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# Here's what legal experts are saying about the Kevin Spacey sexual assault case

By [Travis Andersen](#), [Matt Rocheleau](#) and [John R. Ellement](#) Globe Staff, July 9, 2019, 2:19 p.m.



A missing phone at the center of Kevin Spacey's pending sexual assault case on Nantucket, coupled with the accuser's refusal to answer questions about the device, could force prosecutors to drop an indecent assault and battery charge filed against the actor, legal experts said Tuesday. STEVEN SENNE/ASSOCIATED PRESS/FILE 2019/ASSOCIATED PRESS

A missing phone at the center of Kevin Spacey's pending sexual assault case on Nantucket, coupled with the accuser's refusal to answer questions about the device, could force prosecutors to drop an indecent assault and battery charge filed against the actor, legal experts said Tuesday.

"If I were a betting man, I'd say this case is going to end short of a trial" via dismissal, said Chris Dearborn, clinical professor of law at Suffolk University and a former Massachusetts public defender.

Dearborn and other specialists spoke to the Globe following a [dramatic hearing](#) Monday in Nantucket District Court, where Spacey's 21-year-old accuser asserted his Fifth Amendment right against self-incrimination regarding the phone.

The accuser, who says Spacey unzipped his pants and fondled him during a July 2016 encounter inside the Club Car bar, used the phone to send text messages to his then-girlfriend during the incident, legal filings show.

Spacey's lawyers assert that some texts were deleted from the phone before the accuser's family turned it over to police, and the defense has a right to examine the device to look for exculpatory material. The presiding judge last month ordered that the phone be turned over to the defense.

But the accuser's lawyer said in court Monday that his family can't find the device, which police say they returned to the family.

"The prosecution has an absolute duty to preserve evidence," said Peter Elikann, a prominent Boston defense lawyer, in an e-mail. "The key is that it must be shown that there was a reasonable possibility that the lost or destroyed evidence was exculpatory and access to it could have potentially produced evidence that was favorable to the accused person's cause."

Elikann said that if the case goes to trial, “A judge could simply give the jury what’s known as a ‘missing evidence instruction’ informing them that they can completely take into consideration and draw a negative inference from the fundamental unfairness of lost or destroyed evidence. But the judge may dismiss the entire case if the harm can’t be remedied, since how can an accused person use evidence that could show his innocence if it no longer exists?”

The accuser’s mother, former Boston TV anchor Heather Unruh, testified Monday that she deleted some material from her son’s phone before giving it to investigators.

Unruh maintained that the deleted information wasn’t directly related to the allegations against Spacey and insisted the deletions showed her son partying and getting high in college more than a year after his encounter with the two-time Oscar winner.

Dearborn said Tuesday that Spacey’s lawyers could use the missing phone as “powerful fodder” for cross-examination at trial, and the accuser would “look foolish” in front of a jury if he continued to plead the fifth when asked about the device.

What’s more, Dearborn said, a trial judge may not allow the accuser to take the Fifth if asked about the phone, on the grounds that Spacey’s Sixth Amendment right to a fair trial overrides the accuser’s Fifth Amendment concerns.

Judges, Dearborn said, have wide latitude in deciding whether to allow witnesses to “selectively invoke” the Fifth on the stand. He said if prosecutors determine Spacey’s accuser will continue pleading the Fifth if asked about the phone, “I don’t think they have a case.”

Initially during Monday’s hearing, the accuser did answer questions from Spacey’s lead lawyer, Alan Jackson, about the phone. The Globe doesn’t name sexual assault victims without their permission.



Before invoking his Fifth Amendment rights, the accuser told Jackson he had “no knowledge of any deletions of messages from my phone.” He conceded some information was missing “due to a variety of circumstances” but said “those circumstances were not related to any deletions.”

Court [filings](#) show that during the alleged assault, which Spacey’s lawyers have described as “mutual and consensual flirtation,” the accuser texted his then-girlfriend, telling her the actor “grabbed my [expletive] like 8 times. He also repeatedly wrote, “Help me.”

In addition, records show, the accuser texted at one point, “I got the autographs and a hell of a . . . story.”

The filing also describes a group text the accuser, who was 18 at the time, sent to six friends on the night in question. He wrote in a series of texts: “No I’m serious. One sec. I’m calling my mom. I’m serious. I’m dead serious. I swear on everyone. Ask [girlfriend’s name]. I’m [not] [expletive] around. I’m drunk but I’m not [expletive] around.”

The accuser [last week dropped a civil suit against](#) Spacey just days after it was filed, and Unruh said on the stand Monday in the criminal matter that the parties did not reach a settlement.

“The phone is material relevant evidence and when combined with the recent dismissal of the civil suit it would appear that the criminal case is in real jeopardy of being dismissed,” Mark J. Geragos, a Los Angeles defense lawyer who’s represented a number of celebrities, said in an e-mail.

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