Adult Contact with Minors—Institutional Best Practices for Investigating, Reporting and Preventing Abuse in Light of the Penn State and Clergy Scandals:

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The Penn State and Catholic Clergy Abuse scandals demonstrate the need for every large institution to have clear policies and practices with respect to adult contact with minors. Even if the institution does not directly cater its activities towards children, most large institutions encounter situations where adults regularly or tangentially have contact with minors on their premises or situations where adult employees are supervising or monitoring children. These situations create opportunities for inappropriate contact to occur; and raise questions concerning the institution’s obligation to prevent and report suspected abuse. As discussed below, many states charge particular individuals and institutions with an affirmative duty to report inappropriate contact with minors to law enforcement or social welfare agencies. Institutions may also face common law liability for failing to protect minors from sexual abuse.

This problem is not exclusive to educational institutions. Many businesses, non-profit organizations, and other groups host, hire or supervise minors. Contact can occur in the workplace or during an institution-sponsored event like a company picnic or party. Accordingly, institutions must create and evaluate policies concerning adult contact with minors and evaluate them against the framework of criminal liability, employment practices, premises security, professional liability, family law, and negligence. In addition to addressing legal responsibility, policies and practices should also address the moral responsibility of the institution’s individual actors to protect children from harm. A perception that an institution’s moral failure resulted in the abuse of a child may harm the institution’s reputation or prevent it from carrying out its purpose. This article examines these particular issues and suggests best practices.

What Constitutes Child Sexual Abuse?
Before discussing “Best Practices” for reporting and preventing child sexual abuse, it is important to understand what constitutes “abuse.” Laws regarding criminal sexual contact with minors vary greatly from state to state. Accordingly, the definition of “abuse” may depend upon the laws of the respective jurisdiction with respect to what age a minor may lawfully consent to sexual contact. Although not always explicitly stated, it is a fair assumption that conduct that violates a criminal statute would also constitute sexual abuse. While the Penn State events drew attention to the issue of adult contact with prepubescent children, sexual abuse remains more prominent among teenagers between the ages of 16 and 19, who are 3.5 times more likely to be victims of rape than the rest of the general population.\(^1\) Studies related to the Catholic Clergy Abuse scandal also suggest that adolescent victims are far more prevalent than prepubescent children. Moreover, while victimization of children of any age is always horrifying, the legal consequences are clearer with regard to younger children. There appears to be no situation in any jurisdiction where adult contact with a prepubescent child would be anything but criminal and reportable abuse; however, in some jurisdictions, conduct with and between teenagers does not always present such a bright-line rule.

To further complicate things, contact that is permissible in one state could be a felony in another. In Pennsylvania, like many jurisdictions, the age of consent is 16.\(^2\) In Delaware, however, the age of consent is 18.\(^3\) Additionally, many states, including Pennsylvania, afford a close-in-age exception for partners who are within four years of each other in age to account for consensual relationships between teens and young adults.\(^4\) Other states afford no such exception. Without a close-in-age exception, a high school senior over the age of consent engaged in a physical relationship with a younger classmate may be guilty of criminal conduct. Most institutions have no real policies to prevent or address these types of situations.
While many state criminal statutes provide clear guidelines, in other jurisdictions there are gray areas that include consensual sexual contact between teenagers who are both below the age of consent; sexual contact between older teens and young adults without close-in-age exceptions; and same-sex conduct. Moreover, close-in-age exceptions do not always afford protection in fairly routine scenarios involving teens and young adults. For example, the provision of alcohol or another intoxicating substance to a minor may transform a permissible contact into a criminal contact. Because providing alcohol or drugs to a minor violates clear criminal statutes, a college student who entertains his high school girlfriend at a college fraternity party where alcohol is present and physical contact occurs may very well expose himself to a corruption of the morals of a minor charge—even if the actual sexual contact is consensual. Of course, alcohol intoxication involving an adult or minor may void apparent consent to sexual activity.

Given the variances in the laws, each institution should be mindful of the specific criminal statutes that may apply. Moreover, an institution with offices or campuses in more than one state needs to be cognizant of the statutes in each of the states it occupies and adopt policies accordingly. Institutions with teenaged employees, patrons, or residents should educate themselves about the specific criminal provisions that apply. These include provisions addressing statutory rape; corruption of the morals of a minor; the age of consent; permissible age differentials (close in age exceptions); photographing or transmitting sexually explicit images; incest; and same sex conduct between adults and minors. Attention to these laws is particularly important as jurisdictions expand the mandatory reporting obligations and extend the statute of
limitations for crimes involving minors. Ignorance of the law or reporting requirements is clearly no excuse; and the potential liability could extend decades.

