



LIEBERT CASSIDY WHITMORE

6033 WEST CENTURY BOULEVARD,
5TH FLOOR
LOS ANGELES, CALIFORNIA 90045
T: (310) 981-2000
F: (310) 337-0837

135 MAIN STREET,
7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
T: (415) 512-3000
F: (415) 856-0306

5250 NORTH PALM AVENUE,
SUITE 310
FRESNO, CALIFORNIA 93704
T: (559) 256-7800
F: (559) 449-4535

550 WEST "C" STREET,
SUITE 620
SAN DIEGO, CALIFORNIA 92101
T: (619) 481-5900
F: (619) 446-0015

400 CAPITOL MALL
SUITE 1260
SACRAMENTO, CALIFORNIA 95814
T: (916) 584-7000
F: (916) 584-7083

COMMUNITY COLLEGE LEAGUE OF CALIFORNIA (CCLC) 2018 ANNUAL CONVENTION

Responding to #MeToo Accusations: The Critical Need for Policy Leadership

11/16/2018

PRESENTED BY:

Karen Furukawa-Schlereth & Laura
Schulkind & Kristin D. Lindgren


Responding to #MeToo Accusations: The Critical Need for Policy Leadership

Community College League of California (CCLC) 2018 Annual Convention

November 16, 2018


Presented by: Karen Furukawa-Schlereth, Laura Schulkind, & Kristin D. Lindgren

LCW LIEBERT CASSIDY WHITMORE



Responding to #MeToo Accusations: The Critical Need for Policy Leadership
Community College League of California (CCLC) 2018 Annual Convention
November 16, 2018

Presented By: Karen Furukawa-Schlereth,
Laura Schulkind, & Kristin D. Lindgren



The Unique Challenge




What makes #MeToo allegations uniquely challenging?

- Public awareness
 - Questions
 - Expectations
 - Assumptions
 - Fears
- May involve conduct you can't discipline
 - Too far in the past
 - Alleged conduct unconnected to the District

2 | LCW LIEBERT CASSIDY WHITMORE

Legal Backdrop: Competing Duties



- To investigate allegations of sexual harassment
 - Title IX
 - FEHA
- To take prompt and effective action to stop and prevent sexual harassment
 - Title IX
 - FEHA
- To protect privacy of complainant
 - Constitutional privacy protections
 - Title IX


3 | LCW LIEBERT CASSIDY WHITMORE

Responding to #MeToo Accusations: The Critical Need for Policy Leadership

Community College League of California (CCLC) 2018 Annual Convention

November 16, 2018

Presented by: Karen Furukawa-Schlereth, Laura Schulkind, & Kristin D. Lindgren


**Legal Backdrop:
Competing Duties** 

- To comply with employee investigation rights
 - Provide Weingarten notice
 - Provide academic employees with information about complaints before placement on administrative leave
- To protect privacy of accused
 - Constitutional protections
- To act in a manner consistent with the presumption of innocence & due process
 - Constitutional protections
 - Education Code
 - CBAs

4 | LCW | LIEBERT CASSIDY WHITMORE

LCW | LIEBERT CASSIDY WHITMORE 

**Legal Compliance in the
#MeToo Context**

Case Study 

Jane Smith attended XYZ-CCD in 2002. She now lives in New York. In 2018 she posts on social media that a current XYZ instructor, Rob Jones, is a sexual predator who had sex with her in 1995, when she was 17, and he was her high school teacher. Jones is a popular math instructor, and Senate officer. Smith also sends the post to ABC's student paper. The paper contacts XYZ's chancellor, Dr. Green, for comment...


6 | LCW | LIEBERT CASSIDY WHITMORE

Responding to #MeToo Accusations: The Critical Need for Policy Leadership

Community College League of California (CCLC) 2018 Annual Convention

November 16, 2018


Presented by: Karen Furukawa-Schlereth, Laura Schulkind, & Kristin D. Lindgren

Case Study 

Dr. Green takes these immediate steps:

- Gives a statement to the paper that there will be a “full investigation”
- Writes to Smith commending her for the courage to come forward and sadness for what she endured
- Calls a special meeting of the Board
- Directs that Jones be placed on paid administrative leave pending results of the investigation.
- Issues a campus-wide email acknowledging the complaint by Smith against Jones; describes the allegations; urges everyone to withhold judgment.


7 | LCW | LIEBERT CASSIDY WHITMORE

What Do You Do First? 

1. Determine whether to open an investigation.

- Investigate if, assuming the allegations to be true:
 - The conduct is within District’s jurisdiction to discipline;
 - There is a duty to remediate; and/or
 - Failure to address implicates the District’s reputation
- Policy guidance
 - Revise policies that inform complaint procedure APs to set investigation parameters and distinguish “investigation” from “initial inquiry”
- Sample contract language: *Handout paragraph F*

8 | LCW | LIEBERT CASSIDY WHITMORE

What Do You Do First? 

2. Determine who needs to be notified

- Who, how and what
 - Trustees
 - Guidance on managing public comment
 - Avoid discussing content
 - Public Information Officer
 - Prepare limited public statement
 - Complainant & Accused
 - Notice of initial inquiry
 - Union (if applicable)
 - Notice of initial inquiry


9 | LCW | LIEBERT CASSIDY WHITMORE

Responding to #MeToo Accusations: The Critical Need for Policy Leadership

Community College League of California (CCLC) 2018 Annual Convention

November 16, 2018

Presented by: Karen Furukawa-Schlereth, Laura Schulkind, & Kristin D. Lindgren

What Do You Do First? 

