

Boies In Ethics Quagmire Over Weinstein Spy Hire

By **Andrew Strickler**

Law360, New York (November 8, 2017, 10:52 PM EST) -- David Boies' role in hiring a private spy firm to help Hollywood mogul Harvey Weinstein suppress an article detailing sexual harassment and assault allegations drew reactions from ethics specialists ranging from disapproval to disgust, and raised the possibility of professional or disciplinary consequences for the famed litigator.

The Boies Schiller Flexner LLP chairman's explanations about his firm's hiring of Tel Aviv-based Black Cube, which sent an undercover agent to target actress and Weinstein accuser Rose McGowan, as reported Monday by The New Yorker, triggered some head-scratching among experts, as they said Boies appeared to downplay his responsibilities while simultaneously revealing sensitive client communications.

Boies said in a statement Tuesday he was told at the time that the purpose of the Black Cube work was to "ascertain exactly what the actress was accusing Mr. Weinstein of having done, and when, and to try to find facts" to prove the charges were false.

Other Weinstein lawyers oversaw the work, while he only signed the contract at Weinstein's behest.

Many are taking exception to the firm's role in a cloak-and-dagger campaign unambiguously meant to kill a story from running in The New York Times — another Boies firm client.

"Sending in a 'false friend' or people using aliases like this is, at best, unseemly — and is unethical in most instances," said Richard Zitrin of the University of California, Hastings College of the Law in San Francisco. "And to my mind, it's just gross, it's abhorrent and it isn't anything lawyers should be doing."

The New York Times and The New Yorker last month published lengthy investigative pieces detailing years of allegations that Weinstein serially harassed, abused and attacked women. McGowan is among the women who have also publicly accused Weinstein of raping them, charges Weinstein has denied.

Since the initial stories broke, Weinstein has faced a deluge of other accusations of sexual misconduct going back decades. The New York City Police Department has said it is building a case against Weinstein stemming from a rape complaint made by actress Paz de la Huerta.

On Monday, The New Yorker published a follow-up article detailing Weinstein's efforts to use private investigators to "target" his accusers and reporters, and to pass back information to be used to derail the Times article.

Boies, the firm chairman who until recently counted Weinstein among his longtime clients, signed one of the Black Cube contracts. Employing what it called a "blitz methodology," the firm used an ex-Israeli intelligence agent to pretend to be a U.K. woman interested in McGowan's women's rights activism, according to the New Yorker reporting.

The agent, identified as “Anna” in the contract Boies signed in July, ultimately taped hours of conversations with McGowan. The agent also met with a New York magazine reporter working on a Weinstein story; other accusers and reporters, including at The New York Times, were also contacted. A freelance journalist was also engaged to help gather intelligence, according to the magazine.

Boies, who spoke with The New Yorker reporter before publication, called any role he played “a mistake.” He also said he’d denied Weinstein’s request to represent him in defending against the allegations, but confirmed he’d gotten reports from one of the spy firms and passed that information on to Weinstein.

In a statement to his firm Tuesday, Boies said Weinstein and other lawyers chose the firms and drafted a contract, which he then signed under the belief that the effort was an “appropriate endeavor” to help gather information to show The New York Times allegations were false.

A firm representative said Wednesday that it was involved “in documenting a settlement of a billing dispute between Mr. Weinstein and Black Cube.” At Weinstein’s request, Boies then signed both the billing settlement and a new Black Cube contract that Weinstein “wanted signed promptly.”

The New York Times reported Tuesday that Boies had a hand in drafting a Black Cube contract; the firm later said that was inaccurate.

“I would never knowingly participate in an effort to intimidate or silence women or anyone else, including the conduct described in the New Yorker article,” Boies told his firm. “That is not who I am.”

But ethics experts took issue with Boies’ attempt to distance himself from the Black Cube subterfuge, characterizing it as a serious ethical matter with potential disciplinary consequences.

Several also questioned what Weinstein and Boies hoped to achieve by having Boies sign the contract, rather than Weinstein or one of his other lawyers.

Nicole Hyland of Frankfurt Kurnit Klein & Selz PC, said that, in certain situations, a law firm can hire an investigator on behalf of a client, and any communications about that work will be protected under the attorney-client privilege — but only if the investigator’s work is for a legal matter in which the lawyer represents the client.

But that arrangement doesn’t mean a client can simply ask a lawyer to sign a contract and thereby cloak the activities in privilege, she said.

“That’s not how it’s supposed to work, and it doesn’t work that way,” she said. “Here, Mr. Boies seems to be saying that he was simply acting as a conduit between the client and the investigator. If that’s what happened, and there was no actual legal work being done by the lawyer, that’s not a true attorney-client privileged relationship.”

Moreover, since Boies signed the contract, he had a duty to supervise the work, regardless of who chose the investigators.

“Investigators may employ certain types of deception, but a lawyer isn’t allowed to do that, either directly or indirectly. So, if you aren’t overseeing the investigation, how can you ensure that the investigator isn’t using deception?” she said.

A New York Times spokesperson called the spying “reprehensible” in an announcement of the firm’s termination.

"We never contemplated that the law firm would contract with an intelligence firm to conduct a secret spying operation aimed at our reporting and our reporters," the paper said.

Roy Simon, a professor emeritus of legal ethics at Hofstra University's Maurice A. Deane School of Law, agreed that a conflict "outside the category of things contemplated" by a client presented with an advance waiver, even a broad one, should not be considered waived.

"This spying thing is so far beyond the pale, nobody could have ever thought they were waiving this," he said.

Simon also voiced doubt that Boies, whom he called "a premier lawyer of his generation," would be the focus of disciplinary authorities, largely because they don't have the resources to battle a lawyer of Boies' stature; investigators focus on lawyers who hurt clients with few options for recourse.

"At least here, The New York Times can punish him by firing him, but I do think he will lose some clients over this," he said.

The firm denied ever being aware of threats or intimidation to Times reporters. The written conflict waiver "expressly permitted" Boies Schiller to be adverse to the paper "even to the extent of litigation."

"The issue of threats and intimidation is not an issue of conflicts but of what is appropriate whether or not a publication is a client," the firm said.

Boies said Tuesday that Weinstein is no longer a client.

Kathleen Clark, a legal ethics expert and a professor at Washington University Law in St. Louis, called the spying scheme "at best, a kind of bullying."

"If you see this as a fraudulent scheme to illicit information ... and the use of all these levers to get information out of people, and he helped facilitate the fraudulent scheme, Mr. Boies might need to lawyer up," she said.

--Editing by Philip Shea and Breda Lund.