As demonstrated above, increased enforcement and consideration of even existing state laws create widespread and real liability problems for institutions that go well beyond the situation presented by the Sandusky case. Again, utilizing the example of a college freshman (age 18) engaged in a consensual relationship with his high school girlfriend (age 15) on campus raises a myriad of potential liability questions for the college. Assuming that the age of consent is 16, the contact may be criminal. Introduce alcohol and intoxication into the situation and even actual consent becomes unclear. If the minor later regrets her visit to college or the relationship does not end well, then additional questions concerning consent may be raised sometime far into the future. And in those states without a close-in-age exception, like Georgia, the contact between the 18-year-old Emory freshman and his 15-year-old high school girlfriend is felony statutory rape. In Virginia, where the age of consent is 18, a UVA student who has sex with a 17-year-old may be guilty of a Class 1 Misdemeanor. In New Jersey, however, it would be legal for a 14-year-old to engage in consensual sexual conduct with an 18-year-old Rutger’s student. Thus, depending upon where the institution is located, it is not unreasonable to assume that it may have a legal duty to prevent or report “criminal” contact between adults and minors practically every weekend; and every college party presents a theoretical reporting situation.

While the college/high school relationship is a useful example, the same scenario occurs in workplaces where large numbers of teenagers are employed such as retail or fast food. Depending upon where a particular fast food restaurant or retail store is located, consensual dating relationships between teen and young adult workers may or may not be “criminal.”
Equally unclear are situations where the dating relationship involves the teen’s shift manager or supervisor. For example, some states criminalize contact between a minor and a person in a position of trust. In Delaware, a person in a position of trust includes a teacher, coach, mentor, healthcare provider, or any person who assumes responsibility for the care or supervision of a child, with a child being defined as someone who has not yet reached the age of 18. With varying degrees of criminality depending upon factors such as the age of the victim, Delaware criminalizes sexual contact between a child and a person in a position of trust. Therefore, it is unclear whether a 19-year-old assistant manager commits a criminal offense if he dates his 17-year-old employee. If the assistant manager is considered a person in a position of trust, then it could be arguably criminal. Because Delaware does not generally criminalize relationships between adults and 17-year-olds, unless the older actor is 30 years old, there really is no legal distinction between the 19-year-old manager and a 29-year-old manager. Nonetheless, most people subjectively feel that the relationship with the 29-year-old is more problematic and poses greater potential for abuse. Furthermore, it would appear to be perfectly legal for a 17-year-old Delaware teen to have a relationship with a 29-year-old co-worker, provided the older employee is not in a supervisory relationship. However, if the same couple travels to Virginia for the weekend, the conduct may be illegal.

Most criminal statues do not permit subjective evaluation of whether the teenagers are peers or in a situation that is inherently coercive. Given the trend to start children in school at a later age than previous generations, and strict school district age cutoffs for kindergarten and first grade, today’s generation of high school seniors are far more likely than prior generations to be 18 or 19 years old before they graduate. Accordingly, relationships between these young adults and their younger classmates may pose “criminal” implications depending upon particular
jurisdiction. Despite fairly clear bright line age cutoffs in many state jurisdictions, most High Schools would not be concerned about “child abuse” simply because a 19-year-old senior takes a 15-year-old sophomore to the prom. Nonetheless, depending upon the jurisdiction, this fairly routine scenario could create a liability or reporting situation for the school and institution hosting the prom should sexual conduct occur between these prom dates.

Who Should Report And To Whom?

Generally, statutes require the mandatory reporting of “child abuse,” not third-party criminal behavior. This distinction may or may not be legally significant depending upon the age of consent within the particular jurisdiction where the conduct occurs. It is certainly reasonable to assume that criminal conduct involving a minor also meets the standard for “abuse” that must be reported. Sexual conduct between an adult and a child under the age of consent clearly meets the definition of reportable child abuse under any reasonable interpretation—because by definition, the contact cannot be consensual. As discussed above, conduct between an adult and a minor over the age of consent may be consensual but nonetheless criminal.

