INSIDE THE MINDS

Understanding Sports Law

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ASPATORE

Conducting an Effective Sports Investigation

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Introduction

In recent years, a cottage industry of sorts has evolved in the sports law arena: white collar investigations. Given the public's fascination with sports and our twenty-four/sevennews cycle, it is rare for public allegations of wrongdoing in the sports context to go unaddressed or to be handled quietly. Sports organizations now regularly conduct internal investigations into allegations of wrongdoing and publicly release their findings. While the reports are catnip for talking heads, bloggers, and sports junkies, they present a unique set of challenges for the white collar lawyer. Indeed, while no internal investigation is the same and there is no "one size fits all" approach, recent sports investigations highlight a number of difficulties with which counsel must contend.

In this chapter, we highlight some of these challenges and considerations and draw comparisons to internal investigations outside of the sports industry. We conclude with some thoughts on "best practices" for the sports lawyer.

What Makes Sports Investigations Unique?

Internal investigations often begin with retention of outside counsel and are covered by the attorney-client privilege. Typically, a whistleblower allegation, accounting restatement, or government subpoena will spawn such investigations, which then proceed deliberately, with the benefit of time, to uncover the facts and discuss an appropriate path forward. Indeed, clients often want an internal investigation to assess potential exposure and guide decisions as to whether a self-disclosure to government authorities is advisable.

Today's sports investigations, however, typically do not have the luxury of time, or confidentiality. To start with, sports organizations are highly visible. The same can no doubt be said for banks, hedge funds, or other industries for which internal investigations have become commonplace. But although enthusiasts may be loath to admit it, sports also provide *entertainment*. Segments of the public watch them every week, live or in person. When a crisis hits these organizations, followers expect to be told what happened immediately, and the press goes to great lengths to report on what it believes happened.

This public "need to know" drives the decision to conduct an immediate, public investigation, frequently before the facts are fully known or digestible. From a business perspective, there seems to be little choice—the matter is high profile, threatens the integrity and perception of the product, and consumers want to find out the facts. Trying to conduct a confidential investigation heightens the risk of unauthorized leaks, which poses a dilemma. You can either:

1. Conduct a public investigation and potentially chill witness cooperation (as discussed below); or
2. Keep the results confidential and respond to unauthorized leaks on a one-off basis, which oftentimes provides the public with incomplete, inaccurate facts and potentially exposes athletes, teams, and leagues to embarrassment or liability.

In recent years, many sports organizations have chosen the former path—publicly announce an investigation and release the ensuing report. Some noteworthy examples include:

> In October 2013, media reports surfaced that the Miami Dolphins' left tackle Jonathan Martin stormed out of practice after a "prank" went awry. The NFL ordered an investigation in the wake of press reports about these events, including ESPN's release of a transcript of a vulgar voice-mail message (with a racial slur) left for Martin by fellow offensive lineman Richie Incognito.[1] As the Martin Report described: "[i]n the days following Martin's departure from the team, turmoil ensued within the Dolphins organization, and media reports of bullying elicited vocal and mixed reactions from NFL players, analysts and fans."[2] The Dolphins asked NFL Commissioner Roger Goodell to conduct an independent investigation, and Goodell retained a law firm to

[1] THEODORE V. WELLS, JR., ET AL., PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, REPORT TO THE NATIONAL FOOTBALL LEAGUE CONCERNING ISSUES OF WORKPLACE CONDUCT AT THE MIAMI DOLPHINS (2014) [hereinafter "Martin Investigation" or "Martin Report"].
[2] *Id*. at 6.

investigate the bullying allegations. Commissioner Goodell announced that "[b]ecause of the extraordinary public interest in this matter. . . the full Report as presented to [Commissioner Goodell], without any redactions or modifications, [would] be released to the public."[3]

On November 4, 2011, the Attorney General of the Commonwealth of Pennsylvania filed multiple criminal charges against former Pennsylvania State University (Penn State) football coach Jerry Sandusky related to the alleged sexual abuse of children.[4] On November 21, after the charges spurred a firestorm of publicity, the Special Investigations Task Force on behalf of Penn State Board of Trustees commissioned an investigation with a public report into the failure of university personnel to respond to, and report on, the alleged sexual abuse.[5]

