

**Ten Rules of the  
Road for Responding  
to a Crisis in Your  
University Athletics  
Organization**

Miller & Chevalier



## Ten Rules of the Road for Responding to a Crisis in Your University Athletics Organization

Reports of misconduct at universities have the propensity to spread like wildfire, quickly grabbing headlines and presenting challenges to address. A single report often turns into multiple reports of alleged conduct that dates back years and involves a broad range of witnesses, potential victims, and stakeholders. University athletics organizations are particularly susceptible to this phenomenon due to heightened media attention and debates about the balance of athletics and academics at institutions of higher learning.

An organization's response to crisis must be thoughtful and carefully calibrated to protect its interests, safeguard the well-being of its athletes, and maintain or restore trust from the broader community. It is a team effort in the truest sense, requiring coordination, cooperation, and trust among athletic, legal, and overall university leadership.

A crisis does not typically announce itself as such at the outset, nor does it wait for a day when you have extra time in your schedule. While every crisis is different, there are certain common flash points, risks, and opportunities, and recognizing them can help you effectively steer your organization and emerge stronger. To that end, here are 10 rules of the road for responding to a crisis in your university athletics organization. The goal of this article is to support athletic and legal department leadership in developing protocols for addressing allegations or evidence of potential misconduct affecting the organization and to position leadership to respond effectively at the outset, execute pursuant to a strategic, cohesive plan, and enable the organization to emerge successfully and resume normal operations.

### Rule 1: Assess Initial Facts and Take Inventory of What's Known and Unknown

You have received a report of misconduct. Your first step is to assess the initial facts contained in the report against a classic who/what/where/when backdrop:

- ▶ Who is involved?
- ▶ What is the issue?
- ▶ When and where did it happen and is it still happening?
- ▶ Assuming the allegations are true, what university policies and procedures might be implicated?

In your assessment of initial facts, consider the following factors:

- ▶ Identity, nature, and number of reporters, including whether reporters are known or anonymous
- ▶ Reporting channel used
- ▶ Nature of the allegations, including whether the alleged behavior is ongoing



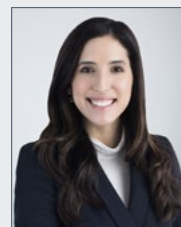
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- ▶ Seniority of personnel identified in the allegations including the individual(s)' current relationship to the reporters and organization broadly
- ▶ Potential witnesses
- ▶ The public's knowledge of the allegations at issue (or the likelihood of the allegations becoming public)
- ▶ Areas where additional information is needed

It is also important to consider the university governance and legal context for the allegations, because doing so enables you to ask questions that not only help you get to the truth of the conduct, but also to understand where you may have gaps or weaknesses in your policies and practice to prevent and detect such conduct. Answers to these questions will help determine next steps, such as whether a formal investigation is appropriate and whether it is advisable to engage external counsel. Answers to the questions also guide the investigative process by helping to focus on potential and existing risk areas, interim measures, and gaps in knowledge. We'll discuss each in turn in this article.

Carefully assess the facts contained in the report to evaluate the nature of the allegations. Allegations of ongoing misconduct may warrant certain interim measures to protect the reporter(s), members of your organization, and/or the broader community. On the other hand, allegations of misconduct that occurred in the past or by individuals who are no longer with the organization may warrant different types of interim measures. The time frame for the alleged conduct can inform the scale of the investigation, such as the likely ability to interview key witnesses and to consider whether any weaknesses in internal governance present at the time of the conduct have since been addressed.

Allegations often come in the form of anonymous reports, which require a risk-based approach as to whether or how to proceed. Summarily rejecting anonymous reports is inadvisable and would likely be viewed with skepticism by U.S. authorities. The amount of diligence needed to adequately follow up on an anonymous report will depend on a number of factors, but the bottom line is that companies should do more to assess and investigate more serious, detailed, and specific anonymous allegations, and do not need to do as much for allegations that are vague, generalized, lacking specifics, and related to conduct that would not create significant exposure for the organization. Some allegations may be so vague that they cannot be investigated; the company should still attempt to get information from the reporter before closing the matter, however, and the report should be tracked in the company's case management system.

