

# PBI HEALTH LAW INSTITUTE INDEPENDENT INVESTIGATIONS

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# COMING TOGETHER-OR COMING APART: THE NEW CLIMATE FOR INDEPENDENT INVESTIGATIONS IN HEALTHCARE

- DOJ and the Yates/Rosenstein Reporting and Disclosure requirements
- #MeToo and Sexual Harassment/Abuse
- Delaware Corporate Law and the Independent Board Committee
- Governance Models for nonprofit organizations-expectations of caring, reporting, and prevention
- Lessons from badly handled investigations

# COMING TOGETHER-OR COMING APART: THE NEW CLIMATE FOR INDEPENDENT INVESTIGATIONS IN HEALTHCARE

- Not just about potential legal criminal or civil liability
- Narrow legal or HR approach can be a disaster
- Board communication and advice
- Board responsibility
- Mandatory reporting of endangerment, suspension of privileges of physicians
- What promises have been made-
  - Code of Conduct
  - Hotline and anonymity/confidentiality
  - Responses to complaints/investigation
  - Consistent discipline
  - Respectful treatment of patients, employees, volunteers

# FOCUS TODAY-SEXUAL ABUSE INVESTIGATIONS IN HEALTH CARE ORGANIZATIONS

- Catholic Church experience
  - Not just about the conduct of individuals, but the institutional response
  - Professionals judge professionals
  - Canon Law-unique, arcane set of internal rules
  - Power and secrecy, trust, intimate acts
  - Autonomy of each bishop
  - Charismatic narcissists
  - Any similarities to health care?

# Hippocratic Oath

- I will come for the benefit of the sick, remaining free of sexual relationships with both female and male persons.”
- Council on Ethical and Judicial Affairs: unethical for physician to have a romantic relationship or sexual contact with a current patient

# #MeToo: The Problem of Sexual Abuse and Harassment in Health Care Organizations

- 2016 Atlanta Journal Constitution report-analysis of public records in every state [doctors.ajc.com](http://doctors.ajc.com)
- Accusations publicly available against 3100 physicians
  - Probably many more “only a fraction (of total) sexual violations”
  - Other physicians and hospitals refusing to report misconduct
  - Medical board issuing only private letter of concern
  - Confidentiality rules for accused physicians
  - Physicians entering “impaired physician” programs to avoid sanctions
  - 450 cases of doctors who were brought before medical regulators or courts for sexual misconduct or sex crimes in 2016 and 2017. In nearly half of those cases, the AJC found, the doctors remain licensed to practice medicine, no matter whether the victims were patients or employees, adults or children

# #MeToo: The Problem of Sexual Abuse and Harassment in Health Care Organizations

- AP Investigation: Doctors Keep Licenses Despite Sex Abuse (April 15, 2018)
- “When doctors are disciplined, the punishment often consists of a short suspension paired with mandatory therapy that treats sexually abusive behavior as a symptom of an illness or addiction. . .” (e.g., “boundary courses.”)
- Public Citizen Report 2018-of 253 doctors reported to NPDB as sanctioned by hospitals or health organizations for sexual misconduct, or paid a settlement based on such an allegation, 170 were not disciplined by state medical boards.

# HOW HEALTH CARE ORGANIZATIONS HAVE RESPONDED TO ALLEGATIONS OF SEXUAL ABUSE AND HARASSMENT

- University of Southern California (USC) (Dr. George Tyndall)
- Michigan State University-"a culture of indifference and institutional protection" (Dr. Larry Nassar) (Michigan Attorney General)
- NY Presbyterian/Columbia (Dr. Robert Hadden)- (2016) forfeited his medical license and entered guilty pleas to two of the counts, criminal sex act in the third degree and forcible touching. No jail time and a stipulation that he is not listed in New York State's online sex offender registry. Follow-up lawsuit filed December 2018 against Columbia University and Presbyterian, claiming Columbia concealed the abuse for decades, and that hospital told patients Hadden was out on "sick leave" after indictment.



