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**Sexual  
Assault and  
Harassment**

# Abuse of power:

## The historical evolution of institutional sexual assault from a litigation perspective

By Mike Arias, Sahar Malek, Assal Badrkhani, and Madeline Heyman

Sexual violence has been documented in human history dating back to the biblical period. In those ancient times, it was the men in power, the perpetrators of the violence, who held the pen when writing the narrative. Warriors pillaged towns at the directive of empires, mass sexual assaults were perpetrated by soldiers at wartime, slaves were routinely raped. For centuries, sexual abuse has been more about asserting power and dominance over the victim than it is about sex. It was then, and with all we have learned through the rise of the #MeToo movement, the same is true now.

The terms 'victim' and 'survivor' are not used interchangeably or haphazardly here, although we often find ourselves conflicted between using the two. Words matter. 'Victim' is appropriately used to describe someone who has been sexually abused at the time of the abuse. 'Survivor' is often used to refer to an individual who has experienced past abuse. We acknowledge

and value the fact that 'survivor' is a word that honors the utmost degree of strength it takes to overcome such trauma. But we also recognize that not every person feels that they have conquered their past. Some continue to identify as 'victim' over 'survivor,' and that is not a pain that should be taken away by assuming they have survived.

It is undisputed that most sexual assaults are perpetrated by men.<sup>1</sup> In nearly all cases of institutional sexual abuse, power is rarely parallel, and it is men in power that find themselves with the opportunity to abuse their position. A perpetrator in an institutional setting often has something that his victims either require or desire. He dangles the promise over the victim attempting to groom compliance. When grooming proves successful, the conduct escalates. A Hollywood producer offering stardom. A religious leader promising virtue. An executive enticing his assistant with a promotion. A doctor making

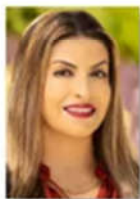
an uncomfortable exam seem routine. The perpetrator in power promises and threatens until he lures his victim in. The grooming period is not initially recognized as such by the victim, who often feels conflicted by the special attention they are receiving from the power player. It is not until after lines are clearly crossed that the victim comprehends the degree to which they have been violated. Unfortunately, through fear and shame, victims often remain silent.

Silence is understandable as sexual violence is a deeply personal event. But where power dynamics play out in an institutional setting, whether it be an educational or religious institution, the entertainment industry, or a sports program – the institutional framework in which the sexual violence occurs can have very public repercussions if not handled correctly once suspicions arise or a victim or witness makes a report. Inadequate institutional response can lead to additional victims,



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can further traumatize those victims who have already come forward, and can give rise to a culture of abuse within the institution that breeds new perpetrators.

With boundless resources and numerous complaints, why would some of the arguably most powerful institutions in the country ignore what was happening on their watch? Because taking action meant bearing responsibility. Each complaint represented a threat, so institutions reacted by protecting the principle of "profit over people." As discussed in this article, certain measures were drastic and often repugnant. Even where monetary profits were not in play, the public repercussions of sexual assault allegations have often led otherwise good people to turn a blind eye to, or outright cover up, horrific acts in the name of protecting the institution (and self-preservation within that institution) at all costs. Sexual assault litigation examines power, profits, and reputation dynamics. Who has it and who does not want to lose it. Therein lies the rub.

#### Litigation of Institutional Sexual Abuse Cases

Studies show that the average age that a victim of childhood sexual assault comes forward for the first time is 52 (N., et al., 2014). When we think in terms of sexual abuse litigation, certain players come to mind – the Catholic Church, the Boy Scouts of America, educational institutions, the entertainment industry and youth-gear extra-curricular programs. Our knowledge to date is limited by the

number of brave victims that have come forward willing to take their personal stories to a court of law. Many continue to come forward as you read this article. As various states implement Child Victims Legislation, and through our dedication to advocating for these victims, new stories will shed light on the true scope of the atrocities that have occurred in the past several decades.

The Boy Scouts (BSA), one of the largest youth organizations in America, was founded in 1910. The organization matches volunteers with young people to aid youth in making positive choices for their lives.

