

How Weinstein's Lawyers Could Face Scrutiny in Sexual Assault Trial

In media reports, David Boies and other attorneys have been portrayed among Harvey Weinstein's alleged "enablers." What are jurors likely to hear about the lawyers' actions?

By [Christine Simmons](#) | June 01, 2018 at 03:22 PM



Harvey Weinstein, center, in court on May 25. Photo: Steven Hirsch/New York Post via AP, Pool

Before Hollywood producer Harvey Weinstein became the face of the #MeToo movement and was arrested last month, prominent lawyers reportedly helped him investigate and even silence women who accused him of sexual misconduct.

Now, some legal observers say actions by Weinstein's attorneys in the years leading up to his arrest could be highlighted in his criminal case under certain conditions—even if any attorney-client communications are highly unlikely to be exposed.

Last year The New York Times and the New Yorker both chronicled allegations that Weinstein and his powerful allies, including attorneys and investigators, had attempted to investigate, intimidate and pay off his accusers.

[In an October New York Times report](#), Ashley Matthau, who accused Weinstein of sexual misconduct in 2004, recounted how she and her attorney, John West of Allred, Maroko & Goldberg, met with Weinstein and his lawyer at the time, Daniel Petrocelli, at a Beverly Hills

hotel. According to Matthau's account, Petrocelli said that she would be painted as promiscuous if she went public with her accusations, telling her, "We'll drag you through the mud by your hair."

Matthau agreed never to speak of the allegations again in exchange for a settlement of more than \$100,000, the Times reported.

Petrocelli, a prominent litigator and O'Melveny & Myers partner, declined to comment to the Times. In a statement to ALM this week, Petrocelli said, "Do I recall ever meeting this person? No. Do I recall meeting this person's lawyer? No. Do I recall there was such a meeting? No. And I certainly would have never made the statement attributed to me."

Petrocelli added that he hasn't been contacted by any prosecutors and he wouldn't expect to be.

Meanwhile, [as the New Yorker reported](#), David Boies, on behalf of Weinstein, signed a contract with security firm Black Cube, which attempted to uncover information that would stop the publication of a Times story about Weinstein's abuses. Investigators from the same agency, using false identities, met with the actress Rose McGowan, who accused Weinstein of rape, to extract information from her.

Boies [has said it was a mistake](#) to arrange the contract with investigators whom he did not select and did not control, and he would "never knowingly participate in an effort to intimidate or silence women or anyone else." A firm spokesman said Boies was unavailable to comment.

'A Big If'

In civil litigation, Weinstein's lawyers and their firms have already been accused of being part of a "Weinstein sexual [RICO] enterprise."

For instance, in a [proposed class action lawsuit](#) filed Friday by three women in Manhattan federal court, [Benjamin Brafman](#) and his law firm; Boies and his firm, Boies Schiller Flexner; K&L Gates; U.K.-based BCL Burton Copeland; and Israel-based Gross, Kleinhendler, Hodak, Halevy, Greenberg & Co. are named as central figures—though not defendants—in an alleged scheme to cover up his misconduct.

On Wednesday, [a Manhattan grand jury voted to indict Weinstein](#) on charges of first- and third-degree rape and first-degree criminal sexual act. According to [news reports](#), Weinstein's criminal sex act count is related to Lucia Evans, [who told The New Yorker](#) that Weinstein forced her to perform oral sex on him in Tribeca in 2004.

Whether Weinstein's attorneys will be mentioned in the criminal case is still unclear. No link has been reported between the allegations in the indictment and the women who were reportedly investigated by Black Cube under the Boies contract, or who communicated with Petrocelli or any other lawyer for Weinstein.

But even if Weinstein's previous lawyers had no communications or dealings with the women in Weinstein's indictment, it's possible other women's accounts could be cited by prosecutors if the judge allows it, said New York defense attorney Jeremy Saland.

Similarly, in Bill Cosby's sexual assault retrial, [a Pennsylvania judge allowed](#) testimony from five prior bad acts witnesses other than complainant Andrea Constand.

Saland, of criminal defense firm Crotty Saland and a former state prosecutor, said any witness, if the judge permits it, can make an assertion about what Weinstein and what one of his lawyers did to her. He added that Weinstein's conduct toward other women who are not parties to the criminal case may be precluded or introduced based on so-called Molineux and Sandoval applications.

