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How #MeToo Is Changing Internal Investigations

By Sindhu Sundar

Law360, New York (January 28, 2018, 9:17 PM EST) -- The #MeToo movement that has grown from the Harvey Weinstein sexual abuse scandal has prompted companies to re-examine employee complaints, workplace policies and even old settlement agreements, and they're turning to BigLaw's white collar investigations teams for answers.

Since October, when The New York Times and The New Yorker published exposés reporting decades of alleged sexual harassment and abuse by the powerful Hollywood producer, law firms with top-tier investigations practices have received more inquiries from companies looking for help in addressing potential problems within their ranks. Many firms have responded by mobilizing special teams with expertise in investigating white collar cases and workplace harassment to meet this demand.

"The #MeToo movement has empowered more people to come forward and raise these issues at their companies or organizations," said Nancy Kestenbaum, co-chair of the white collar defense and investigations team at Covington & Burling LLP. "And that has caused the organizations to examine those specific issues, or issues of harassment and abuse more generally, to make sure that they don't face these problems going forward."

The recent wave of high-profile allegations is also putting pressure on institutions to be more forthright in addressing any systemic problems. BigLaw has increasingly pitched its white collar teams — and their array of former government officials and prosecutors — as skilled investigators with the prosecutorial ethic to root out such malfeasance.

But as law firms and businesses embark on the delicate work of investigating these types of allegations, internal investigators are reckoning with perceptions of bias and looking for ways to signal that their investigations are independent and impartial.

The recent outcry over a Debevoise & Plimpton LLP investigation emphasized the stakes for law firms handling such sensitive claims. Looking into sexual harassment allegations at the University of Rochester, the firm produced a report earlier this month that briefly revealed the names of confidential witnesses when it was uploaded online.

The firm's report, which ultimately found that any misconduct did not rise to the level of sexual harassment under the law, also fueled questions about its objectivity — a common criticism of law firm-led investigations.

"The natural expectation is that, 'Of course a law firm hired by an organization is going to be biased toward that organization — they're the client,'" said Ben Trachtenberg, a professor at the University of Missouri Law School who has worked on white collar investigations. "But law firms like Debevoise and its peer firms also want to maintain a reputation as honest brokers, because there is not much benefit for a company in hiring a law firm to do an investigation if everyone believes the investigation will be a sham."

Investigators in Demand

Amid the #MeToo movement, institutions are revisiting even old allegations of harassment or assault out of the fear that claims long considered settled may not necessarily remain cloaked by confidentiality clauses.

In December, Harvey Weinstein's former assistant Zelda Perkins broke a nondisclosure agreement in an old settlement with Miramax, the production company founded by Weinstein and his brother, to speak out against the producer in a television interview with the BBC's "Newsnight."

More recently, Olympic gold medalist McKayla Maroney reportedly broke a nondisclosure agreement to testify against USA Gymnastics team doctor Larry Nassar at his sentencing hearing in Michigan state court. Maroney had signed a confidential settlement with USA Gymnastics to resolve allegations of sexual abuse against Nassar, The Wall Street Journal reported in December, and she could have faced a \$100,000 fine for her testimony.

As harassment and abuse allegations continue to resurface, companies are calling on law firms to independently review such confidential agreements and are seeking a second look at their policies for resolving complaints.

"Say two years ago, if a demand letter came in with a sexual harassment complaint, that would be sent out to their employment lawyers, who might do defense[-oriented] investigations and make recommendations based on what they found, and the company would negotiate a confidential resolution," said Mike Delikat, the chair of Orrick Herrington & Sutcliffe LLP's global employment law practice. "Now they're saying: 'We want to have a more independent investigation of: Did we do a right thing in that case? Was the appropriate punishment being meted out? We had this claim settled years ago, but we're not sure if we got it right.'"

Morgan Lewis & Bockius LLP, which has more than 100 partners specializing in white collar defense and investigations work, has created a group of about 40 attorneys to respond to an "onslaught of requests and new cases" in recent months, said Kelly Moore, a white collar partner at the firm.

Covington & Burling LLP has more than 170 attorneys in its white collar and investigations team. Orrick expanded its internal investigations practice to about 19 partners as of mid-2017, up from about a dozen in 2012.

Earlier this month, Stroock & Stroock & Lavan LLP announced it had created a special internal investigations team led by former federal Judge Shira Scheindlin and former New York Attorney General Robert Abrams to investigate workplace sexual harassment complaints.