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Within a decade, the BSA began keeping records of what it deemed to be "ineligible volunteers" due to claims of sexual abuse. These records were later called the "red files." By 1994, there were almost 2,000 reported cases of sexual assault within the organization. The floodgates of litigation against the Boy Scouts opened as early as 2007 in an Oregon case in which six men claimed they had been sexually abused by their scoutmaster in the 1980's. In the Oregon trial, thousands of records were released documenting sexual abuse allegations – the first time these records had been

made public. These files are now known as the "Perversion Files." Within years, courts across the country ordered BSA to release over 20,000 pages of confidential documents alleging sexual abuse. Lawsuits piled up as more victims felt empowered to speak out and hold BSA accountable. By February 2020, BSA filed for Chapter 11 bankruptcy to restructure finances in an effort to offer victims compensation. By the end of that year, over 92,000 sexual abuse claims were filed with the bankruptcy court (McLaughlin, Vera, & CNN, 2020). In 2021, BSA reached a settlement of \$850 million with over 84,000 victims (Siegel & News, 2021).

Similarly, the first reports of abuse perpetrated by those within the ranks of the Catholic Clergy were documented as early as the 1940s. However, the abuse did not reach the public eye until four decades later when a priest in Louisiana pled guilty to molesting young boys. Thereafter, through books and investigative journalism, more details were revealed about the pervasiveness of abuse in the Church. News of verdicts and settlements spread across the country including over \$25 million for 240 victims in Louisville, Kentucky in 2003, \$85 million for 552 victims in Boston, Massachusetts in 2003, \$100 million for 87 victims in Orange, California in 2005, \$660 million to over 508 victims in Los Angeles, California in 2007 and \$87.5 million for almost 300 victims in New Jersey in 2022.

Scandals also arose at educational institutions across the country, with sexual assault complaints made as early as the



1990s against USC gynecologist George Tyndall for improper medical exams and actions which crossed clear lines from medical to sexual. From 2000 to 2021, similar complaints were brought against gynecologist James Heaps at UCLA. Over 1,000 complaints were made to the University of Michigan against sports doctor Robert Anderson over the course of his almost four-decade career. These are just a small sampling of the many institutions that have faced similar allegations of abuse and cover-up. In the cases mentioned, complaints of abuse were not sporadically reported, but rather often landed in the hundreds at each institution. And despite the variety of actors discussed above, the egregiousness of their response to sexual misconduct complaints followed distinctly similar patterns that have been revealed through ardent litigation.

#### **The Institutional "Playbook" for Concealing the Truth**

No matter the institutional setting, common patterns have been discovered which can serve as a useful guide on how to identify key failures and ultimately prove institutional liability. A 2018 Pennsylvania Grand Jury Report investigating six of the state's main Catholic archdioceses for the mishandling of sexual assault allegations found that those who were in charge followed a "playbook for concealing the truth." The theme of following a playbook, and its components, are not unique to the Church. Identifying similar patterns in the evidence of your particular case can prove crucial to a favorable result.

First step in the playbook: Once a suspicion of assault arises or complaint is made, either choose to ignore it completely or seek to minimize any report received. A popular method involves the use of watered-down language to conceal indications of sexual abuse. For example, receiving a graphic report involving penetration, yet calling what occurred an "inappropriate contact" not a "rape." Words matter. While BSA kept an internal list of "Ineligible Volunteers" for decades to keep tabs on suspected pedophiles and potentially remove them from access to children, external reports were rarely made to law enforcement. In the 1930's, they were confusingly referred to as the "red files," leaving some to question whether

BSA was keeping track of communists within its ranks. The current name for this compilation, the "Perversion Files," is strikingly different from the initial references to "ineligible volunteers." Absent court order, those files may still be kept hidden today. Consequently, it is key, when litigating sexual assault cases, to pay attention to the context and intent of documents. Words matter.

Next step in the playbook: Pass the perpetrator. Whether from parish to parish or school to school, "perp-shuffling" occurs when those in charge become aware of misconduct allegations but choose to re-assign the accused to a new location instead of permanently removing them from their position. This practice opens avenues for an abuser's vile acts to spread to new areas and new victims. No internal disciplinary records are kept as to the true reason for the reassignment. No reports are made to law enforcement. The victim's parents are rarely notified, which prevents the parents from taking steps to protect their child. Finally, no warnings are relayed to the employees at the location where the shuffled perp lands, which leaves these employees uninformed and unprepared to protect children in their care. Therefore, the abuser continues to keep their position of trust while also having new opportunities to find new victims. Thus, in discovery, any lateral moves or reassignments of a suspected perpetrator should be closely examined, even in the absence of disciplinary records. Failure to document a reason behind a move within an institution can be indicative of known misconduct.