"Yes, it's going to come out that he potentially abused other women," Saland said. "But this [trial] needs to be tight. Did Weinstein do it, and he did he break the law? Not 'did his attorneys make someone feel uncomfortable?'"

"The issue here is, did Weinstein rape or sexually assault these women," not whether he "attempted to keep it quiet," Saland said.

Assuming that the court would allow in some evidence of other incidents with other women—and "that's a big if"—said Richard Holwell, a former federal judge, "the most you would get out of a lawyer who represented Weinstein would be if the lawyer made an admission" on behalf of Weinstein, such as a statement from the lawyer that Weinstein had been drinking during an encounter.

Overall, Holwell, now a partner at Holwell Shuster & Goldberg, said it's hard to see any of the lawyers' actions making it into the record before the jury.

But another former federal judge, Shira Scheindlin, said that if Weinstein's criminal defense team questions why the accusers didn't complain earlier about Weinstein, the prosecution may be allowed to say "because his lawyer met with [the victims] and said they were intimidated ... to rebut the argument of recent fabrication."

Scheindlin, now of counsel at Stroock & Stroock & Lavan, said that unlike communications between Weinstein and his lawyers, the action of a defense lawyer meeting with a witness or victim isn't privileged. It's possible an attorney who confronted an accuser could be called by one side or another to testify about the interaction, Scheindlin said.

All these issues would likely be addressed in motions in limine, before trial, to limit, control or prevent what is admissible during trial and determine how much latitude the defense and prosecution have in witness testimony, Saland said.

Saland and Isabelle Kirshner, a partner at Clayman & Rosenberg, both pointed to a possible line of argument for the prosecution, consciousness of guilt, in which the role of Weinstein's lawyers could be highlighted if they ever met with victims or attempted to settle with them.

If Weinstein and his attorneys met with the victims in the Manhattan district attorney's case in an effort to silence them or offer them money, prosecutors could argue it showed consciousness of guilt on Weinstein's part, said Kirshner, whose firm [has often represented attorneys](#) and is now counsel to former Attorney General Eric Schneiderman.

Another top defense attorney who declined to be identified because of his cases before the Manhattan District Attorney's Office said prosecutors may try to raise the actions of Weinstein's agents, including his attorneys and investigators, in intimidating witnesses or even paying them to stay silent. But a judge would permit that only if they could show Weinstein knew exactly what his agents were doing and directed their actions, the lawyer said.

If prosecutions can tie the intimidation to Weinstein, it may show consciousness of guilt "because the presumption is, if he's innocent, you wouldn't go around threatening witnesses," the defense attorney said.

"They [the prosecution] will likely try whatever evidence they can get their hands on that supports a narrative of an aggressive sexual predator," Saland said. "But there comes a point where it becomes too prejudicial or not relevant."

As several attorneys pointed out, defense lawyers have a right to request to speak with a witness or confront a complainant to investigate his or her claims.

Scheidlin said lawyers are "perfectly permitted to investigate witnesses in order to prepare a defense," including doing a deep dive into witnesses' background.

Kirshner said, in most instances, the attorney hires an investigator and the investigator is part of the defense team, taking direction from the lawyer. "There's nothing in itself inappropriate or illegal about conducting an investigation about somebody who is a potential adversary," she said.

Brafman, Weinstein's criminal defense attorney, declined to comment on potential arguments in the case, as did a spokesman for the District Attorney's Office.

Attorney-Client Communications

What is highly unlikely to be shown at trial are any communications between Weinstein and his attorneys, several legal observers said.

Kirshner said it would be surprising if an attorney had advised Weinstein to commit criminal acts to conceal his sexual misconduct, and so it's unlikely any attorney-client privilege communications would be sought. Any communications between Weinstein and his lawyers related to his accusers would be privileged unless there was some allegation of tampering or other criminal conduct under the crime-fraud exception, she said.

Regardless of whether their name appears in court briefs, witness testimony or other evidence, the work of Weinstein's former attorneys in thwarting accusations against him will likely

continue to be cited in press reports and other public accounts—part of the nature of any defense attorney’s job.

His “defense attorneys,” Saland said, “are vilified because they are the public face of a man who is reviled across the world.”