To the extent that sexual contact constitutes a crime committed against a minor, pursuant to various state reporting statutes, an institution with knowledge that this particular criminal contact took place may be theoretically required to report the incident as child abuse to the appropriate authorities. Many states have enacted mandatory reporting statutes. For example, Pennsylvania statutes currently obligate certain persons who, in the course of employment, occupation, or practice of a profession, come into contact with children to report suspected abuse. The law requires, for example, that certain licensed professionals, teachers, and school
officials to make mandatory reports to the authorities when they have “reasonable cause to suspect, on the basis of medical, professional or other training and experience, that a child under the care, supervision, guidance or training of that person or of an agency, institution, organization or other entity with which that person is affiliated is a victim of child abuse.” These persons are subject to mandatory reporting obligations and have a legal obligation to report suspected abuse, including sexual abuse, to the designated county agency or the “person in charge” of their institution.

The question of who should report is not exclusive to educational institutions. Although these positions of trust and authority expose educational institutions to direct criminal liability with failure to comply with mandatory reporting guidelines, civil liability rests also with entities that employ or host minors. As explained above, retailers and fast food restaurants frequently employ teenagers and regularly provide service to minors; while other institutions sponsor student internships or employ teenagers part-time. Recreation centers, camps, sports programs, and churches all regularly create situations where adults have close personal contact with teens and minors. Hotels and banquet halls host parties and events attended by minors. Accordingly, even an organization not strictly subject to a particular state’s mandatory reporting guidelines needs to be mindful of potentially criminal activity that may expose it to civil liability.

The trend appears to be toward broadening the scope of individuals and institutions subject to mandatory reporting and extending the scope of responsibility for the protection of children. Part of this expansion stems from the shift in views regarding what society considers acceptable behavior. For example, forty years ago, it was not uncommon for parents to allow children as young as six to walk several blocks to school or a store unsupervised. However, in
today’s society such situations may be viewed by the prevailing culture to be neglectful or irresponsible. In 1959, Elvis and Priscilla Pressley began a relationship when she was 14 and he was 24. It is unlikely that such a relationship would be viewed favorably today even if it did not otherwise implicate criminal conduct. As society becomes more protective of minors, it is only natural that the type of conduct constituting abuse may become broader than in past generations.

Adult concern about a relationship between a teenager and an adult often depends upon an individual’s personal perception of the teenager and the adult. For instance, a relationship between an immature 20-year-old and a particularly mature and responsible 15-year-old may or may not subjectively raise concerns. However, in many states, including Pennsylvania, sexual contact between such individuals still constitutes a crime. What may appear to be an appropriate relationship given a subjective evaluation of the maturity level of the participants has no bearing on whether the relationship violates criminal law. There is no safe harbor for the teenager who is unusually mature or responsible, or the adult who appears to be relatively immature. And, if there are no reasonable statutes of limitations for sexual conduct involving minors, it may be difficult to justify or defend a lawsuit alleging a refusal to report or protect against “sexual abuse” based upon one’s own perception of how mature or precocious the teen was thirty or forty years earlier.

The lag between societal attitudes towards adolescents and the legal system is reflected in some state marriage laws. For example, New Hampshire law permits a 14-year-old female and a 13-year-old male to marry, with parental consent. The law was likely enacted at a time when marriage between two 14-year-olds was not uncommon; but it is difficult to imagine parents today consenting to let their 14-year-old children marry. And, as Elvis and Priscilla’s
relationship suggests, these societal changes can occur during a period of time contemplated by
the modern trend towards expanded or unlimited statutes of limitations for crimes against
minors. Indeed, there are certainly elderly married couples who dated and married very young
according to the prevailing custom of the time; and it would be difficult to characterize those
relationships post hoc as abusive. While society may be becoming more liberal with respect to
adult sexual conduct, society’s view towards protecting children generally, particularly with
respect to sexual abuse, has been trending in a different way.

Given the ever-changing societal norms, an institution creating policies and procedures
concerning adult contact with minors that is faced with a statute of limitations extending decades
must predict potential changes in the way society views relationships between teens and adults
and the scope of responsibility of adults supervising children to protect them. Despite New
Jersey’s current law that would permit a sexual relationship between a 14-year-old and an 18
year-old, or Delaware’s law that currently permits a consensual relationship between a 16-year-
old and 29-year-old, there is no guarantee that a fact finder sitting on a case 30 years hence will
conclude that such contact did not involve abuse or inherently coercive conduct. In other words,
an institution must assume that its failure to report or prevent a relationship that can be
characterized as “abuse” will be judged not against the prevailing standard of this time; but will
be judged against the standard of some period in the future.

