

Conducting a High-Profile Workplace Investigation

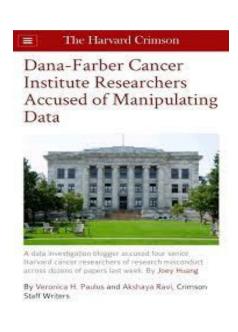
SPEAKERS

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What is "High Profile"?

- The Three "I"s:
 - Prominent Individual
 - Prominent Issue
 - Prominent Interest
- When these all Intersect you are staring at the potential for a high-profile investigation

Really Must Investigate, High Profile or Not

- Conduct that, if true, would violate institutional policy
- Conduct that, if true, would violate the law (and, almost surely, also violate institutional policy as a result)
- When mandated to do so by external entity/agency (NCAA, NIH, etc.)

But What About ...

- Anonymous complaint?
- Complaint made by someone who has already separated from institution?
- Trustee-driven request?
- Donor-driven request?

Privileged, or Not?

- Threshold consideration once start in unprivileged way, tough to put genie back in bottle
- Who is the client?
- What are the pros if privileged?
- What are the cons?
- Does the "high profile" nature impact the decision?

What's the Work Product?

- Written report, for internal consumption only
- Written report, would produce in litigation willingly
- Written report, intend to release to the public / post on website
- Longer privileged written report, verbal summary for key constituents
- Verbal report only
- What notification will the subject of investigation receive?
- Obviously regs can impact (i.e., if Title IX matter)

Who's On the Day 1 Team?

- OGC
- President?
- Provost/HR/Dean of Students/Athletic Director/etc.?
- Communications team?
 - Internal?
 - External?
- Board Chair/Committee?
- Others?

Who Outside of Institution May Need to Be Advised?

- Research Misconduct
 - NIH
 - Journals
 - Other co-authors/researchers
- Coaching Misconduct
 - NCAA
 - Safe Sport
- Criminal Misconduct
 - Law enforcement
 - Mandatory reporting obligations

Other "Day 1" Considerations

- Is employee on leave? Should they be, if not?
- High-level assessment of legal risks
- Informing Board/key Board members
- Informing key constituents
- How much to share?
- Data/IT preservation

Who Is Conducting the Investigation?

- Internal vs. external
- Lawyer?
 - Someone familiar with institution?
 - Someone completely new?
- Size of "team"
- Cost considerations
- Demographic considerations

Structure of Investigation

- Engagement Letter
- Work product expectations
- Segregate investigative materials from business records
- Plan for possible waiver from Day 1 (?)
- Public records request awareness
- Insurance available? Commmunications with insurers

Structure of Interviews

- Where? In person or virtual? Dealing with media on campus
- *Upjohn* warnings
- Allow counsel if policy is silent? Pros/cons
- Record interviews or not? Pros/cons
- Intentionally difficult witness (hoping for P.R. bump)

Other Evidentiary Considerations - Stuff

- Phones/personal devices. What can you demand to see?
- Forensic investigation of devices
- Electronic document vendor
- AI/TAR-assisted document review?

Other Evidentiary Considerations - People

- Method of notifying witnesses
- In-person, or virtual, or both?
- If involves a team or years of alleged conduct how far back do you go? How broad of a witness net do you cast?
- If not Title IX ... what are you sharing with employee under investigation?

Dealing with the Press

- Proactively announce investigation?
- Talking points for Board / key constituents if they get cold call
- Responding, or not, to public statements from employee/their lawyer
- Mitigating leaks

SO WHAT IF INVESTIGATION INVOLVES ...

The Institution's President

- Walling off access
- Continuing to function
- Who gets updates?
- Does that impact any privilege/work product/press considerations?

An Attorney in OGC



Well-Known Coach

- In-season, or not. Different impacts. Do you wait if near end of season?
- Do you tell the team? When? What? They may be witnesses
- Retaliation concerns
- Assistants/grad assistants/trainers
- Calls from boosters

Leading Researcher at Academic Medical Center



Thorny Procedural Issues

- "Counterclaim" / retaliation
- Protecting witness identity
- Subject of investigation takes medical leave before or midinvestigation
- Subject seeks disability accommodations
- Subject resigns
- Subject demands that institution pay for counsel
- University witness wants university counsel present at interview



Thorny Collateral Issues

- Subject employee active on social media
- Protests (possibly cross-protests)
- Employee someone regularly in national spotlight
- Elected official involvement
- Hot-button social issues / interest groups



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