# HOW HEALTH CARE ORGANIZATIONS HAVE RESPONDED TO ALLEGATIONS OF SEXUAL ABUSE AND HARASSMENT

- How not to do it: “Top administrators (at USC) allowed Dr. Tyndall to resign with a payout last summer without informing his patients or reporting him at the time to the Medical Board of California.”
- How not to do it: “MSU had proclaimed publicly that the investigation, led by a former United States Attorney, would lead to 'prompt [and] appropriate action in response to what [they] learned during the review.' In response to our request, however, MSU revealed that (the attorney) prepared no written report of any findings. . .(he) was not hired to investigate for the purpose of presenting his findings to the public, as MSU originally implied, but to prepare and protect the institution in forthcoming litigation.”

# USC and Sexual Abuse by Dr. George Tyndall

- Dr. George Tyndall, USC ob-gyn physician -8 complaints between 2000 and 2014, 2016 internal investigation, permitted to resign and paid settlement in 2017. No report to medical board at time of resignation. No report to patients. Hotline gets 200 calls from concerned patients. (LA Times 5/16/2018)
- USC said it had no obligation to report termination of Tyndall's privileges because the university wasn't governed by the rules of clinics and hospitals, and the complaints against Tyndall "were made as a human resources matter." (LA Times 5/16/2018)

# USC and Sexual Abuse

- USC Medical School Dean No. 1 Carmen Puliafito (July, 2017)-drugs, videos and 21 year old female overdoses in his hotel room-resigns
- USC Medical School Dean No. 2 Rohit Varma(October, 2017)-in 2003,letter of reprimand for unwanted sexual advances to young researcher, retaliation for reporting-USC payment of \$135,000 to complainant.-resigns.(LA Times 10/6/2017)
- USC Business School Dean, James Ellis-terminated as Dean for alleged sexual harassment (not by him) but by faculty and staff at the Business School effective at the end of academic year (LA Times 12/12/2018)

# USC and Sexual Abuse

- external review done by Gibson Dunn & Crutcher; no public report. Partner handling investigation represented the university in at least four lawsuits in recent years. (LA Times 2017)
- “200 USC professors demand USC President Nikias step down; trustees express 'full confidence' in president” (LA Times May 22, 2018)
- “There still has been no public report of the investigation into the two cases involving USC medical deans, nor any visible attempt to determine what University administrators knew and when they knew it, and why they waited as long as they did to take action,” the letter said. “We lament that, time after time, the administration has admitted to its failings only after being exposed by the Los Angeles Times.” Daily Trojan, May 2018
- Max Nikias resigns (August 2018)
- After Nikias resignation, committee of 5 trustees assigned to study how other college boards function
- Fall 2018 USC Board listening sessions
- February 2019-\$125 million settlement; \$2500 to \$250,000 to each victim; reporting procedures

# Ca. Patient's Right to Know Act of 2018

- ensures that consumers are fully informed if their doctor is on probation for cases of serious professional misconduct that involved patient harm or potential patient harm.

# Patient Sexual Abuse and Employee Sexual Harassment by Physicians

- Conflict-physician due process and obligation to protect patients and employees
- 29 CFR 1604.11(e) –employers may be liable for sexual harassment perpetrated by non-employees “in the workplace, where the employer . . . Knows or should have known of the conduct, and fails to take immediate and appropriate corrective action. . . . Commission will consider extent of employer’s control . . . .”
- Immediate suspension/Immediate restriction of clinical privileges
- May require a showing that physician’s misconduct will have an adverse impact on patient care or welfare
- Do your medical staff policies or bylaw provisions authorize immediate suspension when hospital concludes after investigation that a violation of sexual harassment or hostile workplace policies occurred?
- State due process requirements

# Patient Sexual Abuse and Employee Sexual Harassment by Physicians

- National Practitioner Data Bank required reporting-decision adversely affecting physician hospital privileges for more than 30 days
- Required reporting-limited to those “based on a practitioner’s professional competence or professional conduct that adversely affects, or could adversely effect, the health or welfare of a patient.”  
45 CR 60.3

# Patient Sexual Abuse and Employee Sexual Harassment by Physicians

- Cross-Sectional Analysis of the 1039 U.S. Physicians reported to NPDB for sexual conduct, 2003-2013 PLOS One 11(2); A. AbbuDagga, et al. (2016)
- “A majority of the physicians with a clinical privileges action or malpractice payment report due to sexual misconduct were not disciplined by medical boards for this behavior.”



