm alleged that Emma Cline plagiarized segments of her novel, "The Girls," from her ex-boyfriend, Chaz Reetz-Laiolo, by installing spyware on her computer and allowing Reetz-Laiolo to use and later buy it. Cline countered that she used the spyware to monitor Reetz-Laiolo and protect herself from his physical and emotional abuse and his suspected infidelity.

In May 2017, Boies Schiller sent Cline a draft complaint bearing Boies' name, which the firm threatened to file, if the parties did not resolve the case. It contained thirteen pages of sexually explicit and potentially embarrassing material about Cline, which purportedly would be used to discredit her abuse claims. However, a few days after the Weinstein scandal broke, Boies Schiller provided Cline an amended draft, which omitted the sexual material and was filed later without Boies' name. Cline filed a countersuit alleging that Reetz-Laiolo exploited her personal information to "extract a financial windfall[.]"

Stopping the publication of a news article, alone, is not a crime, but racketeering, intimidation of or retaliation against witnesses who speak to law enforcement officials, obstruction of justice and extortion could serve as bases to apply the exception. Under New York law, it is also a misdemeanor to offer, agree to offer, accept or agree to accept something of value in exchange for refraining from initiating criminal charges. If prosecutors set forth sufficient evidence of a crime and establish that Weinstein used Boies to further his criminal scheme, protected communications could be subject to disclosure.

Application of the U.K. privilege would yield similar results, if authorities in London extradited Weinstein for prosecution. The U.K.'s legal advice privilege is akin to the attorney-client privilege in America and has a similar exception for crimes and frauds. Whereas the breadth of the crime-fraud exception in the U.S. tends to be a matter of state law, the U.K. uniformly enforces an exception that extends to "iniquities," and is aptly called the "crime, fraud and iniquities" rule. The U.K. courts have explained that the rule extends beyond criminal purposes to "fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice."

Historically, English courts have been reluctant to apply the rule to "ordinary run of cases," and, the rule is not well-defined. Earlier this year, in *Holyoake v. Candy*, England's High Court declined to apply the exception to compel disclosure of information covered by the litigation privilege. In that case, the court held that violation of one's privacy or of any other fundamental human right, alone, was inadequate to trigger the iniquity exception.

Because Boies has admitted that he did not serve as Weinstein's attorney in engaging the intelligence firm, government investigators should be able to question him about any communications he had with Weinstein to cover up the Times' news story, as they would not be privileged. Even if the communications are privileged, Weinstein's pattern of suppressing, silencing and retaliating against his victims through an intricate network of high-powered investigators, lawyers and journalists may present a rare case for application of the exceptions to the attorney-client privilege.

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