

# BEST PRACTICES FOR THE USE OF OUTSIDE INVESTIGATORS IN TITLE IX INVESTIGATIONS: FIVE QUESTIONS EVERY INSTITUTION SHOULD ASK.

## 106 colleges under investigation for mishandling sexual assault complaints, website reports

The Times-Picayune on April 09, 2015 at 2:36 PM

Harvard, Dartmouth, Princeton: Why Are So Many Elite Schools Being Investigated for Mishandling Sexual Assault?

By Amanda Hess



These Are The Colleges And Universities Now Under Federal Investigation For Botching Rape Cases

BY TARA CULP-RESSLER POSTED ON JANUARY 13, 2015 AT 9:00 AM



UNIVERSITY UNDER FEDERAL INVESTIGATION FOR HANDLING OF SEXUAL ASSAULT

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## Executive Summary

Since 2011, the U.S. Department of Education, Office of Civil Rights (respectively, “ED” and “OCR”), has required that all persons involved in an institution’s Title IX grievance procedure – including its investigators – have demonstrable training or experience in conducting sexual assault investigations. Many institutions are attempting to comply with this requirement by hiring dedicated Title IX investigators; however, many such investigators have insufficient training or experience in the investigation of sexual assault or sexual violence to comply with OCR’s requirements.

Few institutions realize that private investigators may be leveraged to either conduct the institution’s Title IX investigations or enhance and augment the skills, experience, and resources of institutional investigators. However, there is wide variety in the skills and capabilities of those currently working in this field. This paper discusses five questions that every administrator should ask when contemplating the use of outside investigators in connection with Title IX investigations.

## The Challenge

In 2011, OCR acknowledged what it described as “a number of issues” related to the adequacy, reliability and impartiality of institutions’ investigation of complaints related to sexual harassment and sexual violence.<sup>1</sup> In response to these issues, OCR issued specific guidance to institutions for the investigation and handling of such complaints, including the requirements that:

- a. Institutions conduct a prompt, thorough, and independent investigation, even before the conclusion of any concurrent criminal investigation;
- b. All persons involved in the institution’s investigation have demonstrable training or experience in investigating complaints of sexual harassment and sexual violence;
- c. Investigations be impartial, without real or perceived conflicts of interest between the fact finders, decision makers and parties; and
- d. Institutions investigate their own employees’ failure to comply with Title IX in responding to allegations of sexual harassment and sexual violence.<sup>1</sup>

## Current Solutions

Many institutions are attempting to meet these challenges by hiring dedicated Title IX investigators. A recent query of a popular online job board revealed more than eighty postings, nationwide, for Title IX investigators and related positions.<sup>2</sup> However, OCR and other noted commentators have cautioned that compliance requires more than a warm body and a flashy title – to ensure compliance with Title IX, the investigator must possess adequate training, skills and abilities, and conduct prompt, thorough and objective investigations.

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<sup>1</sup> U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter dated April 4, 2011.

<sup>2</sup> Source: [www.indeed.com](http://www.indeed.com) (last accessed June 22, 2015)

Historically, those who have conducted Title IX investigations have had little to no formal training in the investigation of sexual assault or sexual violence. Even when they do, institutional investigators frequently lack meaningful, real-world opportunities to apply and refine the concepts discussed in training. In addition, most training fails to equip investigators with the skills or resources necessary to identify and exploit even the most basic forms of physical evidence, let alone those forms commonly found in a typical sexual assault case (e.g., serology, DNA, digital evidence). This leaves institutional investigators at a distinct disadvantage and institutions exposed to liability for failing to conduct prompt and thorough investigations.

In addition, Title IX does not allow schools to await the outcome of a law enforcement investigation to complete their own investigation. Beyond the challenges posed by a sexual assault investigation, administrative investigations conducted in parallel with criminal investigations are fraught with peril. The line between a parallel civil or administrative investigation, which is required by Title IX, and interfering with a criminal investigation, which is a crime in most jurisdictions, is often very fine and very gray. The risks posed by such investigations are magnified exponentially for those unfamiliar with the issues and pitfalls.