The location where the alleged misconduct occurred can similarly inform the use of interim measures, disclosure obligations, jurisdictional considerations, and the overall scope of the investigation. For example, what is the nexus between the alleged misconduct and the organization? Did the alleged misconduct occur on the organization's property or during an organization-sponsored event, including practice, games, and tournaments/competitions? It is also important to consider the severity of the allegations, including whether the report triggers external or internal reporting obligations and whether the alleged misconduct is regulated by your organization's policies or procedures, or is potentially unlawful under applicable laws and regulations. Reports of physical or verbal abuse specifically may require disclosure to senior leadership, the Board of Directors, and external stakeholders, including law enforcement (discussed in greater detail in [Rule 5](#)).



The reporting channel through which you receive the report is also important as it can help establish the parameters of communication with the reporter(s), particularly in cases where the reporter is anonymous. Did you receive the report through the organization's reporting line, via email, or through a third party, including social media or an external publication? Public reports create additional dynamics that may impact your communications strategy by, for example, adding to the list of potential stakeholders with which the organization will interface throughout the investigative process or informing the organization's assessment of litigation risk or reputational damage. Finally, the identity and status (student/faculty/graduate/employee/officer/director/booster/other), specifically whether they are anonymous or known and their proximity to the alleged misconduct and organization, must also be considered in the organization's evaluation of interim measures, potential witnesses and reporter(s) (if the reporter is anonymous), and accessibility of information.

## Rule 2: Designate Your Response Team, Identify Stakeholders, and Evaluate Potential Risk

Designating your internal response team is a critical initial step. Assuring you have the requisite internal expertise, authority, and coordination enables you to act decisively, in a coordinated fashion, and with appropriate confidentiality. It also allows for appropriate prioritization of athletic department, legal, and university management objectives. Identifying your stakeholders and conducting an initial evaluation of the existing and potential risks will help inform overall strategy. Although these risks may change and evolve as you engage with different stakeholders and new facts emerge, an initial risk assessment will help the organization triage responses, provide a road map for the investigation, and take steps to promptly stop any ongoing misconduct.

At the outset, assess the need to report to and consult with your organization's security function and law enforcement. Follow applicable legal requirements and policies and procedures outlining disclosure obligations. The severity of the allegations, prior allegations and/or sanctions for similar conduct, as well as whether the alleged misconduct is ongoing may be factors to take into consideration when evaluating your reporting obligations. For example, reports of assault or harassment may be subject to mandatory reporting requirements and other members of your organization could be considered mandatory reporters.

When evaluating existing or former faculty, staff, booster, alumni, and student/athlete populations, consider which population is directly impacted by the allegations under review. Prepare a list of the relevant population with each group's exposure to and knowledge of the allegations to help define the guideposts of your communications strategy (discussed in greater detail in **Rule 3**). In your assessment, also consider the extent to which stakeholders could have conflicts of interest or biases for or against the reporter(s) or subject(s). While it is advisable to consider a broad range of organizational stakeholders when developing your list, it is important to carefully calibrate interactions concerning the investigation with those stakeholders.

Take note of relevant non-governmental organizations (NGOs), national governing bodies (NGBs), athletic conferences or associations, youth-serving organizations, and sponsors that may be implicated by the allegations or the organization's response to those allegations, including the investigation, related interim measures, and subsequent remediation. In doing so, assess the organization's reporting obligations to these stakeholders. A word of caution: even in the absence of formal



reporting requirements, it is important to carefully evaluate the potential consequences of opting not to report to these stakeholders, particularly if the subject of alleged misconduct plays an active role or is otherwise closely affiliated with an NGO, NGB, or other youth-serving organization and sponsor.

Identify relevant media outlets and implement an alert system to track adverse media or other coverage related to the allegations. Think broadly and identify local, regional, and national media outlets, as well as university press and media functions, including student-run publications or outlets. Although communications with all these organizations may not be warranted, it is prudent to cast a wide net for purposes of collecting information about the allegations, assessing the public's perception, and implementing your communications strategy (discussed in greater detail in [Rule 3](#)), particularly if the allegations have been made public. Similarly, if the allegations have not been made public, identifying media outlets with the potential or proclivity to comment on allegations of misconduct will help maintain the organization's finger on the proverbial pulse regarding publicity. It can also inform the organization's assessment of confidentiality and reduce the number of individuals who are privy to sensitive information.

