

Investigating and Addressing Complaints of Historical Sexual Harassment and Abuse



Of the myriad challenges facing in-house counsel, one has been of increased frequency and concern: complaints about

historical sexual harassment, abuse, and assault. A heightened sensitivity in the United States, indeed globally, about sexual assault and harassment often in social media and other public forums, has sparked complaints about inappropriate and sometimes illegal acts that occurred years, if not

decades earlier. This article poses questions—and suggests action plans—when in-house counsel in businesses, secondary and higher education institutions, foundations, and other charitable organizations learn about allegations of historical sexual misconduct against their client. Some

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potential claims may be precluded from civil suits, criminal investigation or prosecution, or administrative charges or regulator's inquiries, and some may not, but all require thoughtful and considered advice to clients.

The questions are many but principal ones include: Should an investigation be undertaken? What should be the temporal scope and breadth of an investigation? What advice should be given to the client's governing board and its executives? Which leadership group will the investigators' report to and brief on progress, conclusions, and recommendations? Should the client proactively initiate a broad-based public communication when the allegations first come to light? Should the investigators solicit information from others who may have been victimized, but have not yet complained informally or formally? Who should be engaged as the investigative counsel to oversee the investigation, and should they retain former law enforcement investigators? Will the investigation—and its results—be voluntarily made public or will the client attempt to keep it confidential? Should the client keep it confidential? And what are the attorney-client and attorney work product privilege implications of undertaking such an investigation, especially where civil litigation by the complaining victims may be barred by statutes of limitations? In other words, what should the client do, how should the client do it, and what and when should the client communicate publicly or privately to complainants about it?

The public's growing sensitivity to reports of past sexual misconduct in our nation's schools, the workplace, sports leagues, the military, and non-profit institutions can be measured, albeit not empirically, in media reports. Indeed, the public's growing response, which has evolved over time, indicates marked changes in attitudes and expectations about such claims. Within the political arena, examples include allegations that dogged Herman Cain's election campaign, and most recently allegations that arose during the U.S. Presidential election campaign. Outside of politics, the media extensively reported on allegations by Gretchen Carlson against Roger Ailes, the former CEO of

Fox News, which was followed by claims of more than two dozen other present or former Fox News employees of sexual harassment or abuse going back more than a decade. In higher education, there have been a myriad of colleges and universities attempting to investigate and address historical complaints of serial sexual harass-

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ment and assaults against students that in some cases have followed professors from one institution to another. The allegations about the former coaching staff at Penn State, and even more recently, news reports about past abuse between current or former faculty members and adolescents at independent schools are no longer uncommon and have been covered extensively by the media (St. George's School in Rhode Island exemplifies the scale of press coverage). Moreover, in the wake of a series of articles published in the *Boston Globe* about sexual abuse at private boarding schools, some survivors have used the media to highlight their abuse or have found a voice on social media, survivor blogs, and alternative media sites. Given the public's changing attitudes and expectations about past abuse, and the intense media scrutiny such allegations have sparked, it appears from media reports that more victims have been

willing to come forward with the expectation that their reports will be meaningfully investigated and that transparency and accountability will result from their willingness to speak out and participate. The proliferation of media reports regarding the perpetrators at institutions where their sexual abuse and sexual harassment have thrived lends credence to the conclusion that the public's expectation is that these individuals will be held responsible, punished accordingly, and the survivors will be supported.

Challenges and Suggested Action Plans

The First Question from Client Executives and Governing Boards: Should an Investigation Be Undertaken, and if So, Should It Be Independent?

Our short answer: yes and yes.