Call the Cops or Appropriate Agency Now!

The most critical error made by institutions is a delay or failure to call the police or
appropriate agency in response to credible evidence of a crime or sexual abuse involving minors.
In many situations, the institution pauses to consider its own potential civil liability to the victim
or suspected abuser. And in many situations secrecy appears to be part of an informal code or practice. Regardless of the motivation for failing to call the police or appropriate social service agency immediately, delay may result in the destruction of relevant evidence or, more egregiously, create a situation where the victim continues to be abused by the abuser. As demonstrated in public scandals involving the Catholic Church and Penn State, the potential harm arising from the delay, including catastrophic harm to the institution’s reputation clearly outweighs any legitimate institutional concerns. Institutional delay and silence frequently increase the number of victims; instances of abuse; and potential criminal liability.

Consistent with provisions permitting reporting, institutions should promulgate policies that ensure that all employees report all crimes against minors that occur on its property directly to the police or designated agency and cooperate in the authority’s investigation. In its simplest expression, employees should be instructed to call the cops immediately any time they witness a crime against a child or any time a child reports a crime. Direct reporting of criminal conduct in response to direct evidence allows the appropriate authorities to conduct a full and professional investigation into the abuse while evidence is available to secure a conviction of a predator, or exonerate a person who is falsely accused. Moreover, bringing in professionals trained to secure and preserve evidence ensures a more accurate and expedited investigation.

Most importantly, direct reporting reduces the likelihood that the predator will engage in further abuse of the victim, given the absence of additional time typically encountered while a bureaucratic institution deliberates calling the police. In our opinion, under these circumstances, preventing further victimization of children and cooperating with law enforcement is more important than institutional concerns about potential liability. This opinion is supported by the
reporting statute that specifically immunizes any institution that “participates in good faith in the making of a report, whether required or not” from civil or criminal liability arising from that report. Given the immunity provisions of the reporting statute, there is simply no legitimate legal or moral basis for encouraging private institutions to delay reporting a clear and credible report of the criminal abuse of a child.

The most damning portions of the newly released “Freeh/PSU Report” demonstrate the problems with lengthy deliberations over whether the appropriate authorities should be called. The report concludes, based upon internal emails among higher Penn State officials, that the decision about whether to report a 2001 incident of sexual abuse witnessed by Graduate Assistant Michael McQueary was delayed and then altered because of concerns about then “Professor Emeritus” Sandusky and institutional issues. Ultimately, the decision makers concluded that no report needed to be made to either the police or the appropriate child agency; and that the matter could be handled “humanely” and internally within the affected institutions, namely PSU and Sandusky’s current employer, The Second Mile. Even at that time, there was recognition that the institutions could be held liable for a failure to report if the “humane” approach was unsuccessful in halting Sandusky’s conduct. What was lacking in the “humane” response was any consideration of current or future victims of Sandusky’s conduct. Policies and decisions that are focused primarily upon institutional liability at the expense of child safety will ultimately fail both the institution and children. Prompt accurate reporting is the only “humane” or legal response to credible allegations of child abuse.

Likewise, the recent conviction of an Archdiocese of Philadelphia official for Endangering the Welfare of a Minor illustrates the problems in approaching child sexual abuse
as an institutional liability issue rather than a law enforcement matter. During the trial of Monsignor William Lynn, the Archdiocese’s Human Relations Director for Clergy, the prosecution presented significant evidence spanning several decades that the institution prioritized: treating suspected priests “humanely;” protecting the church’s reputation; avoiding civil liability; and enforcing the authority and discretion of the now deceased Archbishop Bevilacqua. After a multi-week hotly contested trial, the jury concluded that the Lynn was more concerned with the Archdiocesan priorities than he was with protecting children from abusive priests; and found him guilty of a felony. Conspicuously absent from the trial was any indication that the Archdiocese routinely reported cases of suspected abuse to the appropriate law enforcement authorities or child agencies. Indeed, the evidence suggested that it was Archdiocesan policy to discourage parishioners making reports to civil authorities.