In tandem, evaluate potential risks that can arise from the allegations at issue, including but not limited to safety, reputational, litigation and regulatory enforcement risks, and other risks to the organization and relevant stakeholders.

### **Rule 3: Evaluate Whether Assistance from External Advisors Is Warranted**

Assess whether an external investigation by a third party and the costs and benefits associated with such an investigation are warranted. This assessment should be informed by the nature of the allegations, the power and influence (perceived or actual) of the parties involved, and whether the allegations have been made public, or alternatively, the potential reputational harm to the organization if the allegations became public. Allegations involving serious misconduct, including misconduct that is criminal in nature, may require greater levels of expertise and sensitivity. Reports that involve allegations that senior management willfully turned a blind eye or inadequately responded to (1) previous concerns or (2) systemic cultural issues or a breakdown of controls, for example, may raise the depth and breadth of the investigation and may require additional resources to effectively investigate.

The seniority of the parties can also present additional complexities for the investigative process, including increased risk that the reports are made public and the increased likelihood that the investigation's independence and objectivity are questioned. For example, allegations against or involving senior executives, coaching staff, or star athletes can attract greater media speculation and public commentary. They can also put additional pressure on ensuring the independence and objectivity of the investigation because internal stakeholders tasked with carrying out the investigation may lack independence or be perceived to lack independence when dealing with senior executives or star athletes. Moreover, organizations would be well-suited to avoid scenarios in which a junior employee is investigating senior employees. Reports of negligence by senior management, systemic cultural issues, or the breakdown of controls may warrant externalizing the investigation to an outside source for similar reasons as well as obtaining buy-in regarding the legitimacy of the investigation from internal and external stakeholders alike. Lastly, engaging a third party to conduct an independent investigation signals to the organization and broader community that the organization has taken the allegations seriously and is responding with equal measure.



A few guiding principles should apply regardless of whether the organization chooses to investigate the allegations internally or to engage a third party to do so. First and foremost, the organization should take steps towards maintaining independence to ensure that the investigative team is not unduly influenced or otherwise subject to avoidable obstacles in the pursuit of determining whether the allegations are substantiated. Take action to assure that the investigative team has access to the documents, information, and personnel necessary, regardless of the potential impact of those documents and witness interviews. Second, additional interim measures may be warranted as the investigative team uncovers additional facts: organizations should promptly act to implement those measures in good faith. For example, potential or existing conflicts of interest can emerge as the pool of reporters or potential subjects grows and the organization should be prepared to implement controls to safeguard against such conflicts even if the implementation of those controls impacts business as usual. And, as a baseline, the subject(s) of allegations should not receive a copy of the report against them or be in any way responsible for or involved in investigating allegations against themselves.

#### Rule 4: Secure Existing Evidence

Identify potential sources of data, evaluate collection mechanisms, and document your efforts. Where is data stored and who owns it? Are you accessing data owned by the organization or contained in organization-owned devices? If data is owned by the organization, including organization-owned devices, collaborate with your organization's IT department to ensure proper collection protocols are followed. If data is owned by a third party, evaluate the costs and benefits of retrieving that data. Allow applicable policies and procedures and known facts to guide document collection efforts. For example, does the report reference the use of cell phones, emails, social media platforms, or ephemeral messaging as channels through which the alleged misconduct occurred? However, also keep an open mind when considering potential sources of data and avoid unwarranted limits placed on the identification of data sources.

Legal counsel will assist in this process. With the support of your organization's IT department, counsel will be expected to identify custodians of the data, including whether custodians are current or former members of your organization or third parties. Take greater care in your assessment of whether to contact former members of your organization, as the organization may have limited control over information obtained from those individuals. Evaluate the costs and benefits of distributing a document hold notice to your organization or identified custodians. One factor to consider in this respect is the extent to which the allegations at issue identify written communication platforms as channels through which the alleged misconduct occurred. Another factor is whether the report(s) allege systemic organizational weaknesses that can be evidenced through emails, texts, or other written communications. Moreover, consider the risk of custodians deleting relevant data upon receiving a document hold notice. In this context, also consider existing policies prohibiting the destruction of documentation relevant to an investigation. Document actions taken to obtain relevant evidence or, in the alternative, the reasons for not doing so.