The focus—and concern—cannot be only about the complaint first made now about past conduct, often by persons no longer associated with or employed by the client. The damages in share value, reputation, public perception of the company and its products or services—whether consumer products, education or philanthropic endeavors—are hard to measure, but surely an ostrich's approach to the dangers is at best wishful thinking. Whether the client has just learned about complaints from the media or through a demand letter or oral complaint, investigating new complaints about past abuse or harassment is not only critical to a defense against claims or public outcry, but also in almost every case supports the current leadership's commitment to a discrimination and harassment-free workplace, school, or university. Such course of action is important from a compliance and legal perspective, but is also borne out of “doing the right thing” and not attempting to “sweep the allegations under the carpet.” Subsequent litigation or investigations by regulatory or even prosecutorial authorities will likely uncover the “stale and unaddressed” claims, and the fact that the client chose not to do anything to investigate their veracity. Moreover, the cascade of responses in the court of public opinion for failing to act upon first learning of such allegations places the institution at risk for

increased reputational damage. Undertaking a thorough and unfettered independent investigation at the outset—even before allegations have gotten any purchase in the public discourse—and promptly communicating to the complainants that the client is doing so and requests that they cooperate with the investigation signals that the client does and will not tolerate such conduct, even if it is claimed to have occurred in the distant past and may take responsibility for it. Given the intense media scrutiny institutions now face and the institutional crises of immense proportion that these allegations may present, it is critical that boards and key decision-makers carefully consider how they will respond.

Whether the client preemptively announces the investigation of new complaints about alleged acts occurring years earlier—or does not—is not susceptible to a one size fits all response. Sometimes there is no choice—the complaints have been made in public forums, in the media (or even alternative media); and even if only on Facebook, Instagram, or chat forums, likely will become public sooner rather than later. In those circumstances, a prompt public response—acknowledging that the client has just become aware of the allegations, is taking them seriously, has commenced an independent investigation, and is committed to finding out what happened and addressing wrongdoing if it can—is really the only sound option. In situations where the perpetrator’s name is not shared publicly, there is one complaint, or there are allegations that appear fraught with red flags, or significant factual inconsistencies with other known facts, the decision is harder. Indeed, the more difficult setting is where there are one or a few complainants, making complaints that are not consistent in pointing the finger at certain alleged perpetrators or are not focused on a certain time period. In such cases, while preemptively announcing the investigation may be the right path, reaching out to the complainants privately and advising them that an independent investigation has been commissioned may avoid publicity, at least not surprise publicity, and may provide the time to untangle the facts first before engaging publicly. Another consideration is the age of the potential victims.

Adolescents or young adults may not have recognized or understood the wrongful conduct when it occurred, and may even feel further victimized by attendant publicity about the complaints of others who may have been their peers. Often, these individuals have no interest in participating in an investigation and may question the benefit

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of engaging in a process that will not result in any criminal or civil action. Instead they may be angered by the institution’s failure to act earlier, especially if there were prior complaints that were not addressed earlier.

Second, What Should Be the Scope of the Independent Investigation?

We recommend that the independent investigation bear a reasonable relation-

ship to the temporal periods of the alleged incidents, but also scoped based upon the alleged perpetrators’ duration of employment or potential contact with victims in the subject workplace, college, or school. Experience, both very recent and in the past fifteen years, teaches that disclosures of salacious, high profile, and sometimes even criminal conduct will spark others to voice their allegations publicly. Getting out in front of these allegations is paramount.

Another reason for a fairly broad scope of investigation is that knowledge that there is an investigation may reduce additional civil claims and liabilities. Our experiences as investigative counsel and lead investigators in many high-profile publicly announced investigations, as well as in ones conducted out of the public eye, teaches that when victims are approached by independent investigators who are trained to avoid “victimizing” the victims in their interviews, but who convey that they seek the unfettered facts, victims often not only appreciate the opportunity to finally voice to a third party what happened to them and others, but may find some sense of closure in doing so. In fact, at least sometimes and for some, the fact of their disclosing, potentially for the first time in their lives, how they were hurt by what happened to them helps them emotionally reconcile the past and often not seek to blame the “client of today.” In other words, for some victims the cathartic act of disclosure is a remedy for the wrong they feel they suffered, especially where trained investigators listen non-judgmentally and advise the interviewee that they will try to maintain their confidentiality to the fullest extent of the law. Moreover, learning that they were not the only ones affected may result in their feeling less isolated. For many, allowing the institution to learn from what occurred in the past and have input in protecting those at the institution in the future from experiencing any similar conduct, may be paramount to their own healing process.