**Conducting an Internal Investigation**

It is the rare case where an institution receives direct evidence of sexual abuse. In most cases, an institution is confronted with circumstances that merely suggest inappropriate contact; therefore, it refers the suspicion to supervisors or human resource personnel. Investigations typically follow well-established employment law principles, many of which have not yet adapted to the demands of criminal and tort law; or even advances in technology.

In *Faragher*, the United States Supreme Court recognized an affirmative defense available for institutions that promulgate procedures for the internal reporting and investigation of certain forms of employment discrimination, including sexual harassment. Accordingly, most large institutions have implemented internal procedures for conducting thorough internal investigations of sexual harassment, including internal interviews, recorded or written statements
of potential witnesses, analysis of documents and materials, and contact with both the accused and the victim. The problem with this process is that what can be viewed as prudent employment practices in the civil context essentially obstructs and compromises an independent criminal investigation by the appropriate authorities. Setting aside the problems presented when an institution attempts to interview a minor victim – with or without the consent of the minor’s parent or guardian – the institution’s investigation can create serious credibility issues for the prosecutor and impede the criminal investigation. The Penn State Grand Jury report about the 2002 incident illustrates this problem perfectly.\(^\text{15}\)

According to the report, a Penn State Assistant Coach directly witnessed an adult anally raping a child.\(^\text{16}\) He allegedly reported to his supervisor, Coach Paterno, that he witnessed some form of sexual abuse between Sandusky and a child.\(^\text{17}\) Coach Paterno allegedly reported the event to his supervisor in more equivocal terms, some sort of inappropriate sexual conduct or fondling.\(^\text{18}\) Coach Paterno’s supervisor reported it up the chain to the University president; and in a later meeting with the Assistant Coach the supervisor described the incident as merely “horsing around.”\(^\text{19}\) Apparently, the Assistant Coach reported the incident to his father and then a family friend. Indeed, at each reporting level, the story becomes more vague and ambiguous as to whether anything improper happened at the institution. Suffice it to say, these types of inconsistencies and reports within an internal investigation can affect the credibility of key witnesses and impede a prosecutor’s attempt to present these witnesses and secure a conviction at trial. Indeed, it was one of the chief avenues of attack by Sandusky’s defense counsel. Although Sandusky’s attorney’s attempt to exploit these inconsistencies did not prevent a conviction, most cases do not involve the same number of witnesses or victims coming forward. In other words, what might simply be innocuous inconsistencies in the context of a routine
employment discrimination investigation are potentially fatal to a successful prosecution for sexual abuse. In a case that depends entirely upon witness credibility, inconsistencies in an internal investigation could create credibility issues that otherwise do not exist and result in significant injustice.

An initial investigation conducted by the authorities, rather than an institution, would likely utilize appropriate procedures to protect the rights of the victim, accused, and witnesses. Presumably, a police officer or designated child abuse investigator would conduct appropriate detailed interviews and the witnesses would be aware of the consequences of making a false statement to a law enforcement officer. Furthermore, if the Assistant Coach in the Penn State scandal had been advised to call the police immediately, then physical evidence or a medical examination could have corroborated the allegations. At best, an internal investigation generally delays or prevents the police from doing their jobs, including gathering physical evidence, interrogating the suspect after a proper advisement of his rights, and interviewing witnesses in a timely fashion. At worst, an internal investigation creates false or misleading evidence, prepares a suspect for his contact or interview with law enforcement, further traumatizes the victim, and permits further contact and abuse between the suspect and victim. A human resource manager, supervisor, or typical private employment attorney may not have the training or expertise required to deal with child rape victims or sexual assault victims. A football coach, retail manager, or camp director may have even less training with regard to sexual abuse investigations.

Of course, the 2001 Penn State incident is unusual in that there is allegedly a direct witness of actual sexual contact between an adult and child. In our opinion, there is no
justification for an internal investigation to clarify this type of situation before the police are called. There is no innocent or equivocal explanation for the conduct described, i.e. an unrelated adult and child in a shower together having inappropriate physical contact.