Take steps to secure the data. Consider using a forensic analyst, operating at the direction of legal counsel, to secure and image servers, computers, or phones, collect the data, and implement a document review platform to process and house the data, depending on the volume of data to be secured. Once the data is staged in the platform, develop and apply key search terms that are informed by the report(s) and any other facts obtained, including relevant witnesses and timelines. Consult with relevant functions regarding data privacy considerations as greater sensitivity may be needed depending on the jurisdiction in which relevant data is located.

## Rule 5: Develop and Implement a Communication Strategy

Although an organization's communication strategy is likely to evolve as it gathers information over the course of its investigation, swift and thoughtful implementation of a preliminary communication strategy can help manage expectations among internal and external stakeholders, quiet speculation and skepticism regarding your organization's response, and protect the integrity of the investigative process and your organization's interests.

What should it entail? As a baseline, your communication strategy should demonstrate a commitment to understanding the facts and ensuring the safety of the student population. Public statements should not require frequent updating in the press and should avoid questioning or disparaging the allegations under review or the reporters of those allegations. Do not take adverse action(s) or action(s) that can be perceived as adverse against whistleblowers or reporters prior to completing an investigation, as such conduct can serve to both ripen retaliation claims by reporters and hinder the neutrality of the investigation. Conversely, do not make supportive statements or take favorable employment actions (or actions that could create such a perception) towards the subject(s) of allegations, irrespective of their seniority or popularity. Impartiality and neutrality should be the guiding principles of an effective communication strategy.

Second, your communication strategy should seek to protect the confidentiality of reporters to the extent practicable, display sensitivity around delicate topics, particularly assault, harassment, and discrimination, and promote a speak-up culture with an emphasis on anti-retaliation. For example, to the extent that the identity of the reporter(s) is unknown, it will be important to ensure that employees and other members of your organization do not disclose information that could reveal reporter identities. And, to the extent that reporter identities are known, it is equally as important that sensitive details regarding their experiences and involvement in the allegations under review are not disclosed to the public prior to completing the investigation. Investigating allegations of assault, harassment, and discrimination compels additional discretion and sensitivity to prevent the further victimization of reporters.

Third, your communication strategy should include unwavering public commitments to fully cooperate with law enforcement and applicable regulatory agencies. This helps to set a decisive tone at the outset and establish expectations for all stakeholders. However, a word of caution: do not make grandiose public commitments or premature representations that your organization cannot act on. Falling short of those commitments/representations can undermine the credibility and legitimacy of your investigation, needlessly attract negative press and media, and harm overall morale.

Finally, ensure faithful adherence to your communications strategy across all levels of your organization. This means training relevant personnel, including those in gatekeeper functions (*e.g.*, finance, legal, compliance, and audit) and individuals authorized to speak on your organization's behalf on the communication strategy. Utilize your organization's public relations or communications function to identify and appoint a neutral spokesperson to engage in external communications. Define the rules of engagement for that spokesperson, including the circumstances under which the organization will/will not comment and approval processes for the issuance of press releases. If your organization does not have a public relations or communications function, establish an ad-hoc communications committee consisting of a cross-functional set of neutral leaders and identify and appoint a spokesperson. Clearly defined governance structures will enable your organization to effectively implement your communication strategy, mitigate the risk of inconsistent statements or adverse statements, and maintain control of the public narrative.



## Rule 6: Follow Applicable Laws, Regulations, and Internal Policies and Procedures

Ensure you are aware of the federal and state laws and regulations applicable to your organization and understand the legal standards against which the organization would be held should subsequent litigation or regulatory investigations ensue as well as any reporting obligations. For example, universities that are recipients of federal financial assistance agree to comply with regulations, such as Title IX, which aims to prevent and address sex discrimination. Youth organizations are similarly subject to mandatory reporting requirements in certain cases of alleged misconduct. Involve your legal function at the earliest opportunity to help identify organizational repositories containing applicable laws and regulations and related guidance, and to assist more broadly in navigating legal risks.

Understand applicable policies and procedures at the athletic conference or association and university levels. Consider starting with the organization's code of conduct, as it likely contains relevant provisions as well as references to other issue-specific policies. Look for policies on harassment and discrimination, workplace conduct, personal relationships and avoiding conflicts of interest, investigation and mandatory escalation and disclosure, security and safety, social media, use of personal devices, and records and retention. Assess whether the subject(s) of the allegations have employment agreements and, if so, review those agreements' relevant provisions (*e.g.*, termination, morality, and duty to cooperate with investigations). Follow policies and procedures and allow them to guide your investigative process. Again, consult your legal function on these questions.