Third, Who Should Conduct the Independent Investigation?

It is prudent to have these investigations conducted by individuals who are independent of the institution where the

harassment or abuse occurred to ward off accusations of a lack of independence in actuality, as well as in appearance. Most recently, there has been recognition that a thorough, independent, yet confidential investigation performed by someone with both expertise and credibility in this field is a better model for ensuring a fair and equitable outcome. An investigation performed by investigators who have extensive experience in investigating sexual assault and sexual harassment allegations is far more likely to produce an accurate understanding of what happened during the reported incident than one engaged in by inexperienced investigators or someone closely associated with the institution that is also the subject of the investigation. Hiring very experienced investigators to determine culpability, or even more significantly if the facts demand it, to validate innocence, cannot be underestimated. The public sector long ago recognized the uniqueness of investigating sexual assault cases and, as a result, created special victims units in prosecutorial offices to address these types of crimes. Law enforcement and prosecutors alike must have special training to handle these cases because they are so challenging to investigate. Often an institution's policy is broader in its definition of sexual assault than is the criminal law, in addition to the applicable civil standard of proof being lower and potential sanctions differing widely. It is every bit as important to accurately determine what really happened whether the investigation is criminal or civil in nature. The investigator tasked with conducting the investigation has the same goals in mind and must be thorough, skilled, and sensitive to get to the truth about what happened.

Individuals bereft of the training and experience to conduct such delicate investigations should not be using a crisis situation to develop an expertise. Examples abound of instances where internal investigations done by well-meaning institutional leaders and in-house counsel cause enormous problems for a client, either because they reached what later was shown to be an incorrect conclusion or because their initial efforts to investigate the allegations themselves tainted the subsequent investigation that had to be done by someone with

appropriate expertise. Interviewing anyone about sexual assault is challenging and the stakes in these cases are simply too high for everyone concerned—the alleged victim, the accused perpetrator, and the client—not to engage in an investigation that is best-suited to get to the truth, and that requires expertise that most simply do not

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possess. Clients, whether corporations or non-profit institutions, should refrain from trying to do these investigations themselves and instead should retain outside independent counsel and an experienced investigator with background and expertise in this area. In addition to ensuring more accurate results, this will enhance the institution's credibility if and when it must make a public statement about the results.

Fourth, Developing and Implementing Communications Strategy

Clients, even ones with senior internal communications professionals, should strongly consider bringing in a crisis communications firm that is experienced in dealing with this subject matter and in which the client's leadership and internal communications executives have confidence. The best time to engage a crisis communications team is at the outset, or better

yet, consider selecting one by requests for information in advance of a crisis so that the relationship will be in place before the first wave of adverse publicity hits.

One core precept to successful crisis communications is to get ahead of the story and have the client's story out if not first, then as soon as possible. The media outlets with which a company's communications teams routinely interacts surely will have an interest in the story, but so will other media platforms, ones with which the internal communications team has no pre-existing relationship. An experienced crisis communications consultant can not only provide advice based on substantial experience in similar cases, but also leverage its own media relationships for the client's benefit.

Aligning the independent team's scope of work with that of the communications team is essential. One way to do so is to seek input from the lead investigator's counsel and investigator on the crisis communications firms they have worked with in other matters. The message should be that the client is taking the complaint or allegations seriously, is committed to investigating them, and, while if not yet public, it will not release the complainant's name to protect his or her privacy. The message should also make clear that the company, college, or institution is committed to ensuring that its workplace/operations/institution is free from sexual abuse, harassment, and discrimination. A brief summary of the client's hopefully robust, current policies against discrimination, harassment, abuse, and retaliation is an important part of the client's first public statement. Likewise, its urging all who have knowledge of wrongful past sexual conduct to share their knowledge confidentially with the independent investigators, sets the critical tone that the client will not tolerate sexual abuse, discrimination or harassment in 2017. In other words, "we are concerned, we are saddened to have just heard about the allegations of improper conduct years ago, but we are committed to investigating these claims fully and have retained independent experts to do so."