In 2008, the commissioner of the National Basketball Association (NBA) ordered an investigation into the NBA's officiating program after the Federal Bureau of Investigation and the United States Attorney's Office for the Eastern District of New York notified the league that one of its referees, Tim Donaghy, "had placed bets on NBA games, including games he had officiated" and "disclosed confidential NBA information [to bookies] for use in betting on NBA games."[6] After Donaghy pled guilty to conspiracy to commit wire fraud and conspiracy to transmit wagering information, the NBA announced "a

[3] *Id*. at 54.

[4] LOUIS FREEH, FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTEE BY GERALD A. SANDUSKY 13 (2012) [hereinafter "Sandusky Investigation" or "Sandusky Report"].

[5] Press Release, Penn State University, Former FBI director Freeh to conduct independent investigation (November 21, 2011), *available at* http://news.psu.edu/story/153530/2011/11/21/former-fbi-director-freeh-conduct-independent-investigation.

[6] LAWRENCE B. PEDOWITZ, WACHTELL, LIPTON, ROSEN & KATZ, REPORT TO THE BOARD OF GOVERNORS OF THE NATIONAL BASKETBALL ASSOCIATION ES-1 (2008) [hereinafter "Donaghy Investigation" or "Donaghy Report"].

> review of the League's officiating program" that would be reported "to the League and the public."[7]
>
> In 2006, the commissioner of Major League Baseball (MLB) ordered an investigation into steroid use by baseball players after the publication of Mark Fainaru-Wada and Lance Williams's book *Game of Shadows*:[8] "a book that contained allegations about the illegal use of performance enhancing substances by major league players that were supplied by [the Bay Area Laboratory Co-operative ("BALCO")] and the personal trainer Greg Anderson."[9] Major League Baseball's initiation of this investigation also "pledged that [the MLB Report], when completed, would be made public."[10]

These recent investigations contrast with sports investigations from just twenty-five years ago, which bore a closer resemblance to classic white collar investigations. John Dowd's investigation into allegations that former MLB player Pete Rose bet on baseball games, for example, was quietly commissioned by the league.[11] Unlike recent investigations, MLB did not announce that the report would be made public at the outset. In fact, Dowd's report was only released as part of a court proceeding *initiated by Rose*, who went to court in an ill-fated attempt to obtain an injunction restraining MLB from formally finding that Rose bet on baseball and would be banned from the game.[12]

As we explain below, the public nature of recent sports investigations poses some unique obstacles for the sports lawyer conducting the investigation.

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[7] *Id.* at 1-2

[8] MARK FAINARU-WADA & LANCE WILLIAMS, GAME OF SHADOWS (Gotham 2006).

[9] GEORGE J. MITCHELL, DLA PIPER US LLP, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL SR-17 (2007) [hereinafter "MLB Investigation" or "MLB Report"].

[10] MLB Report at SR-3.

[11] JOHN M. DOWD, REPORT TO THE COMMISSIONER (1989) [hereinafter "Rose Investigation" or "Rose Report"]

[12] Associated Press, *The Pete Rose Investigation: Rose Bet on Reds, Report Charges: Baseball Investigation Alleges He Set Up a Gambling Network*, L.A. TIMES (June 27, 1989), *available at* http://articles.latimes.com/1989-06-27/sports/sp-4291_1_rose-bet-225-page-report-reds-games.

Handling the Public Sports Investigation

So what are some of these challenges and how should an effective sports lawyer deal with them? Below we outline three key issues for sports lawyers to consider when conducting internal investigations, each of which played a role in a recent investigative report of a sports-related matter.

Investigation Obstacles to Overcome: Encouraging Witness Cooperation and Addressing Requests for Confidentiality

A hurdle all lawyers must clear when conducting an investigation is witness cooperation.