Failure to follow applicable laws and regulations and your organization's policies and procedures not only undermines the effectiveness and legitimacy of the organization's investigation but can also create additional risk and liability. For example, an ineffective investigation can arrive at the wrong outcome, fail to adequately remediate any misconduct identified, risk the safety and well-being of your athletes and staff, pervasively tarnish the organization's reputation, and result in consequential fines and penalties. Consider the depth and breadth of the organization's subject matter expertise when taking inventory of applicable laws, regulations, and policies and procedures with an eye toward evaluating the extent to which external resources may be warranted. Similar considerations may be warranted in cases where your organization lacks relevant policies or if there are questions regarding whether the alleged conduct is covered by existing policies.

## Rule 7: Maintain Objective Governance and Oversight Throughout the Investigation

Process matters for crisis management and good governance forms the bedrock of that process. While not every matter rises to the level requiring board involvement, assuring appropriate communication at the board level can lend credibility to the process. It is also important to consider relevant Board committees such as the Audit Committee or Compliance Committee. If initial steps have signaled that Board members' independence could be compromised, consider establishing a Special Committee to oversee the investigation and receive periodic reports regarding status and developments. Similarly, scrutinize the independence of members of senior management that will be assigned responsibility over the investigation for potential or existing conflicts of interest. Consistent communication with internal stakeholders will preserve integrity and transparency as well as drive management accountability. Conversely, failing to preserve independence, transparency, and accountability can tarnish the effectiveness of the investigation, making it susceptible to probing questions as to its legitimacy.

Following the disclosure of the report to the identified internal stakeholders, align with those stakeholders on disclosure of the report to external stakeholders, including, but not limited to, law enforcement and relevant NGOs and NGBs. If multiple allegations are at play, consider whether disclosure is required or otherwise indicated of all or some of those allegations. Demonstrate commitment to cooperating with law enforcement following disclosure of the report, including, but not limited to, adequately responding to document and interview requests. Allegations that are criminal in nature require expediency and will trigger obligations on behalf of law enforcement with which your organization should cooperate.

Implement mechanisms and controls for facilitating effective ongoing communication with identified NGOs and NGBs and, if appropriate, memorialize commitments and expectations with these stakeholders. In doing so, however, ensure that such agreements do not frustrate cooperation with law enforcement. For example, common interest agreements with NGOs and NGBs should be carefully designed to safeguard against unreasonable delays or gag orders on document production and witness cooperation.



Maintain objective governance and oversight throughout the investigative process by consistently communicating with your stakeholders, ensuring the impartiality of individuals involved in conducting the investigation, following policies and procedures, implementing controls to safeguard against disproportionate individual discretion, and ensuring that persons tasked with responsibility concerning the investigation are qualified to carry out those responsibilities.

## Rule 8: Implement an Effective Investigation and Avoid Common Missteps (Investigation Dos and Don'ts)

First, it is important to properly scope your investigation to not only evaluate the allegations at issue but also assess organizational awareness, including action (or inaction) regarding misconduct. Taking a myopic view of the factual underpinnings of the allegations at issue rather than the broader context in which the alleged misconduct occurred undermines a root cause analysis of the organizational risk factors that enabled the misconduct at issue and in turn can compromise the effectiveness of resulting remediation. At the same time, properly scoping the investigation at the outset allows for a disciplined and intentional approach to expanding the investigation if such expansion is warranted.

Second, take appropriate interim measures to protect student/athlete well-being as needed throughout the investigation and verify that those measures have been implemented. For example, suspension of the subject of the investigation pending completion of the investigation might be warranted to safeguard against the risk of continued misconduct and limit the ability of the subject — particularly subjects who are senior members of the organization — from improperly interfering with the investigation. It is also often prudent to prohibit the subject of the investigation from communicating with known reporter(s). Similarly, organizations should not unreasonably delay or create impediments to the timely completion of the investigation by, for example, delaying acting on allegations because of upcoming games, tournaments, or competitions. An organization must verify that interim measures have been implemented and require rigorous adherence by all relevant parties.

