PERRIN CONFERENCES

SEXUAL ABUSE LITIGATION & COVERAGE CONFERENCE

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ETHICAL CHALLENGES OF RECORD COLLECTION



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Benefits of Early Investigation and Special Considerations

From my perspective, the biggest advantage is information quality. In sexual-abuse and trafficking cases, the passage of time is particularly damaging. Memories change, witnesses disappear, employees leave, electronic information is overwritten or deleted, important company policies are revised, surveillance disappears, and documents become harder to locate.

I want defense counsel investigating before the allegations become the accepted narrative of the case.

That means identifying what happened, when it allegedly happened, who knew what and when, what the institution did or did not do, and what evidence exists to corroborate or contradict the allegations.

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What are the most important benefits of beginning an investigation early?

Early investigation permits my claims professionals to make an **informed exposure assessment**. **I want to know early whether this is a case we should vigorously defend, a case presenting significant institutional exposure that should be considered for early resolution, or something in between.**

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What am I seeking from defense counsel's early investigation?

Don't just investigate what happened. Investigate what I will eventually need to make decisions about the case.

I always want my defense counsel to develop a chronology as quickly as possible.

- **Who are the important people?**
- **What did each person know?**
- **When did they know it?**
- **What did they do with that information?**
- **What documents confirm it?**

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What am I seeking from defense counsel's early investigation? (cont'd)

I expect early investigation to address:

- The claimant's allegations and timeline
- Identity and background of the alleged perpetrator
- Prior complaints, reports or warning signs (red flags)
- Hiring, screening, training and supervision
- Policies actually in effect at the relevant time—not merely today's policies
- Incident and internal investigative materials
- Communications among employees, administrators and third parties
- Law-enforcement and regulatory involvement
- Potential witnesses and former employees
- Insurance and contractual relationships
- Other potentially responsible entities (risk transfer)
- Damages and causation
- Facts that could materially affect settlement value or trial risk.

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What am I seeking from defense counsel's early investigation? (cont'd)

I don't want to see a document dump. **I want analysis.**

- Tell me what the evidence means
- Tell me what hurts us
- Tell me what helps us
- Tell me what we still don't know
- Tell me what evidence may disappear if we don't act immediately

The early investigation should therefore produce **three things**:

- **A reliable chronology** — what allegedly happened and when.
- **An evidence map** — what supports or contradicts each material allegation, and where that evidence resides.
- **An exposure assessment** — what the facts currently tell us about liability, damages, causation, coverage-related considerations, and potential resolution.

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Which records or sources of information are most vulnerable to loss, alteration, or inaccuracy over time, and what safeguards should be used when preserving them?

Electronic information is an obvious concern: texts, emails, messaging applications, social-media communications, photographs, videos, surveillance footage, access-control information, location information where legitimately available, and data residing on former employees' devices or accounts.

A witness interviewed six weeks after an event is different from a witness deposed three years later. Early counsel interviews should attempt to establish not only what the witness remembers, but **the source of that recollection** and what documents may refresh or corroborate it.

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Which records or sources of information are most vulnerable to loss, alteration, or inaccuracy over time, and what safeguards should be used when preserving them?

My expectation is that counsel promptly:

- Identifies potential custodians of records
- Issues appropriate preservation instructions
- Determines applicable retention policies
- Identifies third-party evidence

The objective isn't simply avoiding spoliation. It is preserving the best version of the evidence, while it still exists.

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Summary

I don't **not** want defense counsel waiting for written discovery to begin investigating.

The best defense attorneys become investigators immediately. They preserve evidence, interview witnesses, build the chronology, identify the bad facts as readily as the good ones, and tell the claims professional what the case really looks like.

Don't make me discover the worst fact in the case six months before trial.

If there is a devastating email, a prior complaint, a problematic personnel file, an inconsistent witness, a missing record, or a serious notice issue, **I want to know about it early**. Bad facts generally become more expensive, not less expensive, when they are discovered late.

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Final Thoughts

Early investigation creates options. Late investigation eliminates them.

The purpose of early fact investigation is not to build the perfect defense. It is to discover the facts while they are still discoverable, preserve them, understand the exposure, and give the claims team enough reliable information to make informed decisions.

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Responsible Collection of Sensitive Information

How do we fully evaluate the claim without over-collecting personal information?

1 SCOPE & SEQUENCE

Start with targeted requests; expand only when concrete gaps emerge.

Tie each category to an element, defense, damages issue, or identified inconsistency.

Use public, business, and third-party sources before seeking the most sensitive records.

2 VERIFY & COLLABORATE

Confer with counsel early on categories, date ranges, custodians, redactions, and alternatives.

Corroborate through a source-and-timeline matrix rather than relying on one record set.

For medical or psychological records, consider tailored requests with the use of an authorization from the trafficking plaintiff. If I litigation, accompany the authorization and request with a subpoena.