A more typical case involves circumstantial evidence of an inappropriate relationship between an adult and a child. In the modern context, this typically involves an unusual amount of private unsupervised contact with the child, frequent cell phone calls or texts, suspicious email or social networking messages, close physical proximity, and picking or dropping off the minor from school or work. In simplest terms, the evidence is usually that of an extraordinary amount of attention and time lavished by an adult on a child that cannot otherwise be explained. Although there are situations where the child manifests observable behavioral or mood changes during an inappropriate relationship, they are not always present. Absent direct evidence of abuse, there is admittedly some threshold that must be crossed beyond mere suspicion before authorities should be contacted. Nonetheless, if the institution would otherwise feel justified in conducting an internal investigation, it is disingenuous to suggest that the behavior fails to meet the standard of reasonable suspicion.

Preservation of Evidence

The ability to create permanent photographic and digital records of unlawful conduct has become exceedingly easy. It is not uncommon for this generation of minors and young adults to create permanent records of their activities on Facebook, in text messages, in e-mails, on blogs, or on message boards. The ubiquitous nature of cell phone video and still cameras creates more opportunity to create images, which by their nature may be criminal or constitute child pornography. The ease with which such video and images are shared creates additional areas of
concern for institutions when an individual transmits the offending materials through the institution’s computer network. Furthermore, it becomes more difficult for an institution to claim ignorance of an improper relationship if evidence is widely available and disseminated.

Many institutions utilize surveillance equipment on their facilities that may create recordings of unlawful or suspicious conduct or that record significant events relevant to a criminal investigation. In other words, it may become increasingly difficult for institutions to simply deny knowledge of potentially reportable situations involving unlawful conduct between adults and minors. There are criminal statutes that impose liability for manufacturing, transmitting, viewing, and possessing sexually explicit images involving minors. Surveillance video may capture whether a potential victim was incapacitated with alcohol or drugs during a particular time when abuse was alleged to have occurred or capture images of a minor meeting or spending unsupervised time with an alleged abuser.

In cases where abuse is believed to have occurred on premises or during company time, surveillance and electronic media should be reviewed and preserved for law enforcement or social service agency review. Again, in many circumstances, the evidence consists of an inordinate amount of attention, such as text messages, e-mails, or cell phone contact, some occurring on company time. Another, less common, example is video evidence that shows an adult is spending an inordinate amount of time with a particular minor without an apparent legitimate work purpose, including periods where the adult and minor are alone or in a private area. In other situations, reports come from co-workers or other supervisors of suspicious behavior involving the minor and the adult. In the presence of reasonable suspicion, a failure to preserve evidence may be construed as spoliation.
Further, destroying or failing to preserve such images for law enforcement or the appropriate social service agency may be perceived as hampering or interfering with a potential criminal investigation. To address the new issues created by advances in technology, institutions need clear guidelines and procedures for the handling and reporting of digital media that implicates criminal behavior involving minors.

**Premises Security -- Failure to Supervise**

In Pennsylvania and most other jurisdictions, a premises owner or operator is liable for the criminal conduct of third parties based upon ordinary negligence principles. Generally, liability requires some proof of notice that the institution was aware of the specific criminal conduct or that the premises owner was aware of circumstances that created a reasonably foreseeable probability that some criminal conduct might occur on its premises. Under some circumstances, an institution may be vicariously liable for the criminal conduct of its employees. As between the minor’s potential claim that the institution negligently failed to prevent sexual abuse and an accused’s claim that the institution negligently made a false report of sexual abuse, the minor’s claim exposes the institution to greater exposure. As discussed below, most reporting statutes afford immunity arising from reporting the abuse in good faith, but no immunity arising from the abuse itself. Evidence that an adult is lavishing attention upon a minor on or around an institution’s premises without the minor’s parent’s prior knowledge or consent, and in violation of a company policy, should satisfy any interpretation of a good faith standard.

In situations involving adults and a young minor under the age of consent, or conduct that is criminal, the course is clear: contact the police or designated social agency immediately. In
the interest of the minor, the institution should cooperate fully with the investigation. Even in situations where no crime has occurred, some courts could seek to impose liability under normal negligence principles, which applies a reasonable man standard as opposed to the criminal standard. For example, contact between a 14-year-old and an 18-year-old co-worker may not violate a criminal statute, but a court could construe the failure to prevent the contact, or report the relationship to the minor’s parents, as violating a duty of ordinary care owed to minors. Additionally, situations involving supervisory-level employees raise both tort and employment related liability.