Third, do not disclose the identity of reporter(s) to the subject(s) of the investigation where that information is not already known to them. In addition, implement controls to mitigate conflicts of interest that may arise during the investigation, including, but not limited to, ensuring that automated escalation mechanisms do not inadvertently create a scenario where the subject of the allegation is also the recipient of the report. Do not misuse contractual controls such as non-disclosure or confidentiality agreements to prevent witnesses or reporter(s) from sharing their stories, including as a condition of settlement.

Fourth, it is important to communicate with reporter(s) periodically, even if only limited information can be provided regarding the investigation. Consistent communication reinforces to the reporter(s) that the organization's reporting channels are meaningful and mitigates the risk that the reporter becomes disgruntled and resorts to voicing their concerns to the public or via litigation. Follow your communications strategy and keep other relevant stakeholders — including law enforcement, regulatory authorities, and the public — appropriately apprised of the status of the investigation, including key developments. Be wary of allowing confidentiality to become the enemy of transparency. Moreover, cooperate with requests for documents and interviews by law enforcement and regulatory authorities and do not create unreasonable obstacles towards accessibility of documents and personnel by, for example, weaponizing attorney-client privilege.

Fifth, remain nimble as the investigation unfolds. In many cases, the initial whistleblower is one of many reporters who will come forward. Do not expect reporters to exhibit a uniform level of comfort and confidence with the reporting process. Therefore, refrain from dismissing allegations because reporters are afraid to speak up: each reporter's experience and response is unique, particularly with respect to assault, harassment, and discrimination. When evaluating identified misconduct, do not disproportionately focus on whether the conduct at issue is "unlawful" rather than whether it is contrary to your organization's policies or is otherwise inappropriate. Do not dismiss reports simply because they did not technically follow established, formal channels; some reporters will be comfortable with "open door" reporting to an individual they trust (which can include a teammate), others with an anonymous hotline. Similarly, be cognizant about prioritizing the risk of litigation by the subject(s) of allegations or becoming consumed by the risk of drawing negative attention to your organization over the safety and well-being of your athletes and the community.

Sixth, take steps to assure that the investigation is properly executed and documented. An investigation is a serious, technical endeavor and requires expertise in various subject matter areas including, for example, preservation and proper collection of evidence, document identification and review, interviews of witnesses and subjects, and financial analysis. The investigation should be executed and documented according to best practices. While confidentiality is important, a documented process will be invaluable in the event the investigation or its findings are called into question. Proper documentation of the investigative process can include interview memoranda, lists of key persons or document custodians, and other tracking and analytical documents.

Finally, keep your policies and procedures front and center and avoid unjustifiably violating or dismissing them. If policy deviations are warranted, meaningfully review and obtain approval of such deviations (and memorialize the process).

## Rule 9: Identify Recipients of the Investigation's Findings

At the conclusion of the investigation, you will have to identify the recipients of the investigation's findings and the level of detail each recipient is provided. This is often a challenging task, particularly with respect to external stakeholders as their interests differ. For example, an organization's sponsor may be worried about the impact of the investigation on a team's performance or their own brand, while media outlets, students, or faculty members might place greater emphasis on seeing individual accountability and actionable remediation to safeguard athletes and the broader community. A few factors should inform your assessment, including prior organizational practice, the level of public attention garnered around the allegations and subsequent investigation, pending litigation or regulatory enforcement, and desired privacy by victims.

First, consider prior organizational practice, specifically whether and to what extent investigative findings from previous investigations have been shared with external parties. Consistency can help minimize any questions regarding why a deviation from prior practice was warranted, particularly for investigations that implicate senior leaders. Ensure that all internal stakeholders that will be tasked with overseeing or implementing remediation receive adequate details regarding the investigation's findings.

Second, consider the spotlight and level of media attention surrounding the allegations and subsequent investigation. The more eyes on the organization's investigation and findings, the more pressure there may be to release the report. In this context, it is also important to consider the level of detail to share with the public. The severity of substantiated misconduct could simultaneously put a spotlight on the investigation but also result in undesired exposure for victims of the misconduct, particularly if the victims are not publicly known. It is important to consider their desired privacy and weigh the costs and benefits to the organization of complying with requests for privacy and the extent to which redactions may be utilized.