Third step in the playbook: Failure to report abuse allegations to law enforcement where abuse is either known or suspected to have occurred. Or worse — demanding and directing law enforcement to disregard or minimize a report of abuse. Key problems in this area might involve inconsistent policies and procedures for obligatory reporting, discouragement of submitting reports by higher-ups within the institution, and failure in training on reporting obligations including what to report and to whom. The California Child Abuse and Reporting Act (CANRA, implemented in 1980) requires the identification and reporting of child abuse or neglect by certain persons. A "mandatory reporter" is obligated to report suspicion of

child abuse if their duties bring them into contact with children on a regular basis, or if they supervise staff that fall within this category. Reporters include coaches, school employees, first responders, youth program workers, and health care professionals. CANRA requires certain steps be taken once abuse is suspected, including (1) making a verbal report to either local law enforcement or child protective services; and (2) filling out a written report no later than 36 hours after the verbal

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report. Members of the clergy are also already designated as mandatory reporters; however, under the current law, priests are exempt if they are informed of abuse under the Catholic seal of confession. In those institutional settings where CANRA does not come into play, institutions should be encouraged to develop their own policies and procedures regarding reporting that either mirror, or improve upon, CANRA requirements.

Fourth step in the playbook: Failure to train. Institutions typically do not have adequate policies and procedures in place and often fail to train their staff on how to (1) identify the signs of sexual misconduct; (2) handle complaints; and (3) conduct internal investigations once a complaint is received. Training in all three areas is required to competently handle complaints. In the absence of training, average employees of an institution are generally ill-equipped to identify and detect the early signs of grooming and inappropriate behavior that can escalate to sexual misconduct. Without targeted training, an employee may not correctly interpret obvious warning signs and a child in their care will remain at risk for further exposure to abuse. Specifically in the context

of working with young children, training is necessary on verbal and non-verbal behavior which may indicate foul play.

Once misconduct is suspected or reported, it is important to have sound policies in place instructing how to handle documentation of the complaint as well as internally investigate. Handling a complaint should always involve a report being made to law enforcement as well as to the minor victim's parents, if they are not already aware. Record keeping is vital to an institution's ability to identify patterns and potential risks to children, especially in those instances where allegations against a suspected employee are ultimately unsubstantiated. Failures can occur when institutions do not maintain records of unsubstantiated allegations or unofficial warnings given to employees. Problems also arise where employees investigating assault allegations conduct interviews on behalf of an institution but do not take or retain notes. These are indicators that an institution is not taking its role in enforcing its policies and procedures seriously.

While some institutions have guidelines on how to conduct an internal investigation, the policies may either be inadequate or there may be a lack of training as to what those policies are. Assigning inexperienced employees to conduct internal investigations once a complaint is made is a key institutional misstep. As is failing to assign an impartial employee—for example, a coworker who regularly works with the accused. Other failures include not interviewing all pertinent witnesses, not documenting interviews, and not reaching any conclusions as to the result of the investigation. In those rare cases where a third-party investigator is hired by the institution, it is important to examine the records provided to the investigator to confirm whether they were given full disclosures of information and documents by the institution, or if the institution was attempting to hide the ball from the investigator.

A final step in the playbook is the lack of support provided to victims as well as the lack of internal soul-searching to figure out what went wrong in the hope of preventing future similar events. Weaving terms involving policies, prevention and training into settlement agreements in these cases is essential in bringing about tangible change.

## Prevention – Litigation Leading to Changes in Policies and Practices

Over time, several pieces had to fit together to meaningfully address the sexual misconduct that was running rampant in our communities. The first, and arguably the most difficult, step was for these survivors to find platforms to come forward and share their experiences. Individual voices were not powerful enough alone. Only when institutions were held accountable in courtrooms, with their pocketbooks and reputations at stake, did the power balance finally begin to tilt.

Unlike most other personal injury clients, victims and survivors of sexual assault are unique in their dedication to the idea that their story should bring about change in the very systems that failed them. While paying large sums of money acts as a means of holding institutions accountable for past wrongs, weaving terms into your settlements that require training and policy changes incentivizes true systematic change within the institution and also helps your client's healing process.