What is clear is that the recent Penn State scandal and the prominent clergy scandals create societal calls for increased measures and theories of liability to protect children from sexual contact with adults. However, relaxing statutes of limitations and increasing the scope of institutional liability to address horrific and specific instances of abuse can create expansive and unprecedented liability. In our opinion, there is no current widespread moral outcry to prevent all consensual relationships between teens and young adults who are relatively close-in-age. However, a relationship between older adults and teens do raise concerns, particularly where there is a supervisory relationship or a position of trust. Given the greater societal attention and concern for protecting minors from sexual abuse, an institution intending to draft procedures to address potential liability that can extend decades must plan for shifts in moral attitudes involving teenage sexual activity and should probably err on the side of caution.

**Employment Related Claims**

For the reasons stated above, an employer that employs minors should promulgate clear guidelines prohibiting even consensual relationships that would violate the respective state
criminal laws, and employees should be given notice that such relationships involving conduct in or around the premises will result in termination and a report to the appropriate authorities. As a practical matter, relationships that do not affect the workplace either because no contact occurs on the premises or there is no favoritism or distraction occurring at work may not come to the attention of the employer or implicate a policy. Likewise, engaging in criminal conduct on an employer’s premises is always a reasonable ground for terminating an employee. Although there is a legitimate concern that terminating the minor for violation of such a policy may “prompt” the minor to bring a claim for sexual harassment or employment discrimination, that concern needs to be balanced against the virtually unlimited liability in tort—again unbridled by any statute of limitations. A clear employment rule characterizing such conduct as gross misconduct could assist in defending employers in employment-related claims, including potential claims for sexual harassment or even an unemployment claim.

Of course, prohibitions on relationships between supervisory and non-supervisory employees of any age are always reasonably related to the business of the employer. The problem with these policies is that they are often not uniformly or fairly enforced. And the practical problem with all of these policies, irrespective of age or supervisory status, is that people frequently date and engage in relationships with co-workers. Attempting to regulate human relationships with workplace policies and procedures can be viewed as a fool’s errand. Nonetheless, it is not unreasonable for parents to expect that an employer will have reasonable policies in place to protect their children from sexual contact with significantly older co-workers, particularly their children’s supervisors. This trend is likely to continue into the foreseeable future.
As a general principle, any unwanted sexual advances or contact in the workplace violates ordinary employment law principles and should be addressed promptly. It is not the purpose of this article to be a general primer on employment discrimination or sexual harassment type claims. Obviously, any conduct that could give rise to a claim for sexual harassment claim, either under a theory of *Quid Pro Quo* harassment or hostile workplace, should be investigated and documented regardless of whether it involves a minor. Conduct involving minors should be investigated and documented in a manner that would not otherwise interfere or hamper a potential criminal investigation.

**Family Law Issues**

Perpetrators of sexual abuse are often related to the victim. 30% of perpetrators are family members, e.g., fathers, brothers, uncles, cousins. In the Sandusky case, there appears to be a pattern of targeting children involved in family-related crises and attempting to assume some parental role with the victims’ families. The same phenomena has been observed in clergy abuse victims. Given the position of trust assumed by many perpetrators, like Sandusky, traditional ways in which communities addressed suspected abuse informally, such as a telephone call to a parent about suspicions, may be even less effective.

Liability may arise from situations where an institution releases the minor into the care of a known or suspected abuser. Navigating who precisely has custody of the minor and what information can be shared with a non-custodial parent are potential problem areas. Furthermore, an institution may receive a phone call or inquiries from a non-custodial parent or relative about a child’s work schedule or transportation arrangements. An educational institution that supervises children essentially acts in *loco parentis* to that child and assumes a special
relationship to protect that child while in its care or custody. In the educational context, this includes the responsibility to release the minor only into the custody of persons specifically authorized to have custody of the child. This same obligation is generally extended to recreational centers, camps, and sports programs.

Some states require employers to exercise even greater levels of protection for their minor employees than adult employees. However, this generally does not include the obligation to monitor or supervise with whom the minor employee arrives with or leaves with from work. Nonetheless, institutions that assume custody and supervision of minors should have clear guidelines with whom they are permitted to communicate with about the child’s welfare and who is permitted to have custody of the child when out of their care. The problems and difficulties with determining the custodial rights of the respective guardians also raise additional problems with internal investigations into suspected abuse and provide further support for entrusting investigations into the hands of law enforcement or the appropriate social agency. Obtaining the consent of a noncustodial parent to interview the minor about an ongoing investigation may or may not be effective. In our experience, there is a natural tendency of institutions encountering suspected abuse to view it as a “family matter.” Absent a clear understanding of the precise family dynamic or custody arrangements, this approach may only create hostility and complicate an investigation by the appropriate social agency or law enforcement.