These internal investigations practices generally include former prosecutors and other officials, whom

law firms tout in promoting themselves as credible outside investigators.

Former U.S. Attorney General Eric Holder currently practices in Covington's investigations group, along with Lanny Breuer, a former chief of the criminal division at the U.S. Department of Justice. Former U.S. Securities and Exchange Commission Chair Mary Jo White led Debevoise's University of Rochester investigation, and former U.S. Deputy Attorney General Jim Cole is the global co-lead of Sidley Austin LLP's white collar practice.

Lawyers at Morgan Lewis say they've seen as many as three new cases that would involve internal investigations in some weeks, and they've also received more calls for help in workplace culture studies as well as audits of employee relationship policies and harassment reporting procedures.

The firm's new team, led by labor practice head Grace Speights, is designed to field such requests. The team is mostly, but not exclusively, made up of women, and includes attorneys from its white collar group and employment practice, which has long specialized in harassment and other workplace investigations.

Covington has formed a similar working group that includes attorneys with experience in issues as varied as corporate governance, employment and even the First Amendment, Kestenbaum said.

Stroock's investigations practice is particularly targeted to companies and institutions seeking independent investigations from an outside law firm, Scheindlin said.

"If a company uses their regular outside counsel [to conduct an investigation], that might be perceived differently," she said. "We thought there was a great need for that kind of service from a firm that could independently, and with real neutrality, conduct an investigation."

The Stroock team will also offer its services to existing clients, Scheindlin said, but would take certain steps to ensure the credibility of its investigations.

"The scope should not be limited; the investigation should be pursued where it takes you," she said. "You should make a written report, whether or not the client chooses to make it public."

These investigations also have to be undertaken with skill and, in some cases, specialized knowledge or at least basic literacy on issues of gender dynamics, said Michelle Phillips, a principal at Jackson Lewis PC who specializes in sexual harassment and LGBTQ issues.

"For example, if it's a sexual harassment complaint by a woman, it's helpful to have a female investigator," she said. "If it's a same-sex harassment complaint, you have to have an investigator with a sensitivity to LGBT issues. If it's a complaint by a trans or gender nonconforming employee, the investigator needs to be fluent in concepts of gender identity and understand terms like 'cisgender' and 'gender nonconformity.'"

In the Spotlight

As law firms increasingly wade into the visible and publicly scrutinized role of investigating a client, Debevoise's reported misstep demonstrates the stakes.

Earlier this month, the University of Rochester newspaper Campus Times reported that the names of

four witnesses were inadvertently revealed when Debevoise's investigation report and accompanying affidavits were posted online earlier this month, an error that was fixed shortly after.

The investigation — which began in September, cost \$4.5 million and produced a more than 200-page public report — involved allegations of sexual impropriety and workplace hostility against Florian Jaeger, a professor in the university's brain and cognitive sciences department. Debevoise has declined to comment.

Debevoise's investigation concluded that although Jaeger's conduct might have been "at times, reckless, immature and highly unprofessional," it ultimately did not rise to the level of unlawful sexual harassment.

The firm's investigation began the same month that seven University of Rochester professors, including some who had left, and a recent Ph.D. student filed a complaint with the Equal Employment Opportunity Commission against Jaeger, the university and some of its top officials. The complaint, first reported by Mother Jones magazine, claimed Jaeger repeatedly sexually harassed students and crossed professional boundaries since his hiring in 2007.

In a statement to Law360 sent through his attorney, Steven Modica, Jaeger denied that he had ever had a relationship with anyone over whom he held a position of authority. The statement pointed to two other investigations the school previously conducted into allegations against Jaeger in 2016.

"Debevoise & Plimpton spent months interviewing 140 witnesses and reviewing 6,000 documents," Modica said in the statement. "They reached the same conclusions as two previous investigations, that is, Dr. Jaeger did not violate any laws or break any university policies when he had consensual relationships with four women early in his career."

In addition to its findings regarding Jaeger, Debevoise's report noted that throughout the investigation, the firm faced "attacks on" its independence and competence.

The report said investigators had been criticized for challenging the allegations in the EEOC complaint and ongoing federal lawsuit in New York.

The Campus Times article also noted that some students had criticized the investigation for appearing to favor the university.

For its part, the Debevoise report came with a built-in defense:

"That comes with the territory when the matters being investigated are so critical and deeply felt by so many who are not in agreement about what happened, what the appropriate remedies should be or what should happen more generally going forward, leading to a general climate of mistrust."

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