Following the University of Southern California's (USC) \$852 million settlement for the sexual abuse perpetrated by physician George Tyndall and the failure on the part of USC to properly investigate and prevent the abuse from occurring, settlement terms required the university to implement significant internal changes. Hard fought litigation forced USC to impose new sensitive medical exam policies and training for medical staff, to assign an independent Women's Health Advocate, to form a new Office of Professionalism and Ethics, and to translate materials related to sensitive exams into multiple languages. The latter change is crucial because the language barrier during sensitive exams allowed Tyndall to take advantage of patients who could have otherwise identified something improper was occurring.

While litigation against BSA was ongoing, the organization released materials on their website with updated policies aimed at stopping sexual abuse. Youth are no longer permitted to be left alone with an adult, no recording devices are permitted in bathrooms or near showers, a helpline and email for reporting sexual misconduct has been implemented on the BSA website, and more thorough background checks are required for all adults involved in BSA.

While some of these "updated" policies are a step in the right direction, others are not changes at all. For example, youth not being permitted to be left one on one with an adult has been a component of BSA's Youth Protection Program since the 1980's to address reports of abuse at that time. Mandatory background checks were initially implemented in 2003. With the mountain of litigation and bankruptcy restructuring on its doorstep, whether the BSA finally begins enforcing its own policies will be telling as to the institution's future.

An examination of sexual abuse at Penn State University, Baylor University, and Michigan State University found that all three institutions had inadequate reporting mechanisms, that athletic programs failed to remove perpetrators from their positions, and that Title IX offices failed to provide appropriate responses—even after a federal mandate was put in place. Penn State removed a star football player from one season citing "team rule violations" after that player was found to have raped another student. Reducing the offense to a "team rules violation" essentially silenced the victim to avoid monetary loss for the football team. Again, words matter.

At Michigan State University trainer and physician Larry Nassar was reported for sexual misconduct numerous times by parents and athletes. A Detroit News investigation found that reports were made to at least 14 different individuals within different offices at the university and to the police in the two decades prior to his ultimate arrest. However, Nassar's success with treating athletes was valued over the safety of students and Nassar was given free rein. Despite the misconduct reports, Nassar was elevated to a position as doctor for the USA Olympic gymnastics team. His serial molesting was revealed and ultimately stopped due to the courageous actions of former gymnasts who spoke out against him publicly. As a result of legal action, MSU's leadership underwent immediate changes and restructuring, additional funds were directed toward the Title IX program, offices were restructured, and a third-party firm was hired to investigate complaints.

The #MeToo movement in Hollywood stemmed from similar cover-ups by studios and executives with the goal of preventing box-office bombs that would



result from sexual assault accusations being made public. For decades, powerful producers and stars were allowed to get away with misconduct because they were highly successful in Hollywood. Victims were often kept silent by small sums of money exchanged for signing airtight Non-Disclosure Agreements. Self-interested executives allowed the money and fame born from these predators to overshadow their heinous crimes. As with the other institutions discussed above, systemic change within the entertainment industry began to occur because of battles originating in the courtroom. As a result of the Weinstein actions and other similar lawsuits, studios no longer find it beneficial to hide misconduct. Cover-ups can lead to bankruptcy as evidenced by the fall of The Weinstein Company. In recent years, more companies implemented training on sexual misconduct prevention. Language in employment contracts was updated to include "morality conflicts," allowing studios to remove talent from their projects if accused of sexual misconduct. Actor's unions released literature strongly

discouraging meetings being conducted in "high-risk environments" like hotel rooms and agents stopped agreeing to let their talent attend such meetings. More women than ever before are replacing male counterparts who have been removed for sexual misconduct and more female producers and writers are able to obtain funding for their film and television projects. While these changes are important steps forward, the power dynamics that exist in the entertainment industry, as well as the pressure for box office success, create an environment that is still ripe for misconduct and institutional cover-up.

As litigators, it is easy to get lost in the narrative and details of a particular case with the goal of achieving justice for an individual client. In institutional sexual assault litigation, a single plaintiff's case potentially has the power to hold an entire institution accountable. Thus, the script is flipped. The power of the pen is given to victims and the litigators who stand with them. Through negotiated settlement terms, we demand institutional accountability, reject the abuse of power, and seek to prevent further victimization through policy changes and training programs. We hold this power with great responsibility and care. Until the power fully shifts, we will continue to seek justice. ■

<sup>1</sup> According to the CDC and the National Sexual Violence Resource Center (NSVRC), almost 1 in 5 women (18.3 percent) reported experiencing rape at some time in their lives, as compared with 1.4 percent of men.

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