Conducting an Effective Sports Investigation

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Introduction

- In recent years, investigations in the sports world have evolved to where they resemble white collar investigations.
- The public’s fascination with sports and the 24/7 news cycle present unique challenges and considerations for the sports investigator.
- This presentation will highlight some of these challenges and considerations and draw comparisons to white collar investigations by:
  - Describing the “new normal.”
  - Reviewing recent high-profile sports investigations.
  - Identifying best practices for sports investigators.
The New Normal in Sports Investigations

- The days of “under-the-radar” investigations are over.
  - In 1989, Major League Baseball (“MLB”) investigated allegations that former MLB player Pete Rose bet on baseball games. The investigation included a confidential report that was only released as part of a court proceeding initiated by Rose.

- Sports leagues and franchises now often commit to release any final report following an investigation.

- Public nature of reports affects the investigative plan and approach.
Unique Challenges for Sports Investigators

- Investigators typically do not have the luxury of time or confidentiality.
- When a crisis hits sports organizations, fans expect to be told what happened immediately, and the sports press goes to great lengths to report on what it believes happened.
- Public nature of investigations may chill witness cooperation.
- Investigators must identify corroborative evidence even though they lack subpoena power.
Recent Investigations – Alleged Harassment

Miami Dolphins Investigation

- Miami Dolphins player left the team, alleged he was bullied by his teammates, and produced text messages and voicemails from a teammate to substantiate his claim.
- Teammate was suspended and league and union investigated allegations and team culture.
- External counsel was appointed to establish timeline of alleged abuse, analyze interaction of collective bargaining agreement and federal law, and issue public report.
- Final report concluded that “the treatment of [player] and others in the Miami Dolphins organization at times was offensive and unacceptable in any environment, including the world professional football players inhabit.”
Recent Investigations – Alleged Sexual Abuse

In early November 2011, Jerry Sandusky was charged with multiple sex crime offenses, and Penn State athletic director Tim Curley and senior vice president Gary Schultz were charged with perjury and failure to report suspected child abuse.

Penn State trustees fired school president Graham Spanier, head football coach Joe Paterno, Curley, and Schultz.

Penn State hired former FBI director Louis Freeh to investigate whether school officials failed to respond to allegations of sexual abuse and the circumstances under which abuse occurred, and to issue a public report.

Final report (“Penn State Report”) found, among other things, a “total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky’s child victims.”

Failure to identify witnesses in the Report has caused persistent questions concerning the credibility of the Report’s conclusions.
Recent Investigations – Alleged Betting by Referees

In 2008, the United States Attorney’s Office for the Eastern District of New York notified the National Basketball Association (“NBA”) that one of its referees “had placed bets on NBA games, including games he had officiated” and “disclosed confidential NBA information [to bookies] for use in betting on games.”

The NBA ordered an investigation into the NBA’s officiating program, as well as the issuance of a public report summarizing the investigation’s findings.

External counsel investigated the NBA’s anti-gambling efforts, the processes the league used to hire, train, and monitor its officials, and whether any other referees violated NBA rules.

The investigative report found that the “anti-gambling rules had been too broadly drafted, and the League’s failure to enforce the rules had contributed to a permissive atmosphere.” The Report recommended that the league narrow and clarify its rules.

The Report found nothing to suggest that other referees bet on NBA games or disclosed confidential NBA information.
Recent Investigations – Alleged Performance Enhancing Drug Use

In 2006, the Commissioner of MLB ordered an investigation into potential performance enhancing drug ("PED") use by players, after the publication of Game of Shadows—a book containing allegations of steroid abuse by players.

External counsel, led by former Senator George Mitchell, was engaged by the Commissioner, who agreed to make the investigative report public upon completion.

Counsel’s final report (the “MLB Report”) found the use of PEDs in MLB was “widespread” and the “response by baseball was slow to develop and . . . initially ineffective.”