## **An Alternate Approach**

Few institutions realize that private investigators offer a vast and virtually untapped pool of investigative talent, which may be leveraged by institutions to either conduct the institution's Title IX investigations, or enhance and augment the skills, experience, and resources of institutional investigators.

Contrary to the stereotypes perpetuated by Hollywood movies, most modern private investigators are highly skilled, well-disciplined professionals who enter the field after distinguished careers in the law enforcement, military, and intelligence communities. Many have extensive training and experience in conducting complex investigations, conducting interviews, and collecting, preserving and analyzing various forms of evidence. A number also specialize in practice areas that require frequent interaction and cooperation with law enforcement and participation in parallel administrative/criminal investigations.

Despite the advantages, there is wide variety in the skills and capabilities of private investigators. As with any personal or professional service, the choice in providers can have a material impact on the quality of the end product. Therefore, the acquisition of investigative services should be viewed no differently than the acquisition of any other personal or professional service. To assist institutions, this paper discusses five questions that every administrator should ask when contemplating the use of outside investigators in connection with Title IX investigations.

## Five Questions Every Institution Should Ask

### 1. When Should We Use Outside Investigators?

During a recent Title IX certification course, the Executive Director of the Association of Title IX Administrators (ATIXA) recommended that institutions consider the use of outside investigators when: (a) completing a timely investigation requires more investigators than the institution can field internally; (b) completing a thorough investigation requires specialized or technical expertise which is not possessed internally by the institution; (c) the investigation produces evidence of institutional non-compliance; and (d) it appears the investigation will receive excessive scrutiny.<sup>3</sup> Each of these scenarios is discussed separately below.

#### a. A Timely Investigation Requires Significant Manpower.

Most Title IX investigations do not require the simultaneous deployment of multiple investigators. However, there may be occasions when completing a timely investigation will demand just such an approach. Suppose, for example, a sexual assault is alleged to have occurred at party attended by 100 guests. Interviewing each guest to determine what, if anything, they saw or heard could easily translate into weeks of investigative work, under the best of circumstances. However, witnesses cannot always be immediately identified or located. Should this be the case, completion of the initial witness interviews by a one or two-person investigative team could become a task of monumental proportion.

Professional investigative firms can often supply the personnel and resources necessary to complete such tasks within the time specified by OCR. This includes the ability to use commercial and public record sources to quickly identify and locate witnesses, and the capacity to engage multiple investigators to complete interviews or other labor intensive, investigative activities in a timely manner. Many of these organizations employ former law enforcement investigators who have significant training and experience in conducting major case investigations, including those related to sexual assault. Higher quality firms also participate in or maintain professional networks that enable them to quickly engage qualified investigators in other locales when necessary.

#### b. A Thorough Investigation Requires Specialized or Technical Expertise.

With the continuous advances in computing and communication technologies, there seems to be a digital or technical aspect to virtually every investigation – even those that were once considered exclusively interpersonal. Sexual assault investigations are no exception. Indeed, the recovery and preservation of this evidence is often outcome-determinative. Too often, however, this evidence is either not considered or collected in a manner that impairs its evidentiary value.

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<sup>3</sup> Sokolow, Brett A., *Title IX Investigator Training and Certification Course*, Nashville, TN, January 26-29, 2015.

Many professional investigative firms employ former law enforcement investigators who have been specially trained to identify, collect and exploit various forms of digital and forensic evidence. Higher quality firms also maintain relationships with recognized forensics experts and reputable testing laboratories, and will be able to offer or arrange many of the same forensic tests available in modern crime laboratories, including:

- Digital forensics (computer, cell phone, etc.)
- Forensic document examination (handwriting identification, etc.)
- DNA analysis
- Latent print analysis (fingerprints, etc.)
- Serology (identification of blood and other bodily fluids)

**c. The Investigation Produces Evidence of Institutional Non-Compliance.**

It is not uncommon for investigative activity to uncover evidence of violations not contemplated at the outset of the investigation. For example, a Title IX investigation of a sexual harassment could show that a responsible institution employee either knew, or reasonably should have known, about the harassment and failed to properly report it. This puts the institutional investigator in the unenviable position of having to investigate both the allegations of harassment and the appropriateness of the institution's response. It also presents a potential conflict of interest, since the school has a vested interest in the outcome of the second investigation.