Recommendations

In the wake of the clergy abuse scandals, Pennsylvania extended the statute of limitations for minors to bring claims of suspected abuse to age 50. This means that today an institution could theoretically face a claim from conduct against a ten-year-old child in 2042. After the Penn
State scandal, there are calls to eliminate the statute of limitations for sexual abuse of minors completely and to expand the individuals and institutions subject to mandatory reporting guidelines. As discussed above, the problem with extending the statute of limitations for offenses against minors is that the situation may be measured, not against the community standard that existed at the time of the contact, but it may be measured against a much different standard at the time when the contact is reported or prosecuted, possibly decades later.

In addition to this unprecedented expansion of liability into future decades, institutions are ill prepared to address the possibility of future claims. In our opinion, the Penn State Scandal demonstrates that traditional employment law and human relations considerations are poor tools to address the expanded liability and likely societal reaction arising from the child sexual abuse cases. More importantly, they have been woefully ineffective in preventing further abuse towards the victims; protecting the institutions themselves from severe financial harm; and stemming further damage to the reputation of institutions.

The institutional examination of these incidents as potential liability (or reputational) threats rather than simply crimes that must be reported has caused the most severe damage; and this approach should be discontinued. A clear policy of reporting all suspected criminal activity to the appropriate authorities is the only viable policy offering any protection to the victims or the institution. As set forth above, there are already clear statutory provisions that afford immunity to individuals and institutions that make good faith reports to the appropriate authorities and agencies. In our opinion, “best practices” requires institutions to avail themselves of those reporting statutes, including the immunity provisions. Furthermore, an institution should state clearly and unequivocally that it has a policy or reporting all suspected criminal
sexual abuse involving minors to the appropriate authorities; procedures to preserve and retain relevant digital media; and clear policies addressing appropriate and inappropriate contact with minors inside and outside the workplace.

Institutions should also have clear, explicit policies advising employees that the institution will contact the minor’s parent, guardian and authorities if it is presented with any evidence of an inappropriate relationship, or even the appearance of an inappropriate relationship; and that violations of the policy will result in termination. These policies are reasonably related to protecting the institution from liability and, most importantly, to protecting the interests of the minor. Institutions should prohibit adult employees from contacting children without the consent or knowledge of their parent or guardian for each contact. This eliminates the need to conduct an investigation, internal or otherwise, into the circumstances of each contact or incident to determine whether there is an innocent explanation. In most situations, there is no legitimate institutional need served by permitting adults to contact minors outside the workplace without the permission or knowledge of the parent or guardian. Therefore, if employee texts a minor frequently, sits in the company’s parking lot with the minor, or spends unsupervised time in a private room or area, then the employee should be terminated for poor business judgment, even if those contacts are purely innocent. In states where most employment is considered employment-at-will, such as Pennsylvania and New Jersey, termination in these instances would, in all likelihood, be reasonable. That employee has exposed the institution to a claim by the minor, potentially until that minor reaches the age of 50. Where conduct rises to the level of reasonable suspicion and otherwise violates company policy, contacting the authorities to conduct an investigation is wholly appropriate. As Penn State and the Catholic Church have taught, there is no benefit gained from turning a blind eye or ignoring compelling evidence of
sexual child abuse. Accordingly, we recommend a very proactive aggressive approach that first recognizes these incidents as crimes rather than public relations problems.

2 18 Pa.C.S.A. § 3122.1
3 11 Del. C. § 768
4 18 Pa.C.S.A. § 3122.1(a)(1)
5 O.C.G.A. § 16-6-3
6 Va. Code § 18.2-371
7 N.J.S.A. § 2C:14-2(c)(4)
8 11 Del. C. § 761 (e)(2), (7)
9 11 Del. C. § 778
10 23 Pa.C.S.A. § 6311(a)
11 18 Pa.C.S.A. § 3122.1
12 NH Rev Stat § 457:4
13 23 Pa.C.S.A. § 6318
16 Id. at pp. 6-7
17 Id. at p. 7
18 Id. at p. 7
19 Id. at p. 8