One of the many benefits that the grand jury provides to federal prosecutors is simple: secrecy.[13] The secrecy of grand jury proceedings enables the government to investigate crimes without alerting the targets of investigations, and protects targets from public condemnation prior to the grand jury returning an indictment. The confidentiality of these proceedings goes a long way toward allaying witness concerns about public identification and reprisals for cooperation. While witnesses can never be assured of continued anonymity, they can take comfort knowing that their cooperation with a grand jury investigation may never be publicly disclosed or shared with the target of an investigation. Even interviews of witnesses outside the presence of the grand jury are protected; federal agents do not publicly disclose such statements as a matter of course, and federal statutes do not require the production of prior statements of a testifying witness until after that witness has testified.[14]

While internal investigations are not cloaked with the same legal requirements of secrecy, they often are conducted in the shadows, on a strictly "need to know" basis, even within the business organization. Interviews and reports of internal investigations are typically protected by

[13] *See* FED. R. CRIM. P. 6(e)(2) (providing that various individuals—including sitting grand jurors—"must not disclose a matter occurring before the grand jury").

[14] *See* 18 U.S.C. § 3500 (West) (the Jenks Act). In practice, federal prosecutors often disclose such prior witness statements before the commencement of trial, many times pursuant to court order. Indeed, a key event in federal criminal trials is the date on which such statements are disclosed to the defense. At that point, a defendant learns for certain which witnesses have elected to cooperate against him/her and testify.

the attorney-client or work product privileges, such that they are not discoverable in criminal or civil litigation absent a knowing waiver by the company.[15] And while such reports sometimes are voluntarily disclosed to government authorities, various government privileges can protect such reports from disclosure to the public.

While the advantages of confidentiality are multi-fold, the lawyer conducting an internal investigation for a sports organization often does not enjoy them. Since many sports investigations are commissioned at the outset with the express understanding that results will be publicly disclosed, there is always a risk of chilling witness cooperation. Indeed, many of the assurances that counsel can provide company witnesses in internal investigations—relating to privilege (with the necessary *Upjohn* warnings[16]) and the purpose/goal of investigations—simply do not resonate or cannot be provided in the sports context, where findings will be made public.

While early sports investigations did not have to face this issue—the Rose Investigation, for example, was not meant for public release, identified every witness or source by name, and did not even cite confidentiality concerns—recent reports of sports investigations highlight this problem. The MLB Report, for example, noted that baseball players were terrified of breaching a form of "omerta" that governed players:

> In the course of this investigation, examples of the "code of silence" were abundant. A number of witnesses, for example, claimed that they knew nothing about steroids, never saw anything involving steroids, and had never even heard the word

[15] In a recent decision, *see United States ex rel. Barko v. Halliburton Co.*, 1:05-CV-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014), a district court found that internal investigation reports were not protected by the attorney-client privilege or the work product privilege because the investigations were part of a "routine corporate, and apparently ongoing, compliance investigation required by regulatory law and corporate policy." *Id.* at *6. In so holding, however, the Court emphasized that the investigations were done in the ordinary course of business, the interview subjects were never told that the investigations were for the purpose of obtaining legal advice and the interviewers were non-attorneys. *Id.* at *6-8.

[16] After the U.S. Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), attorneys conducting internal investigations on behalf of corporations routinely advise employee interview subjects that the attorneys represent the corporation (not the individual), and that the corporation (rather than the employee) holds any privilege that applies to the interview.

> "steroids" used in a major league clubhouse, not even in connection with such high-profile issues as the leaked BALCO grand jury testimony, the publicity about Barry Bonds, the March 2005 congressional hearings, Rafael Palmeiro's failed drug test thereafter, or the Jason Grimsley search warrant affidavit in June 2006 . . . . one former player told of annual players-only meetings during which teammates reminded one another that any personal information they learned during the season needed to be kept in "the family." He said that players understood that a failure to abide by this unwritten rule would sound the death knell for their careers. Through his lawyer, another former player who admitted his own use of performance enhancing substances claimed that his career as a major league coach would be harmed "perhaps fatally" if he were required to identify other players who had admitted to him that they had used steroids."[17]

Similarly, in the Martin investigation, when counsel uncovered racially tinged abuse of an assistant trainer (who the Martin Report did not identify by name), they noted: "[w]hen interviewed about these matters, the Assistant Trainer initially pleaded that he not be required to answer certain questions, implying that he could not be forthright because he was concerned about losing the trust of the players"[18] and that "he could not be candid with us because he was concerned about losing the trust of the players, which he felt would compromise his ability to perform his job"[19]