Fifth, Communications with Law Enforcement

While "routine" workplace sexual harassment sometimes is only a civil wrong,

in other circumstances the conduct may also be in violation of the criminal laws. Where incidents of sexual abuse by faculty members—former and present—are reported to have occurred at a school, mandatory reporting laws may be triggered by a report of past abuse. Every state in the United States has a mandatory reporting law that requires certain individuals, deemed “mandatory reporters,” to make a call to child protective services or law enforcement if they reasonably suspect a child has been the victim of physical abuse, sexual abuse, or neglect/maltreatment. Although the complaint is made many years if not decades later, these same reporting obligations may still exist. In addition, disclosure to regulators or other state agencies may be warranted, given the facts and circumstances presented. Regulators may also need to be notified to alert other places of employment where the perpetrator may be working.

The company/school/institution should strongly consider advising applicable prosecutorial authorities when the investigation provides reason for believing that a crime was committed at the workplace or involves its employees, former and present. Counsel need to be aware that criminal statutes of limitations vary by the crime and the jurisdiction. Criminal statutes of limitations for assault and sexual abuse often are considerably longer than for civil claims. Moreover, notifying local authorities ensures transparency, that complaints are taken seriously, and defends against later accusations that failure to disclose what they knew in a timely manner precluded a criminal prosecution. If prosecutorial authorities are notified, the reporters must be informed that law enforcement was contacted to prevent further victimization and surprise when an interview and other information is requested. Others may consider advising the reporter of their right to report the incident(s) to law enforcement and explain they will cooperate fully with law enforcement if they do so. Ultimately, it will be the complainant’s choice whether to cooperate with any investigation. Other key factors in determining whether to report past allegations of abuse when not required by law to do so include the danger to the community the alleged perpetrator presents, both within their own organiza-

tion and where the alleged perpetrator is currently working.

Sixth, Communications Following Completion of Independent Investigation

If there has been either a voluntary announcement by the client of the investigation or involuntary public disclosure,

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the client will need to make a public statement about the investigator’s conclusions and findings, as well as what it will do or intends to do with the information learned. The scope and breadth of that public statement—whether a summary of the findings and conclusions or a more detailed statement usually without victims’ names—is driven by a number of factors, including but not limited to: Has there been significant publicity about the allegations? What are the expectations of those who participated in the investigation? Are there confidentiality restrictions on the information provided? Is the abuser currently employed by the client, and if not, elsewhere? Are there any civil or criminal proceedings pending related to the incident? When the company first learned about the allegations, however, will in most cases be part of the public report—because it helps to remind the public that the client undertook to find out what happened as soon as it heard about the claims. Any “close-out”

communication also needs the attention of communications professionals, and should be vetted by experienced counsel. Most importantly, it must be a statement that the institution or company’s leadership stands behind and supports.

Seventh, Is the Investigators’ Report Privileged?

The short answer is probably not. The client surely has an interest in not disclosing the identities of potential victims or other persons seeking to remain anonymous/confidential and who nevertheless provided information to the investigators, and likely those privacy interests can be legally protected. Some disclosure of the summary of the findings may even fend off some potential claims. But just as an employer cannot claim privilege in a sexual harassment suit it seeks to defend in part on the basis that it promptly investigated and addressed a plaintiff’s charge, so too the client may have to disclose—hopefully in redacted or summary form—the key factual findings, especially to regulators, and almost certainly if there is litigation. For these reasons, on occasion our clients have voluntarily—without litigation or threatened or actual regulatory investigation—publicly disclosed a summary of the independent investigator’s findings, and simultaneously announced what additional steps, policies, and training the client has now put in place to fulfill its commitment to a workplace/environment that will not permit or tolerate sexual harassment, abuse, or discrimination.

Conclusion: There Is No One-Size Fits All

The challenges of addressing newly lodged complaints beyond the applicable statutes of limitations are many. Often there is no “right or wrong” path forward when complaints of this nature first surface. But one of the best first steps is to promptly commence a thorough and independent investigation. Doing so not only provides the client with the best chance of avoiding highly adverse and damaging consequences, but also provides a way the company can convince the public and its stakeholders, including employees, that it is committed to righting past wrongs. 