Michigan State University –  
“A Culture of Indifference and Institutional  
Protection” (Dr. Larry Nassar)

- The report describes a "culture of indifference toward sexual assault" at the university; details how the school "stonewalled" its investigation; and claims that officials worked to protect the school's reputation at the expense of the safety of women and girls.

Michigan State University –  
“A Culture of Indifference and Institutional  
Protection” (Dr. Larry Nassar)

- "That so many survivors independently disclosed to so many different MSU employees over so many years, each time with no success, reveals a problem that cannot be explained as mere isolated, individual failures; it is evidence of a larger cultural problem at the MSU Sports Medicine Clinic and MSU more broadly."

# Bad Things Happen to Good People- Sexual Abuse and Harassment

- #MeToo-not just financial, legal, and investigative risk
- Core values of the institution/Power and accountability
- Responding to victims
- Timely process
- Should you promise “a thorough and independent investigation?”
- Reporting model:  
[www.documentcloud.org/documents/3673488-Emma-Willard-Final-Report-April-18.html](http://www.documentcloud.org/documents/3673488-Emma-Willard-Final-Report-April-18.html)
- Reporting model: Ropes and Gray December 2018 report to US Olympic Committee (See p. 13, Independence)

# US Olympic Committee Independence Standard

- Do you want an independent investigator?
- Do you want to be an independent investigator?
- How will independence be assured?
- How will independence be communicated?
- Are you prepared to commit to a published report?
- What will impact of independent investigation and report be on the institution?
- Board, executive leadership and counsel need to consider before committing

# 12 Months of Sexual Abuse and Harassment Cases

- USA Gymnastics/Michigan State physician Lawrence Nassar sentenced (January 2018) (MSU \$500 million settlement w/332 victims)
- Harvard University Government Professor Jorge Dominguez resigns after 18 women accuse him of sexual harassment (March 2018)
- State Auditor Report-University of California (June 2018)  
<https://www.auditor.ca.gov/pdfs/reports/2017-125.pdf> “UC often imposed inconsistent discipline on faculty who were the subject of multiple sexual harassment complaints.”
- University of Southern California 410 complaints about Dr. George Tyndall; \$215 million class action settlement. (October, 2018 Wall Street Journal)
- Rockefeller University- Dr. Reginald Archibald 1000s of patient sex photos (September 2018)
- University of Maryland School of Medicine –Dr. Robert Crawford, vascular surgeon, and University sued by Carly Goldstein for sexual harassment- Baltimore Sun identified 3 other women who complained about harassment by Crawford. (Baltimore Sun 11/13/2018)

# 12 Months of Sexual Abuse and Harassment Cases

- Dartmouth suit: seven plaintiffs say they were “sexually harassed and sexually assaulted by the Department’s tenured professors and were expected to tolerate increasing levels of sexual predation.” (December 2018)
- Michigan State AG Report (12/18) and Interim President Engler comments(1/19)

# Older Reports

- “Sexual Harassment in Medical Training” Komaromy, M et al. 328 NEJM 322-26(1993)
- 73 per cent of female internal medicine residents reported they were sexually harassed at least once in their training.
- Yale School of Medicine:
  - Dr. Michael Simons, cardiology (NY Times 11/1/2014)
  - Rex Mahnensmith, Nephrology Professor (NY Times 4/11/2015)
  - \* Both articles by Tamar Lewin

# MICHIGAN STATE- JANUARY 14, 2019

- “There are a lot of people who are touched by this, survivors who haven’t been in the spotlight,” Interim MSU President Engler . . . told The Detroit News’s editorial board. “In some ways they have been able to deal with this better than the ones who’ve been in the spotlight, who are still enjoying that moment at times, you know, the awards and recognition.”



# Michigan State – January 16, 2019

- “We’re are trying to get rid of lawyers and consultants now. We’re trying to get back to work.” Detroit Free Press, quoting Interim President Engler
- John Engler Resigns as Interim President of Michigan State

Thank You for Your Attention

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