3 PROTECT & LIMIT ACCESS

Use a protective order, even in pre-suit investigation.

Store records in an encrypted, matter-specific workspace limited to assigned attorneys and staff.

Use secure transfer, redaction, multifactor authentication, access logs, no unapproved local copies, and archival protocols when return or destruction protocols are not possible.

THE LINE TO DRAW: Purpose • Proportionality • Protection

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Steps to Protect Sensitive Records:

- **Strict Access Segmentation: Need-to-Know Basis**
  - For both hard and electronic files
  - Sensitive records should never sit in an open-access folder
  - Confirm audience and redaction protocols before sharing internally

- **Restricted Physical and Electronic Workspaces**
  - Limit physical file circulation
  - Digital permissions and multi-factor authentication

- **Pseudonymization & Masking**
  - Initials, fictious names from early stages
  - Internal files, email subject lines, correspondence

- **“Less is More” in Internal Electronic Communications**
  - Assume discoverable and subject to subpoena
  - Factual, objective vs. speculative commentary

- **Danger of ISO and Database Reporting Traps**
  - Sensitive details in ISO can create privacy breaches or dissemination risks

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Protective/Confidentiality Orders:

Evaluating Scope and Definitions:

- Are “Confidential” and “Attorneys’ Eyes Only” definitions overly broad?
- Negotiate language/red line the proposed orders

Collaborative Carrier Alignment

- Ensure claim handlers understand restrictions being placed evaluation capabilities
- Definition of permitted recipients should include insurer/reinsurers
- Counsel must bridge the gap by preparing summaries of restricted data to carrier
- Destruction mandates must carve out carrier retention requirements
    - Internal discussions regarding restrictions vs. retention requirements

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Common File-Handling Mistakes That Can Create Ethical, Privacy, or Litigation Risks:

The Over-Collection Trap:

- Grabbing every piece of background information available (ex. entire lifetime of plaintiff's medical or academic history)
- Invites motions for sanctions, triggers privacy backlash by the court, raises emotional temperature of litigation

Treating Sensitive Records Like Ordinary Claims

- Filing or transmitting sensitive records through standard email chains
- Unencrypted channels

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Practices To Avoid Ethical, Privacy, Litigation Risks

1. **Look Before You Leap:**
    - Verify relevance, temporal proximity, and necessity before requesting or saving records
2. **Audience and Purpose Confirmation:**
    - Confirm audience, ensure proper redactions are locked in, verify the document serves a legitimate and privileged evaluation purpose
3. **Maintain Rigorous Objectivity:**
    - Keep file notes strictly factual - avoid strong emotion or unverified assumptions

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Practical Steps For Collecting Investigative Material in an Ethically Responsible Manner

Front-End Protocol:

- Map out legally permissible investigative steps with defense counsel

Protecting Privilege on Internal Investigations

- Ensure outside defense counsel closely monitors investigations to maintain privilege

Be Careful About Discoverable Materials

- Investigative materials prepared in the ordinary course of claims handling may be discoverable
- Simply involving an attorney ≠ work product privilege
- Assume routine investigation may be reviewed in litigation

Trauma-Informed Witness Handling

- Aggressive or intimidating tactics used by defense team including investigators can backfire drastically
  - Destroys institutional credibility
  - Can turn manageable defense case into punitive damages exposure

Discovery Proportionality

- Match the depth of the investigation to the true exposure and core issues of the case

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Evaluating the Likely Outcome at Trial

- **Look for corroboration across multiple sources**
- **Test deposition testimony against contemporaneous records**
- **Go beyond the file: payment data, video, schedules, incident reports, training materials**
- **Confirm who owned, operated, or managed the property at the relevant time**

No single category of evidence is dispositive. Look for where the evidence is consistent and where it conflicts.

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Red Flags Versus Knowledge

- **Suspicious activity is not the same as notice of trafficking**
- **The question: did this defendant know or should it have known?**
- **Unknown Party v. Patel: 77 police calls over seven years, summary judgment for defendants**
- **Federal civil trafficking filings: 6 in 2004, about 280 in 2024**

Focus on what the evidence establishes, who knew what, and when.

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Building The Record For Meaningful Resolution

- Identify the core factual disputes early
- Prioritize key witnesses and records through targeted discovery
- Develop enough reliable information to assess liability and damages realistically
- Use proportionality to distinguish necessary discovery from added cost and burden

The goal: enough information to evaluate the real risks—not discovery for discovery's sake.

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Choosing the Right Path to Resolution

- **Direct negotiation:** effective when the record is developed and expectations are realistic
- **Mediation:** particularly useful in multi-party or emotionally complex matters
- **Address confidentiality and privacy early:** protective orders, pseudonyms, redactions, and sensitive-record protocols
- **Reassess continuously:** counsel, insured, and carrier should evaluate exposure as the record develops

Timing matters: the appropriate resolution strategy may change as witnesses are interviewed and records are obtained.

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