It is therefore inevitable that some witnesses will request confidentiality of their interviews, or that their names be withheld or redacted from any public report. Granting such requests should be based on the particular facts of each case. The credibility of the investigative report hinges to a large extent on identifying the basis for certain key witness statements (i.e., what was the witness's relationship with the "target" of the investigation, how often did they speak, how close was the witness to the events at issue?) All such factors are harder to evaluate when the witness's identity is unknown, and critics will seize on such uncertainty in an effort to discredit the report.

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[17] *See* MLB Report *supra* n. 9 at 88.
[18] *See* Martin Report *supra* n. 1 at 23.
[19] *See* Martin Report *supra* n. 1 at 85.

Indeed, the Sandusky Report has been criticized for withholding the names of many witnesses who "spoke with the Special Investigation Counsel."[20] In an extended response to the Sandusky Report, King & Spalding (hired by the family of former Penn State head football coach Joe Paterno) argued that "[w]ithout an understanding of who actually made the statements set forth in the [Sandusky] Report, there is no way for the reader to weigh the credibility or reliability of witnesses or the consistency of statements among witnesses."[21] This is one reason why federal courts have imposed strict limits on parties' efforts to shield public disclosure of the names or appearances of witnesses who testify in open court. While internal investigations and reports are not trials, and there are no corresponding constitutional due process concerns, identifying sources helps the reader assess the credibility of a witness's statement and the investigator's conclusions.

Facts to consider in granting requests for anonymity should include whether a witness's statement is corroborative or the sole piece of evidence on a particular point, whether identification is essential for credibility purposes, and whether there are concerns over witness retaliation. Where possible and necessary, there are benefits to honoring such witness requests for confidentiality. In part, this will promote cooperation with the investigation and potentially encourage more witnesses to come forward. And, given the highly public nature of these investigations and reports, it does protect percipient witnesses—i.e., those who were neither the targets nor subjects of an investigation—from unwanted public scrutiny.

Anticipating this type of criticism, the Martin Report addressed its rationale for protecting the confidentiality of certain witnesses:

> Because of the extraordinary public interest in this matter, the Commissioner made the decision that the full Report as presented to him, without any redactions or modifications, will be released to the public. Accordingly, we attempted to protect the privacy of certain individuals

[20] *See* Sandusky Report *supra* n. 4 at 10.
[21] Wick Sollers, et al., *Critique of the Freeh Report: The Rush To Injustice Regarding Joe Paterno,* 10 (2013).

> whom we interviewed or wrote about, recognizing that many of them never asked to be dragged into the spotlight. In some cases, witnesses specifically asked that their identities remain confidential—a few even seemed to fear potential retaliation for cooperating with our inquiry—and we honored their requests.[22]

The Martin Report stated that its decision "to respect the privacy or protect the confidentiality of certain individuals, particularly on very personal and sensitive subjects," did not "in any way compromise[] the integrity of this Report."[23] In part, this no doubt was because the key parties to the investigation—Martin and Incognito—went on the record, and because counsel developed a highly probative documentary record (discussed below), which rendered many of the witnesses' statements corroborative.

The Sandusky Report also cited examples of witness concerns over retaliation, which understandably played a significant factor in lawyers' decision to withhold the witnesses' names. A janitor told investigators, for example, that "reporting the incident 'would have been like going against the President of the United States in my eyes . . . . I know Paterno has so much power, if he wanted to get rid of someone, I would have been gone."[24] The Sandusky Report also added that when documents that suggested criminal activity were found, the investigators "immediately provided these documents to law enforcement."[25] Where there is a parallel criminal investigation and the sports investigator is cooperating with authorities, it is possible that authorities will request that the lawyers conducting the investigation withhold production of names, especially of non-public figures. If such witnesses turn out to be key witnesses in a criminal case, for example, authorities want to ensure they are not placed in harm's way or approached by private parties regarding their expected testimony.

