



INDIVIDUAL WISHES VS. RISK OF HARM

When and How To Proceed Without A Cooperative Complainant

May 20, 2020

Sexual Misconduct & Civil Rights Investigations Expertise

- ▶ **Independent Investigations of Sexual Assault, Harassment, & Discrimination Reports**
- ▶ **Compliance with new Title IX Regulations**
- ▶ **Lookback Audits**
- ▶ **Policies and Procedures Reviews**
- ▶ **Employee & Student Trainings**

[MORE INFORMATION AT ANKURA.COM](https://www.ankura.com)



DAN SCHORR

MANAGING DIRECTOR

485 Lexington Avenue | New York, NY 10017
 +1.862.255.4915 Office
 +1.914.625.6270 Mobile
 dan.schorr@ankura.com

EDUCATION

JD, Harvard
Law School

MA, University
of Pennsylvania

BA, University
of Pennsylvania

Dan Schorr is a Managing Director at Ankura, based in New York. A former criminal prosecutor and municipal inspector general, he has more than 20 years of legal and investigative experience. Dan manages a variety of complex assignments, from investigations into major fraud, internal issues at corporations and governmental entities, and sexual misconduct and Title IX violations to litigation support, threat management, construction quality concerns, labor-law compliance, and independent monitorships. Dan began his legal career as an assistant district attorney, specializing in the investigation and prosecution of sex crimes, domestic violence, child abuse, and homicides. He also worked for several years as a vice president in the law division at Morgan Stanley, where he conducted investigations into claims related to client investments. He has appeared as a commentator on legal issues for television news programs on ABC, Fox News, CNN, and the BBC, among others. Dan conducts investigations at educational institutions, corporations, governments, and other entities. He has trained university investigators on best practices when handling Title IX matters and is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit.



ALYSSA-RAE MCGINN

SENIOR ASSOCIATE

60 State Street | Boston, MA 02109
 +1.516.382.3043 Mobile
 alyssarae.mcgin@ankura.com

EDUCATION

MA, St. John's
University

BA, St. John's
University

Alyssa-Rae McGinn is a Senior Associate with five years of experience leading and conducting a variety of complex investigations, including monitorships of a large international bank and a governmental child welfare agency. Alyssa-Rae is an ATIXA-certified Civil Rights Investigator. Additionally, she is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit. Alyssa-Rae conducts investigations at educational institutions and corporations into allegations of sexual misconduct and gender-based harassment involving students, faculty, staff, and corporate leadership. These investigations include communication with parties in accordance with school or company policy and Title IX and Title VII regulations, interviews with parties and witnesses, analysis of relevant evidence, and consultation on findings of liability and sanctions.



BALANCING INDIVIDUAL WISHES & COMMUNITY RISK



Reluctant Complainants

- ▶ **Mistrust** of the organization, the investigation process, the interviewers, or the system in general
- ▶ **Discomfort with or fear of:**
 - ▶ Strangers/Interviewers
 - ▶ Subject Matter
 - ▶ Cross Examination at a Live Hearing
 - ▶ Retaliation
 - ▶ Not Being Believed
 - ▶ Re-Traumatization
 - ▶ Getting In Trouble
- ▶ **Denial** or being unprepared to fully process an incident

Assessing Risk

- ▶ Based on complainant's account, is there reason to believe respondent is an ongoing threat?
- ▶ Consider threat to community and threat to complainant
- ▶ Intimate partner violence situations can make complainant reluctant to move forward, even if they are still at risk – important to understand cycle of violence with IPV
- ▶ Some factors to consider:
 - ▶ Pattern Behavior
 - ▶ Predatory Behavior
 - ▶ Number & Severity of Incidents
 - ▶ Use of a Weapon
 - ▶ Apparent Escalation of Behavior

DOE Title IX Regulations

- ▶ New regulations provide the option for a complainant to withdraw from a formal complaint, at which time the Title IX Coordinator may dismiss the investigation or may continue to investigate
- ▶ However, even if the process continues without complainant, regulations require that if “a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility”
- ▶ Without a complainant, you must rely upon other evidence to “build” your case
- ▶ Assess what type of evidence is available that independently shows misconduct (ex: other witnesses, admissions from respondent, video evidence, electronic messages)
- ▶ Even if investigation not required by Title IX regulations, there may be important state law, public policy, or civil liability reasons for proceeding

New York “Enough Is Enough” Law

NY Article 129 B § 6446

[A reporting party] declining to consent to an investigation shall be honored unless the institution determines in good faith that failure to investigate does not adequately mitigate a potential risk of harm to the reporting individual or other members of the community...