Moreover, where there has been public pressure concerning independence or the investigative process followed, an executive summary detailing the organization's method and summarizing the rules of engagement with the investigative team and related controls can lend credence to the investigation's findings. On the other hand, public commitments to sharing full reports made at the start of the investigation (*e.g.*, as part of the organization's communication strategy) demonstrate transparency, organizational integrity, and a commitment to promoting an ethical culture. Lastly, organizational decisions to publish an investigation's findings should not impede ongoing regulatory enforcement, including by law enforcement. In addition, the organization should consider whether publishing findings could adversely impact its interests vis-à-vis any pending litigation, including, but not limited to, any waivers of attorney-client privilege.

## Rule 10: Faithfully and Effectively Execute on Resulting Remediation and Continue to Enhance Your Compliance Program

The importance of effective remediation cannot be understated. Without it, root causes of misconduct will remain unaddressed and an organization is vulnerable to a reoccurrence of misconduct and broader liability for inadequately remediating the misconduct. The first step in developing effective remediation measures is to assess whether the allegations under review are (1) credible and (2) substantiated. In conducting your assessment, it is important to evaluate



alleged misconduct against both legal and policy standards. Conduct falling short of being unlawful may still be otherwise impermissible under your organization's policies and result in discipline, up to and including termination. Also, you may find conduct that was not technically prohibited by your policy standards, but, with the benefit of hindsight, you determine it is in the best interest of the organization and its stakeholders to adjust those standards. Second, identify and implement disciplinary action against individuals implicated in misconduct as well as individuals who failed to comply with their reporting obligations. Overlooking the latter category of individuals can undermine the ability to drive individual accountability across the organization for failing to report potential misconduct. Finally, consider whether senior leaders in the organization who did not technically violate their obligations failed to lead and live the values of the organization. Such failures can create as much if not more risk to an organization, and you will want to determine if any action should be taken regarding those leaders, taking into account requirements of employment agreements, policies, and applicable law.

Discipline against individuals found to have directly engaged in misconduct should be proportionate to the severity of the misconduct and their stature and seniority at the organization. Moreover, senior leaders should be held to a higher standard of scrutiny and should not be offered "sweet deals" in lieu of discipline or termination. For example, offering senior leaders the opportunity to resign before the investigation is completed, thanking them for their service to the organization, and other similar gestures can be perceived as tone deaf, often miss the mark, and can send the wrong signal to the wider audience. In this regard and for the same reasons, avoid providing positive employment references to individuals found to have been implicated in misconduct and terminated or otherwise separated from the organization. Unwarranted positive employment references can also enable those individuals to perpetuate the misconduct elsewhere. In cases where discipline short of termination is warranted, consider tying discipline to discretionary compensation and long or short-term incentive plans.

Third, engage in a root cause analysis to understand how structural and cultural elements played a role in facilitating the environment in which the misconduct occurred. For example, consider inherent risk factors to your organization and the presence or absence of controls to mitigate those risks. Where did those controls fall short? Consider the confluence of factors that can create a culture where athletes are afraid to speak up or are uniquely deferent to authority, even when authority figures are engaging in misconduct. Similarly, consider your organization's governance structures with an eye towards identifying areas of improvement. Allow the results of your root cause analysis to inform enhancements to your compliance program. If, for example, root cause analysis found a lack of awareness of the organization's reporting channels, consider additional training on reporting channels.

Fourth, identify and assign remediation action plan owners to drive individual accountability and ensure that remediation is completed in a timely fashion. Implement ongoing monitoring mechanisms (*e.g.*, culture surveys, function-specific training, and risk assessments) to measure and test the effectiveness of remediation and the organization's compliance program. Furthermore, periodic monitoring and testing mechanisms can serve to identify and mitigate risks in real-time and continuously enhance your compliance program.

## Conclusion

Understanding certain foundational rules of the road can help university leadership identify, assess, and respond to risk with a cohesive plan, appropriate attention to stakeholders, and a sound, documented investigative process. Legal counsel, athletic department leadership, and university leadership all play crucial roles in assuring the university successfully navigates the crises that arise all too often in today's environment, and will allow the organization to emerge stronger and better positioned to address future challenges.

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Miller & Chevalier's **Workplace Culture and Conduct** practice helps clients navigate the high-stakes legal and compliance challenges presented by workplace misconduct allegations, whether involving harassment, discrimination, bullying, or retaliation. [Learn more here.](#)

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