In addition, certain confidentiality issues contained in collective bargaining agreements between a league and its players may require the withholding of the identities of sources. According to the MLB Report, "[t]he Commissioner retained the right to prohibit publication in this report of

[22] *See* Martin Report *supra* n. 1 at 54.
[23] *Id.*
[24] *See* Sandusky Report *supra* n. 4 at 65.
[25] *Id.* at 11.

any information that he is under a legal duty to keep confidential."[26] The MLB Report also noted that counsel were "not permitted to identify either [one] former player with whom we spoke or [a] current player who [admitted steroid use to the former player who met with investigators] because the Commissioner's Office and the Players Association have concluded that for [investigators] to do so would violate the confidentiality provisions" of the Major League Baseball Joint Drug Prevention and Treatment Program.[27]

Nonetheless, there are practical limits to a sports lawyer's ability to ensure witness confidentiality in public reports. Given the public visibility of athletes, the limited number of members of sports teams, and the press reports covering the allegations that form the basis of an investigation, the public often can figure out the names of key witnesses even if the lawyer refers to them by pseudonym or alias in the report. Even so, in our current information age, much can be said for shielding a witness's name from search engine hits over the Internet.

Obtaining and Executing a Broad Investigative Mandate and Highlighting the Limitations of the Investigation in Any Reports

The public nature of sports reports also heightens the need for the investigation's thoroughness and completeness. This is especially true given the broad scope of these investigations. Drafters of the Sandusky Report, for example, were given almost unlimited authority to "[i]dentify any failures and their causes on the part of individuals associated with the University at any level or in any office, or gaps in administrative processes that precluded the timely and accurate reporting of, or response to, reports of these incidents."[28] An investigation into Billy Hunter, the director of the NBA Players Association (NBPA), initially probed whether Hunter had

[26] *See* MLB Report *supra* n. 9 at SR-5.
[27] *Id*. at SR-27.The Major League Baseball Join Drug Prevention and Treatment Program is a collectively bargained agreement for testing players for illegal drugs, including performance enhancing drugs. *See* MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM, *available at* http://mlb.mlb.com/pa/pdf/jda.pdf. Under Sections 5 and 6 of the agreement, both MLB and the league are required to keep the identities of players who have failed tests or are in treatment confidential, subject to certain exceptions. *Id*. at 19-20.
[28] *See* Sandusky Report *supra* n. 4 at 9.

violated federal law, but also used its broad mandate to address whether Hunter breached his fiduciary duty to the union, failed to manage conflicts of interest, improperly used union funds, and engaged in nepotism. In opining on these issues, the Hunter Report recounted various alleged misdeeds by Hunter.[29]

Since the sports lawyer typically plays the role of prosecutor, judge, and jury in a highly visible case with broad findings that will be made public, great care must be taken with conclusions and methodology. To be thorough, it is necessary to have the full cooperation of the leagues and teams in conducting the investigation and to make clear that there are no limits or "filtering" of documents that can be reviewed or witnesses whom can be interviewed. The Martin Report, for example, indicated that "[t]here were no constraints placed on our work or that were aimed to guide our results, not from the NFL, the NFLPA, the Dolphins or any player"[30] and that counsel "had authority to request interviews of anyone deemed to have relevant information, including present and former NFL players, coaches, staff and personnel. We were given access to pertinent documents from the NFL and the Dolphins."[31] Similarly, when the Sandusky investigation was announced, the trustee stated: "No one is above scrutiny . . . [investigators have] complete rein to follow any lead, to look into every corner of the University to get to the bottom of what happened and then to make recommendations that ensure that it never happens again."[32] The Sandusky Report noted that it "operated with total independence," "maintained a secure workspace that was separate from all other University offices and classrooms," and "had unfettered access to University staff, as well as to data and documents maintained throughout the University."[33]

Nonetheless, there are limits to the completeness of any internal investigation. Even when the leagues and teams proffer complete cooperation, counsel lacks the tools to compel the production of documents from outside parties, or the statements of witnesses. This topic is frequently highlighted in investigative reports:

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[29] THEODORE V. WELLS, JR., ET AL, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, REPORT TO THE SPECIAL COMMITTEE OF THE NATIONAL BASKETBALL PLAYERS ASSOCIATION CONCERNING THE LEADERSHIP AND BUSINESS PRACTICES OF THE NBPA 1-2 (2013) [hereinafter "Hunter Investigation" or "Hunter Report"].