The Report recommended: (1) increasing the MLB’s ability to investigate allegations of PED use and improve procedures for keeping steroids out of the clubhouse; (2) implementing a more effective education program for players about the health risks of steroid abuse; and (3) incorporating a state-of-the-art, joint drug program.
Recent Investigations – Alleged Use of Racial Slurs

Don Sterling’s Lifetime Ban

- A local television station broadcast recordings containing racist language, allegedly made by L.A. Clippers owner Donald Sterling.

- With Clippers players threatening to boycott playoff games, the NBA hired outside counsel to conduct an investigation into these allegations in a compressed timeframe.

- The investigative report, which has not been made public, was issued within three days. It confirmed the authenticity of the recordings, and suggested that NBA policies were violated.

- Four days after the recordings were released, NBA Commissioner Adam Silver fined Sterling $2.5 million, banned Sterling from the NBA for life, and said he would try to force Sterling to sell the team.

- Under threat of a forced sale, Sterling’s wife negotiated a sale of the team for $2 billion to former Microsoft CEO Steve Ballmer. The transaction closed in August 2014. Sterling has sued the NBA.
Recent Investigations – Alleged Academic Irregularities

In July 2014, the Orange County District Attorney dropped a charge for obtaining property by false pretenses against a former UNC Chapel Hill professor due to the professor’s cooperation with authorities investigating allegations of academic irregularities and fraud.

The President and Trustees of UNC hired outside counsel to investigate the allegations leveled at the University.

Over eight months, counsel interviewed 120 witnesses, collected and searched 1.6 million emails and other documents, and analyzed student transcripts dating back to the 1980s.

The final public report concluded that over “3,100 students received one or more semesters of deficient instruction and were awarded high grades that often had little relationship to the quality of their work.”
Recent Investigations – Alleged Corruption

- In the wake of allegations of bribery and corruption relating to the hosting of the 2018 and 2022 World Cups, the chairman of the FIFA Investigatory Chamber began an investigation into the allegations.
- The chairman had the power to demand interviews with soccer officials associated with FIFA. Those who refused to be interviewed were subject to disciplinary action.
- Hans-Joachim Eckert, the FIFA ethics committee judge, blocked publication of the chairman’s 430 page investigative report. Instead, a 42 page summary of the report was made public, finding that while there were “potentially problematic facts and circumstances identified by the report,” they did not rise to a level where it would “compromise the integrity of the [bidding process].” The chairman has appealed the decision to block publication of the whole report.
- On November 14, the president of the German Soccer League warned that the Union of European Football Associations (the administrative body for Europe’s national soccer associations) may quit FIFA if the full report was not published, stating: “if this doesn’t happen and the crisis is not resolved in a credible manner, you have to entertain the question of whether you are still in good hands with FIFA.”
Key Take-aways from Recent Investigations

- There is no “one size fits all” approach to investigations.
- Final reports are often made public.
- Witness cooperation and access to evidence are keys to success.
Issues to Consider When Conducting an Investigation

- These issues – often considered in the white collar context – must be addressed when conducting a sports investigation:
  - Autonomy
  - Full Support of the Organization
  - Seeking Corroborative Evidence
  - Requests for Confidentiality
  - Documenting the Investigation Plan and Any Limits Thereto
  - Permitting Targets an Opportunity to Respond
Issue One: Autonomy

- It is essential for counsel to be given autonomy in conducting the investigation.
- Lawyers have routinely cited this factor in recent reports.

“The Special Investigative Counsel’s mandate was made clear in the public statement of Trustee Kenneth C. Frazier announcing this investigation. ‘No one is above scrutiny,’ Frazier said. ‘[Counsel] has 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.’ Frazier assured the Special Investigative Counsel that the investigation would be expected to operate with complete independence and would be empowered to investigate University staff, senior administrators, and the Board of Trustees.” - Penn State Report
ISSUE TWO: FULL SUPPORT OF ORGANIZATIONS

- All investigations – especially public ones – risk witnesses’ lack of cooperation. Having the league encourage cooperation sends the right message, and helps allay witness concerns about reprisals within the league and locker room.

