



# INVESTIGATING NEW COMPLAINTS OF OLD MISCONDUCT

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**DAN SCHORR, LLC**



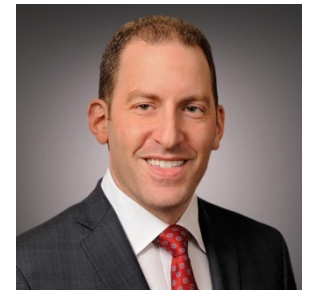
# OUR SERVICES

- Title IX, Civil Rights, and Misconduct Investigations
- Decision Makers and Hearing Officers
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- Interim Title IX Coordinator Coverage

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# DAN SCHORR

President  
New York



Dan Schorr is a former criminal prosecutor and municipal inspector general with more than 20 years of legal and investigative experience. He manages a variety of complex assignments, including investigations into sexual misconduct, Civil Rights, and fraud allegations at educational institutions, corporations, and government entities. In addition to specializing in Title IX investigations, Dan assists higher education and K-12 schools by conducting policy and program reviews, training personnel on all aspects of Title IX and Civil Rights compliance, and serving in hearing officer and decision maker roles. Dan is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit.

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# ALYSSA-RAE MCGINN

Vice President, Investigations  
Boston



Alyssa-Rae McGinn has extensive experience leading a variety of complex investigations, with particular expertise in conducting investigations at educational institutions and corporations into allegations of sexual misconduct and identity-based harassment involving students, faculty, staff, and corporate leadership. Alyssa-Rae was previously a Senior Associate at Ankura, where she and Dan established the firm's Title IX and Civil Rights Investigations practice and grew it to assist institutions nationwide. Prior to Ankura, Alyssa-Rae was an Associate Director in Kroll's Business Investigations & Intelligence practice.

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# REASONS FOR DELAYED REPORTING

- **Mistrust** of the organization, the investigation process, the interviewers, or the system in general
- **Discomfort** with strangers/interviewers or the subject matter
- **Fear** of retaliation, not being believed, retraumatization, or getting in trouble
- **Discouragement** from institution officials or community members
- **No knowledge** of the process or how to report
- **Other possible reasons** such as concern for potential respondent's future, especially in intimate partner violence situations

# INITIAL QUESTIONS

- Does the institution have jurisdiction over the complaint?
- Are/were the parties part of the institutional community?
- What is the current potential safety threat?
- What policies and procedures were in effect at time of the alleged misconduct? What policies and procedures will be applied in this case? (Note: Institutions can use procedures that weren't in place at time of alleged incident, such as hearings, but it can not use updated misconduct definitions)
- Did the alleged misconduct occur before current Title IX regulations?
- Was the policy appropriately enforced at the time of the alleged misconduct?
- Have there been other complaints involving these parties and/or any relevant group?
- Is public notification to the institutional community needed?

# SUPPORT AND INTERIM MEASURES

- Offer supportive services to complainant, regardless of current affiliation with the institution
- Understand that reporting may resurface painful memories
- Offer accommodations if possible and appropriate
- If proceeding to investigation, offer supportive services and accommodations to respondent equally

# PROCEEDING TO INVESTIGATION

- If investigation deemed appropriate, investigators should be aware that collecting evidence may be more difficult the older the alleged incidents
- Investigation includes same steps as contemporaneous investigation:
  - Interview complainant
  - Interview witnesses
  - Collect relevant non-testimonial evidence
  - Interview respondent
  - Document findings in investigative report
- However, each step may include unique challenges

# INTERVIEWING THE COMPLAINANT

- Share definitions, rights, and processes from applicable policies and procedures
- Set clear expectations regarding investigative challenges
- Explain standard of evidence and communicate that even if evidence does not reach that standard, it does not definitely mean the alleged events did not occur
- Be empathetic toward complainant's position as well as difficulty of reporting long after an incident and reasons for delay
- Ask comprehensive questions to mine for surviving evidence, witnesses, and memories



# UNDERSTAND REASONS FOR DELAY

- Important to understand why complainant delayed and why they decided to report now
  - Did they learn about complaints against same respondent involving other complainants?
  - Other intervening incidents/events?
  - Encouraged by other individuals to report?
- Delay may undermine credibility, so reasons must be discussed and assessed
  - Discomfort or trauma directly resulting from the incident
  - Pressure not to report from respondent
  - Wanting to protect the respondent vs. seeking revenge
  - Concern that the report will not meet violation threshold
- Investigators must ask about reasons, but do so in a transparent, kind, and respectful way

# INTERVIEWING WITNESSES

- Identify direct witnesses and outcry witnesses
- Delayed formal reporting is common, but the complainant often informally reports to others soon after the alleged incident, demonstrating that incidents were concerning at the time
- Ask the complainant with whom they first communicated about the alleged misconduct
- Challenges in locating or interviewing witnesses:
  - No longer at institution
  - Difficult to find or contact
  - Deceased or otherwise unavailable
  - No longer interested in participating
  - Affinities and biases shift
  - Memories fade

# COLLECTING NON-TESTIMONIAL EVIDENCE

- Listen for, identify, and pursue relevant evidence, even if it may no longer exist or is unavailable
- Types of evidence that may be preserved:
  - CCTV/surveillance footage
  - Emails, text messages, social media
  - Building access logs, WiFi login records, network login records
  - Medical forensic evidence
- Encourage parties and witnesses to search archived documents, communications, and data, or look for old devices
- If relevant evidence is no longer available, investigative report should clearly document what steps were taken to obtain the evidence and what information shows that it is unavailable

# INTERVIEWING THE RESPONDENT

- If no longer affiliated with institution, cannot compel interview but can still request
- Can allow participation in limited form
- Do not assume responsibility based on refusal to participate
- Share definitions, rights, and processes from applicable policies and procedures
- Set clear expectations regarding investigative challenges
- Be empathetic toward respondent's position as well as difficulty of being part of a misconduct process long after an incident
- Ask comprehensive questions to mine for surviving evidence, witnesses, and memories

# INVESTIGATIVE REPORT

- In addition to usual documentation of procedures, policies, and findings, investigative report must document:
  - Procedural history including delays and time gaps
  - Complainant's reason for delaying reporting and reporting now, and analysis of impact on credibility if appropriate
  - Efforts to contact unavailable witnesses
  - Efforts to collect unavailable non-testimonial evidence
  - Parties' and witnesses' descriptions of any memory impairment and analysis of impact on credibility if appropriate



# EVALUATE NEEDED INSTITUTIONAL CHANGE

- Delayed reports may reveal flaws in institutional reporting processes at the time of the incident or other institutional shortcomings
- Investigation should consider whether there a proper response or mechanism to respond to the misconduct at the time
- Consider whether those shortcomings still exist and can be addressed
- Ensure that conversations with complainant about reasons for delay are respectful, empathetic, and not victim-blaming

# THE TITLE IX AND CIVIL RIGHTS

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