Factors used to determine whether to honor such a request include, but are not limited to:

- a.** Whether the accused has a history of violent behavior or is a repeat offender
- b.** Whether the incident represents escalation in unlawful conduct on behalf of the accused from previously noted behavior
- c.** The increased risk that the accused will commit additional acts of violence
- d.** Whether the accused used a weapon or force
- e.** Whether the reporting individual is a minor
- f.** Whether the institution possesses other means to obtain evidence such as security footage, and whether available information reveals a pattern of perpetration at a given location or by a particular group

Other Considerations

- ▶ Even if your state or federal law does not mandate an investigation, **consider initiating one**
- ▶ Respondent may pose risk to the safety and well-being of your community
- ▶ Duty to protect your community
- ▶ Potential liability if organization fails to protect community from a known risk

Explaining Complainant Options

- ▶ **Ask them to articulate** why they are hesitant to move forward
- ▶ **Be transparent & open** with complainant about reasons to consider moving forward
- ▶ **Explain** anti-retaliation policy
- ▶ **Express your concern** regarding ongoing risk
- ▶ **Ensure they know** that they maintain agency and ownership over their experience and account
- ▶ **Offer time to think** or to speak with counselor or advisor

Explaining Complainant Options

- ▶ **Explain the investigative and hearing process**, including separate rooms for live hearing
- ▶ **Do not press** or force
- ▶ **Remain compassionate**, kind, and understanding of the difficulty of this situation
- ▶ **Offer services and accommodations** regardless of complainant cooperation with investigation
- ▶ When can you allow a complainant to remain **anonymous**?

Deciding To Proceed Without Complainant

- ▶ **Especially in cases of sexual or identity-based violence, it is important to consider the need for the complainant to have control over their account and the process**
 - ▶ Complainant may not be ready to proceed now, but may decide to in the future
 - ▶ Weigh evidence of recurrence of an incident against complainant's hesitation and stage of processing experience
 - ▶ If you decide ongoing risk is great enough, keep complainant informed
 - ▶ Provide option for complainant to remain involved as much as they want to
 - ▶ In cases of pattern behavior and multiple allegations, may offer complainant option to be involved as a witness

Investigating Without a Complainant

- ▶ What information did the complainant provide?
- ▶ Were there witnesses mentioned, including outcry?
- ▶ May have to cast a wider net
- ▶ May have to speak to respondent earlier in process
- ▶ Review publicly visible social media or other online media if possible
- ▶ Continue to keep complainant informed if they'd like to be, and as appropriate
- ▶ Gather other electronic evidence
- ▶ Conduct interviews of other individuals, even if known facts are unclear/vague at time of interviews

Alternative Resolutions

- ▶ **When you determine that the ongoing risk to the community or the complainant is not sufficient to proceed with an investigation, consider alternative resolutions**
 - ▶ Restorative practices can provide a pathway to individual and community healing without an investigation
 - ▶ Restorative practices focus on accountability, recognizing harms done, self-improvement, and community repair
 - ▶ Important to have staff or external resources trained in facilitating restorative circles or conferences
- ▶ **Restorative practices are not the same as mediation**

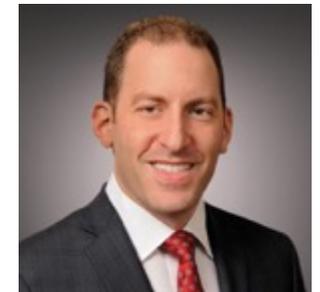
Conclusion

Q&A

DAN SCHORR

Managing Director

485 Lexington Avenue | New York, NY 10017
+1.862.255.4915 Office | +1.914.625.6270 Mobile
dan.schorr@ankura.com



ALYSSA-RAE MCGINN

Senior Associate

60 State Street | Boston, MA 02109
+1.516.382.3043 Mobile
alyssarae.mcginn@ankura.com