- Counsel noted that “The cooperation of all persons and entities that assisted this investigation—including by providing relevant documents—was voluntary, although Dolphins management encouraged players and personnel to cooperate . . . 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.”
Issue Three: Seeking Corroborative Evidence

- Corroboration is key for any lawyer – on summary judgment, at trial, and when conducting an investigation.

- Given the lack of subpoena power and often competing witness statements, getting corroboration through documentary and physical evidence, or through multiple witness statements, is crucial.

- Like many sports investigations, MLB’s investigation involved competing witness statements. The MLB Report noted that the MLB’s Players Association discouraged active players from cooperating with the investigators. This limited the effectiveness of the MLB Report, as critics suggested that investigators’ conclusions were motivated by pro-league bias.
Issue Three: Seeking Corroborative Evidence (continued)

- At their core, many investigations come down to “He-said, She-said.”
- Sports investigations involve unusually close scrutiny from fans and journalists. These parties cannot judge witnesses’ demeanors by reading a report.
- Evidence that corroborates or undercuts witness statements is essential to ensuring the credibility of the investigator’s conclusions.

Examples:

- In the Dolphins Bullying case, Jonathan Martin claimed he was being harassed by teammate Richie Incognito. Counsel investigating the allegations noted that they “struggle[d] with how to evaluate Martin’s claims.” Counsel cited other evidence that substantiated Martin’s allegations.

  The report stated: “[c]ontemporaneous text messages that Martin sent to his parents and others months before he left the Dolphins… corroborate Martin’s account that he was distressed by insults from his teammates and experiencing emotional turmoil because he believed he was ‘a push over.’”

- In the NBA gambling scandal, forensic accounting helped counsel substantiate claims that a referee wagered on games he officiated.

  Audio recordings made it difficult for Donald Sterling to dispute that he made certain statements.
Issue Four: Requests for Confidentiality

- Critics of the Penn State Report cited the Report’s references to unidentified witnesses. The family of Coach Paterno hired counsel to review the Penn State Report and provide a response. This criticism has kept the controversy alive, years after the Penn State Report’s release.

- In sports investigations, reasonable assurances of confidentiality are difficult to provide when investigative findings will be made public.

- While certain considerations may warrant maintaining confidentiality of witnesses – particularly where there is a serious threat of reprisal – a report’s credibility hinges on identifying the basis for key witness statements. Such statements are harder to evaluate when the witness’ identity is unknown. Critics often seize on these uncertainties to discredit the report.

- Honoring such requests does encourage cooperation and helps protect percipient witnesses who are neither targets nor subjects of the investigation. Under the right circumstances, such requests can assist the investigation and the final report.
To maintain the credibility of a report and place its conclusions in proper context, counsel should clearly document the steps taken in the course of the investigation and detail any limits of the investigative plan, including witnesses who refused to speak or documents that were unavailable.

As with requests for confidentiality, this allows the reader to assess credibility of the investigator’s reasoning and the report’s conclusions.
Like any adversarial 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 ensuring impartiality.

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 did interview were taken into account and are reflected in this report.”

Roger Clemens denied allegations in the MLB Report that he took steroids, human growth hormone, or any other banned substances. He issued an unconditional denial through YouTube and in an interview on CBS’s “60 Minutes.”
Conclusion

- The sports industry will continue to provide opportunities for challenging, high-profile investigations.
- Lawyers are well-served by adopting the practices of traditional white collar investigations.
- The crises that strike sports organizations pose unique challenges given the public nature of these investigations, which require the sports investigator to manage unique issues concerning the process and reporting of the investigation.
- Selecting the right counsel and employing the techniques described herein will increase the likelihood of an effective, efficient, and credible sports investigation.
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Mr. LaVigne’s practice focuses on white collar criminal defense, regulatory enforcement defense, sports investigations, white collar investigations, and complex litigation matters. In 2014, Mr. LaVigne was named by Law360 as one of five White Collar Rising Stars, which recognizes “attorneys under 40 whose legal accomplishments belie their age.”
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