Many professional investigative firms specialize in administrative and compliance investigations. These firms are accustomed to investigating confidential and sensitive matters, and operating independently of ongoing investigations to avoid real or perceived conflicts of interest. To ensure full and fair investigation, institutions facing such issues could divide the investigation and engage outside investigators, either independently or under the direction of the institution's counsel, to lead the compliance portion of the investigation.

**d. An Investigation Will Receive Heightened Media Scrutiny.**

Remember the Duke Lacrosse case? If you followed it at all, you probably recall thinking at some point during its infancy that it had the potential to become a firestorm. Fortunately, not every case is the Duke Lacrosse case. However, your institution could easily receive a complaint that immediately prompts the same "firestorm" imagery.

Institutions handling such complaints should be aware that certain investigative firms specialize in Title IX investigations. In addition to the resources commonly available to outside investigative firms, these firms are familiar with Title IX's requirements, use personnel with training and experience in sexual assault investigation, and are able to satisfy OCR's annual training requirements (*See*, Section 3). Use of such a firm offers many advantages, including:

- Ability to field a multidisciplinary team of investigators.
- Ability to collect and analyze digital and other physical evidence.
- Experience conducting high profile investigations.

- Experience conducting sexual assault investigations.
- Experience working with law enforcement.
- Experience conducting parallel, administrative investigations.
- Avoidance of actual or perceived conflicts of interest.
- Minimize risk that institutional investigators will be drawn into subsequent civil suits.

Quality firms will also be insured to protect against the liabilities that most often arise from investigative activities. These firms may be called on to lead investigations, either independently or under the direction of the Title IX coordinator, or consult with and assist institutional investigators, to ensure the investigation is objective, thorough and complete.

## 2. Are Our Outside Investigators Properly Licensed?

Most states require private investigators to meet statutorily prescribed training and experience requirements and be licensed to perform investigative work. In a few states, licensing is handled at the local level. However, in the vast majority, licensing is handled at the state level. Although most require licensing prior to the performance of investigative work, a few require it prior to soliciting business.

Despite some state-to-state variance, there is remarkable similarity in the statutes defining the activities for which a license is required. In North Carolina, the licensing requirement extends to:

Any person who engages in the profession of or accepts employment to furnish, agrees to make, or makes inquiries or investigations concerning any of the following on a contractual basis:

- a. Crimes or wrongs done or threatened against the United States or any state or territory of the United States.
- b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person.
- c. The location, disposition, or recovery of lost or stolen property.
- d. The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties.
- e. Securing evidence to be used before any court, board, officer, or investigative committee.
- f. Protection of individuals from serious bodily harm or death.<sup>4</sup>

North Carolina’s statute, like many others, uses the disjunctive “or” when describing the activities for which a license is required. Consequently, it is immaterial how a person describes himself or his services – if he or she is actually performing investigations, he or she must be licensed. This was the conclusion of the North Carolina Private Protective Services Board (“PPSB”) when it found that an investigator hired by Duke University (“Duke”) performed investigations without a license.

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<sup>4</sup> N.C.G.S. § 74C-3(a)(8)

In 2012, Duke engaged Dr. Celia Irvine, a licensed North Carolina psychologist, to independently investigate allegations of sexual assault received by its Office of Student Conduct (“OSC”). Between 2012 and 2015, Dr. Irvine investigated nine (9) complaints, including a 2014 complaint against Lewis McLeod. In connection with this investigation, Dr. Irvine interviewed McLeod, the complainant, and other witnesses; collected documents including e-mails, text messages and social media posts; and submitted a written report of her findings to OSC. After a disciplinary hearing, Duke expelled McLeod, based in large part on information contained in Dr. Irvine’s report. McLeod subsequently filed suit against Duke and Dr. Irvine, and filed a complaint against Dr. Irvine with PPSB. PPSB found that Dr. Irvine violated N.C.G.S. § 74C-2(a) by conducting private investigations without a license.<sup>5</sup> As of this date, the lawsuit is still pending.