[30] *See* Martin Report *supra* n. 1 at 7.

[31] *See* Martin Report *supra* n. 1 at 52.

[32] *See* Sandusky Report *supra* n. 4 at 11.

[33] *Id.*

> "The cooperation of all persons and entities that assisted this investigation—including by providing relevant documents—was voluntary, although Miami Dolphins management encouraged players and personnel to cooperate with the investigation. As the investigation was not part of any official proceeding, we did not have the power to issue subpoenas or otherwise possess the ability to compel witnesses to make statements or produce documents . . . [but] Martin, Incognito, the NFL and the Dolphins organization all provided written materials to us and cooperated fully."[34]

> During the Hunter Investigation, Prim Capital, the NBPA's financial advisor, abruptly refused to "comply with requests for documents and information concerning important questions."[35] While such a refusal could be addressed through a motion to compel in a criminal investigation, the NBA did not have such recourse. Instead, "[a]s a result of Prim's refusal to give us highly relevant information, we are not able to provide analysis or findings about the propriety of Prim's relationship with the Union."[36]

Such a turn of events can be unavoidable in internal investigations, which is one reason why the power of the grand jury can never be understated. Where such barriers arise in internal investigations, however, it is essential to document these occurrences in the investigative report, and to identify whether they limit in any way the conclusions that were reached. This is necessary to ensure the credibility and accuracy of the report, and this protection allows the reader to take these limitations into account in weighing/assessing competing inferences from the report's findings.

Moreover, negative potential outcomes for the investigator include reporting on no findings of wrongdoing, only later to discover from the government or private parties that such evidence existed. Such a result—which can be unavoidable in some instances if witnesses lie or documents are compromised—inevitably arouses suspicions of white-washing or

[34] *See* Martin Report *supra* n. 1 at 55.
[35] *See* Hunter Report *supra* n. 29 at 19.
[36] *See* Hunter Report *supra* n. 29 at 19.

cover-up. Documenting the scope of the investigative plan—such as the individuals who were interviewed, the documents that were reviewed, and the electronic mailboxes that were searched—as well as any limitations placed on that plan, is essential. In short, reporting on the process that led to the ultimate conclusion is just as important as reporting on the conclusion.

Thus, while the MLB Report Investigation famously named baseball players who used steroids, it explained that it limited those names to those whom it found credible evidence of steroid use, and "No player is identified in this report on the basis of mere suspicion or speculation."[37] Specifically, the MLB Report only named players who were identified by two key witnesses, or pursuant to allegations supported by "(a) checks; (b) prior consistent statements; (c) a statement made about a player's use where the witness was a friend of the player identified and under circumstances in which the witness faced criminal exposure for making a false statement; (d) statements reporting a witness's direct observation of the player using a performance-enhancing substance; or (e) the player's own admission of his use."[38] This explanation provided the public with a helpful benchmark in assessing the report's conclusions of steroid use.

Finally, providing the targets of the investigation with an opportunity to respond to public allegations, or to present their side of the story, will help ensure the appearance of impartiality and a complete record. In the MLB Report, "each current or former player about whom allegations were received of the illegal possession or use of performance enhancing substances [was invited to meet with investigators] so that [investigators] could inform [players] of the evidence supporting the allegations and give [each player] a chance to respond. The explanations provided by those players who we did interview were taken into account and are reflected in this report."[39] Indeed, given that athletes' reputations, and to some extent livelihoods, are at stake, the value of providing ample opportunity for targets to respond to the allegations underlying the investigation cannot be overstated.

Finding Corroboration

[37] *See* MLB Report *supra* n. 9 at SR-21.
[38] *See* MLB Report *supra* n. 9 at 147.
[39] *Id.* at SR-3.

And finally, while there is no universal internal investigation plan, one universal rule holds true: search for corroboration.