Colleges and universities considering the use of outside investigators should familiarize themselves with the private investigator licensing requirements in their state before requesting proposals or soliciting bids for such work. Before engaging an investigator, institutions should ensure that both the investigator and his or her company<sup>6</sup> are licensed to perform the work contemplated by the contract. Many states, including North Carolina, make violation of these statutes a criminal offense, and allow charges to be brought against the institution and its employees as well as the investigator.<sup>7</sup>

### 3. Do Our Outside Investigators Have the Training and Experience to Conduct Title IX Investigations?

In 2011, OCR acknowledged what it described as “a number of issues” related to the adequacy, reliability and impartiality of investigations of sexual harassment and sexual violence complaints.<sup>8</sup> In response to these issues, OCR issued specific guidance to institutions, including the requirement that all persons involved in the institution’s Title IX grievance procedure – including investigators – have training or experience in handling complaints of sexual harassment and sexual violence.<sup>4</sup>

In 2014, OCR further recommended that that these persons have training or experience in:

- Conducting investigations.
- Interviewing persons subjected to sexual violence.
- Types of conduct that would constitute sexual violence.
- The standard of review for sexual violence complaints.
- The issue of consent.
- The effect of drugs or alcohol on the ability to consent.

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<sup>5</sup> 2014-PPS-048

<sup>6</sup> North Carolina, like many other states, requires that both the investigator and the business organization under which he does business, if any, be licensed. See e.g., N.C.G.S. 74C-2(a).

<sup>7</sup> See, N.C.G.S. § 74C-17(b) (providing that “[a]ny person, firm, association, or corporation or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a Class 1 misdemeanor”). See also, *State v. Lawson*, 105 N.C. App. 329 (1992)(aiding and abetting misdemeanor is punished the same as the underlying offense).

<sup>8</sup> U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter dated April 4, 2011.

- Determining credibility.
- Evaluating evidence in an impartial manner.
- Confidentiality.
- The effects of trauma.<sup>9</sup>

ED now requires each institution to certify, in its annual security report, that all persons involved in institutional disciplinary cases involving allegations of dating violence, domestic violence, sexual assault or stalking have “at a minimum, received annual training on issues related to dating violence, domestic violence, sexual assault, and stalking, and how to conduct an investigation . . . that protects the safety of victims and promotes accountability.”<sup>10</sup>

Institutions considering the use of outside investigators – particularly in connection with their Title IX grievance procedure – should, at a minimum, ensure that the investigator’s training, experience, and qualifications meet the standards specified by OCR. Institutions should also inquire about annual training received by the investigator, both to ensure compliance with OCR’s standards and to avoid making a material misstatement in its annual security report.

#### 4. Do Our Outside Investigators Have the Skills and Abilities to Conduct Title IX Investigations?

Beyond minimum qualifications, institutions should probe investigators to ensure they possess both the necessary understanding of Title IX and the skill and capabilities required to conduct an adequate, reliable and impartial investigation. A recent presenter at the annual conference of the National Association of College and University Attorneys (NACUA) observed:

A competent Title IX investigation should be conducted by skilled investigators trained in the dynamics of sexual assault, counter-intuitive victim behaviors, intimate partner violence, the impact of drugs and alcohol, and evaluating consent. Evidence preservation by law enforcement and/or medical facilities is crucial, regardless of whether the case follows a traditional law enforcement track or is handled by student conduct or a Title IX investigator. Investigators should be trained in how to evaluate a credibility case, including an understanding of demeanor, interest, detail, corroboration and known patterns of human behavior. Investigators should remain neutral and impartial and not serve as advocates for either party.

The goals of a good investigation should be: to gather the most robust set of facts; to listen with an earnest intent to understand; to learn, not assume; to tend to the individual; and to search for corroboration where it should reasonably be expected to exist . . .

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<sup>9</sup> U.S. Department of Education, Office of Civil Rights, Questions and Answers on Title IX and Sexual Violence dated April 29, 2014.

<sup>10</sup> 34 CFR 668.46(k)(2)(ii).