This is especially the case for sports investigations, which run the gamut in terms of subject matter. Some address financial dealings of athletic officials and focus on the flow of funds and require forensic accounting analyses, while others focus on discrete events and witness observations/recollections. The Hunter Report, for example, centered on allegations of financial improprieties, so counsel retained an auditor to track the flow of money and provide financial analysis.[40] Others, like the Martin Report, focused on a series of isolated events that hinged on witness testimony and electronic communications.

Regardless of the specific investigation plan used, a key goal is to obtain corroborating evidence. Like presenting a case to a jury, one-witness cases are tough, as are pure document cases that have no "insider" or live witness to place those documents in context. And when the public and league are unable to judge the demeanor of the witnesses themselves, getting as much documentary and corroborative evidence is crucial. Such corroboration is all the more necessary in these types of investigations given the lack of subpoena power or legal ability to compel witness statements or testimony.

The Martin case is illustrative of the need to find documentary corroboration. There, lawyers were faced with a classic "he-said, she-said" situation—Martin discussed the impact Incognito's statements and behavior had on his psyche, whereas Incognito asserted that he never believed such statements had an effect on Martin, and in fact had no effect on Martin.[41] Much of the evidence was mixed—"not only did both linemen report that they enjoyed socializing together, the evidence showed that they often communicated in a vulgar manner."[42] Counsel also noted that Martin suffered from "mental health issues" and a "possible heightened sensitivity to insults and his unusual, 'bipolar' friendship with Incognito."[43] Counsel

[40] *See* Hunter Report *supra* n. 29 at 3.
[41] *See* Martin Report *supra* n. 1 at 25-26.
[42] *Id.* at 2.
[43] *Id.* at 3.

candidly acknowledged that they "struggle[d] with how to evaluate Martin's claims of harassment."[44]

In nonetheless concluding that Incognito bullied and verbally abused Martin, counsel pointed to numerous documents that corroborated Martin's versions of events, including a "notebook used to keep track of 'fines' the offensive lineman imposed on each other in their 'kangaroo court.'"[45] The notebook included a fine Incognito imposed on himself for "breaking Jmart" and a text message Incognito sent to other members of the Dolphins offensive line a week after Martin left the team. There, Incognito asked the linemen to destroy the "fine book," both of which suggested to counsel that Incognito knew what he was doing was wrong.[46]

Further, counsel highlighted "[c]ontemporaneous text messages that Martin sent to his parents and others months before he left the Dolphins—which have never before been made public."[47] In these text messages—sent before the investigation and while Martin was subject to the alleged harassment—Martin confessed to his parents that he was ashamed of his inability to confront the teammates who were bullying him, which he believed was a result of his attending private schools.[48] Martin repeatedly told his parents in text messages that the insults directed at him and about his mother and sister seriously upset him.[49] The lawyers concluded that "[w]ere [the texts between Martin and Incognito] the only available information for us to consider, it would be difficult to reach the conclusion that Martin truly felt harassed by Incognito and others . . . . The additional relevant information here includes Martin's contemporaneous text messages to his parents and the witness statements and documents showing that Player A and the Assistant Trainer were also harassed."[50]

Another example is the MLB Report Investigation, in which the key witness, Kirk Radomski, a former clubhouse employee of the New York Mets, provided MLB with "copies of deposited checks that he retrieved from his banks, copies of some shipping labels or receipts, his telephone

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at 4.
[48] *See* Martin Report *supra* n. 1 at 15.
[49] *Id.* at 15-16.
[50] *Id.* at 37.

records for two years, and a copy of his address book in the form in which it was seized by federal agents when they executed a search warrant at his home."[51] Radomski also "provided detailed telephone records covering the period from June 2004 to June 2006. They show many calls made to telephone numbers that correspond to the numbers of Major League Baseball players. Radomski's address book also was provided to us in the form in which it existed when federal agents seized it during the execution of a search warrant at his home in December 2005. It includes many names and addresses of current and former Major League Baseball players. He also maintained copies of some delivery receipts"[52] These were key pieces of evidence that counsel used to corroborate Radomski's version of events—that he provided steroids to various major league baseball players.