A thorough interview must be conducted of both the complainant and, if available, the respondent that seeks all relevant and attendant information about the incident, any pre-existing relationship, and the circumstances of the report. The interview should be followed by an exhaustive search for corroboration through other witnesses and physical or documentary evidence, including electronic communications, photographs, medical records, and forensic evidence.<sup>11</sup>

Applying this guidance, a qualified Title IX investigator (or investigative firm) should have, and be capable of demonstrating: (a) experience conducting a variety of investigations, particularly those involving allegations of sexual assault; (b) an understanding of the effects of trauma, drugs and alcohol in the context of a sexual assault investigation; (c) the capability to identify, collect and analyze the digital and forensic evidence most commonly associated with sexual assault investigations; (d) procedures to ensure that investigators remain impartial and evaluate cases based on the evidence and applicable standards of review; (e) an understanding of the need for and value of corroborative evidence; and (f) the ability to effectively interview the complainant, respondent and witnesses.

## 5. Where Can We Find Qualified Title IX Investigators?

Private investigators may be identified through a number of sources. Some of the more common sources, and the scope and limits of information they provide, are discussed below. Unfortunately, there is no single source that provides all information needed to identify a qualified Title IX investigator. Therefore, institutions should query multiple sources and actively vet candidates, using the information provided in this paper.

*Attorneys.* Because attorneys are frequent consumers of investigative services, they can be excellent sources for identifying qualified investigators. However, not all attorneys use investigators; primarily because their area of practice does not demand it. Therefore, an attorney's value as a referral source depends to some degree on his or her practice areas. In our experience, litigators are likely to have the most experience with private investigators. Institutions may also find that attorneys who routinely use investigators often use different investigators, depending on the nature of the work to be performed. For example, the same attorney may use one investigator for personal injury investigations, another for surveillance work and yet another for business or financial investigations. Therefore, to ensure the highest quality referral, it is important to understand and articulate the skills and services that will be needed.

*Law Enforcement.* As previously noted, many private investigators enter the field after careers in federal, state and local law enforcement. A number of investigators also specialize in practice areas that require frequent interaction with law enforcement. Because of these past and present relationships, the law enforcement community can also be an excellent source for identifying qualified investigators. However, much like attorneys, not every law enforcement officer will have the same opportunity to

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<sup>11</sup> Smith, Gina M., and Gomez, Leslie M., *Effective Implementation of the Institutional Response to Sexual Misconduct under Title IX and Related Guidance*, National Association of College and University Attorneys, Annual Conference, June 19-22, 2013.

interact with private investigators in the course of his or her duties. Therefore, a law enforcement official's value as a referral source depends largely on his or her past and present duty assignments. In our experience, criminal investigators (or detectives) and senior officials, whose peers have begun to retire and enter the field, are likely to have the most experience with private investigators.

*Licensing Agencies.* As a general rule, the agency charged with licensing private investigators (for states that require licensing) maintains some form of publicly accessible database of licensees. In most cases, these databases can be accessed and searched via the Internet and usually provide the name, address, phone number, and license status of investigators. However, these resources will not provide information about unlicensed investigators, investigators licensed in other states, or the experience, skills or abilities of investigators.

*Trade or Industry Associations.* It is not uncommon for private investigators to belong to one or more trade or industry associations. These associations may range from those that are purely local or regional, such as the North Carolina Association of Private Investigators (NCAPI), to those that are national in scope, such as the American Society for Industrial Security (ASIS). These associations often maintain some form of searchable member directory. These directories typically include the name, address and telephone number of the members. However, some also include information about a member's experience and practice areas. Users of such directories should be mindful that membership in these associations is voluntary and often requires payment of a fee. Thus, these member directories may not include all investigators or firms serving a particular area. In addition, the information included in such directories is often provided directly by the member and not verified.

*ATIXA.* Like the trade or industry associations previously discussed, the Association of Title IX Administrators (ATIXA) also maintains a roster of its members. This list is available only to ATIXA members.

## About Us

Protus3 is a Raleigh, North Carolina, based security consulting and investigation firm. It has served the education sector since 1988, primarily in the areas of security system design, security consulting, and investigations (including Title IX investigations). Its clients include Duke University, East Carolina University, North Carolina State University, the University of North Carolina, and numerous other public and private colleges, universities, elementary and secondary schools.

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