Even in the Donaghy Investigation, while counsel "conducted approximately 200 interviews"—including speaking with fifty-seven referees who were employed by the League during a season in which Donaghy admitted to gambling on games he officiated—lawyers still "reviewed thousands of pages of documents that the League supplied at our request, including personnel files, statistical information, internal NBA documents and studies, and game video."[53] Prompted by press reports identifying over one hundred phone calls between Donaghy and fellow referee Scott Foster, counsel explored whether Foster was also gambling on basketball games.[54] Foster, however, provided benign explanations for the frequent phone calls, including that Donaghy was one of many referee friends with whom he would talk, which were confirmed by the times of the calls.[55] After comparing forensic evidence to Foster's statements, the Donaghy Report concluded that "[t]he report on Donaghy's phone records—when assessed in light of Foster's phone records, Foster's friendship with Donaghy and the frequency with which Foster spoke to other referees—do not in our view raise concerns about [Foster's] integrity."[56]

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[51] *See* MLB Report *supra* n. 9 SR-18.
[52] *See* MLB Report *supra* n. 9 140-41.
[53] *See* Donaghy Report *supra* n. 6 at 6.
[54] *Id.* at 28-29.
[55] *Id.* at 31-35.
[56] *Id.* at 35.

In short, it is essential to outline multiple and separate work streams at the initiation of an internal investigation for sports organizations. While witness interviews are an obvious necessity, counsel should conduct searches of relevant custodians' electronic mailboxes; request pertinent financial records from the league and respective teams; and utilize consultants such as a forensic accounting firm, depending on the complexity of the issues. All of this evidence can help to corroborate or refute witnesses' versions of events.

Conclusion

If recent history is any guide, the sports industry will continue to provide white collar lawyers with some of the most challenging, high-profile investigations occurring today. This is not surprising given what is at stake when crises hit sports organizations; whether claims of corruption in officiating, embezzlement by high-ranking officials or hostile work environments, such allegations seize the public's attention and force sports organizations into a reactive mode. The volume of this work shows no signs of abating. The high-profile nature of these investigations demands retention of expert counsel, capable of resolving the complex issues described herein and managing the risks attendant to such investigations. Selecting the right counsel and employing and adapting the techniques described above will increase the likelihood of an effective, efficient, and credible sports investigation.

Key Takeaways

Key takeaways for lawyers conducting sports investigations include many of the same considerations associated with any white collar investigation. The importance of these takeaways, however, is heightened in a sports investigation, where the investigative report could become public and the report's conclusions could directly affect the investigation's subjects or targets.

- *Autonomy:* It is essential for counsel to be given autonomy in conducting the investigation. Lawyers have routinely cited this factor in recent reports.
- *Full Support of Organizations:* This is a must. While all investigations—especially public ones—risk witnesses' lack of

cooperation, having the league encourage cooperation goes a long way and helps allay witness concerns about reprisals within the league and the locker room.

- *Requests for Confidentiality:* Handling requests for confidentiality presents attorneys with a very fine line. While certain considerations may warrant maintaining confidentiality of witnesses—especially where there is a serious threat of reprisal—attributing statements to sources is an important aspect in assessing a report's findings. Where corroborative of other evidence, honoring such requests is a best practice as it encourages cooperation and helps protect percipient witnesses who are neither targets nor subjects of the investigation.
- *Seeking Corroborative Evidence:* Corroboration is key for any lawyer—on summary judgment, at trial, and in conducting an investigation. Given the lack of subpoena power and often competing witness statements, getting corroboration through documents or as many witness statements as possible is crucial.
- *Documenting the Investigation Plan and Any Limits Thereto:* To maintain the credibility of a report and place the conclusions in proper context, counsel should clearly document the steps taken in the course of the investigation and any limits to that investigation, including witnesses who refused to speak or documents that were unavailable.
- *Permitting Targets an Opportunity to Respond:* Like any adversary proceeding, counsel should permit the target to respond and provide his/her version of events. While targets of investigations may be reluctant to speak with investigators, or refuse to do so on advice of counsel, it is important to provide this opportunity for purposes of thoroughness and appearances of impartiality. Most importantly, the sharing of exculpatory evidence by a target will further the investigation's search for the truth.

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