2. Determine who needs to be notified

- Policy Guidance
 - Emphasize privacy protections
 - Ensure Brown Act compliance
- Sample contract language: *Handout paragraph E*


10 | LCW LIEBERT CASSIDY WHITMORE

What Do You Do First? 

3. Initial response to complainant

- Acknowledge awareness of allegations
- Convey support *without* stating or implying complaint accepted as true
- Explain process & timeline, and distinguish "initial inquiry" from "investigation"
- Ask questions relevant to initial inquiry

11 | LCW LIEBERT CASSIDY WHITMORE

What Do You Do First? 

4. Plan how to respond to questions from the press & public

- Basic parameters:
 - No repeat of names or allegations
 - Express respect for complainant...but also
 - Express district neutrality and presumption of innocence/value due process
 - Plan for managing PRAs
- Sample contract language: Handout paragraphs D & I.


12 | LCW LIEBERT CASSIDY WHITMORE

Responding to #MeToo Accusations: The Critical Need for Policy Leadership

Community College League of California (CCLC) 2018 Annual Convention


November 16, 2018

Presented by: Karen Furukawa-Schlereth, Laura Schulkind, & Kristin D. Lindgren

Next steps...If You Don't Open an Investigation 


- Closure letter to complainant
- Closure letter to accused
- Limited public statement

13 | LCW | LIEBERT CASSIDY WHITMORE

Next steps...If You Do Open an Investigation 

- **Determine**
 - Who will investigate
 - Scope of investigation
- **Provide Notice**
 - Accused
 - Complainant
 - Union (if applicable)
- **Sample contract language: Handout paragraph G.**

14 | LCW | LIEBERT CASSIDY WHITMORE

Closing the Investigation 

- **Closure letter to complainant**
- **Closure letter to accused**
- **Limited public statement**
 - If allegations not sustained: consider collaborating with accused on more detail.
 - If allegations sustained: assess what is disclosable & whether investigation report is a public record. (Case-by-case analysis.)
- **Sample contract language: Handout paragraph H**


15 | LCW | LIEBERT CASSIDY WHITMORE

Responding to #MeToo Accusations: The Critical Need for Policy Leadership

Community College League of California (CCLC) 2018 Annual Convention

November 16, 2018

Presented by: Karen Furukawa-Schlereth, Laura Schulkind, & Kristin D. Lindgren

In Sum 

- Have a protocol in place before you need it
- Script responses to public inquiries...and stick to the script
- Protect privacy of those involved
- Treat complainant and accused with respect throughout the process
- Operate with a presumption of innocence
- Focus on reliability and integrity of the processes

16 | LCW | LIEBERT CASSIDY WHITMORE

Thank You! 

Karen Furukawa-Schlereth
Vice President of Human Resources | Santa Rosa Junior College
kfurukawa-schlereth@santarosa.edu

Laura Schulkind
Partner | San Francisco Office
415.512.3000 | lschulkind@lwlegal.com
www.lwlegal.com/our-people/laura-schulkind

Kristin D. Lindgren
Associate | Sacramento Office
916.584.7000 | klindgren@lwlegal.com
www.lwlegal.com/our-people/Kristin-lindgren

17 | LCW | LIEBERT CASSIDY WHITMORE

**SAMPLE FACULTY CONTRACT LANGUAGE
(TA—SANTA ROSA JUNIOR COLLEGE/SANTA ROSA FACULTY ASSOCIATION)**

Investigations of Allegations Posted to Social Media

- A. Introduction.** The parties recognize that unique challenges, rights and obligations may arise where members are made the subject of accusations on social media, in particular sexual misconduct allegations. The parties have a mutual interest in fostering an environment where members of the college community feel empowered and unafraid to report sexual misconduct and the abuse of power. However, the parties also share a mutual interest in fostering an environment that values due process and the presumption of innocence. In recognition of these dual interests, investigations of social media accusations made against members shall be regulated by this section.
- B. Application.** This provision only applies to allegations of sexual misconduct, abuses of power and/or unlawful harassment or discrimination made against faculty who, at the time the social media accusation is made, are employed as contract or adjunct faculty or are in the District's adjunct pool.
- C. Social Media Defined.** "Social media" refers to forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content (such as videos.) Current examples of social media include Facebook, Twitter, YouTube, Instagram, and similar sites.
- D. Member Privacy.** The posting of an accusation to social media does not erode the private nature of any District response, investigation or action taken in connection with the allegations, except that UNION shall receive the notice, described below, without first securing the member's consent for disclosure to UNION. .
- E. Notice to UNION.** The District shall provide UNION with notice within three business days of it becoming aware of social media allegations against a member involving sexual misconduct, abuse of power and/or unlawful harassment or discrimination. No prior consent of the member who is the subject of the allegation is required. The notice to UNION will also be provided to the member who is the subject of the allegations. The Notice shall include:
1. The social media platform(s) where the accusation was made;
 2. When the District learned of the accusation;
 3. Whether the District has received a formal complaint in connection with the allegations. If so, the complaint will also be provided to UNION, to the extent that it covers the same subject matter as the allegations posted to social media.
 4. Timeline for completion of the initial inquiry.
- F. The Initial Inquiry.** Prior to opening an investigation based on allegations posted to social media, the District will conduct an initial inquiry, the conclusions of which control whether an investigation may be initiated. An investigation may be initiated where the initial inquiry determines that:

1. The allegations pertain to conduct occurring within the last 4 years that—if true—have a sufficient nexus to the workplace to warrant investigation. Sufficient nexus is determined by presuming the allegations to be true for the purposes of the nexus test and applying the *Morrison* factors to the allegations. *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214.
2. The alleged conduct is more than 4 years old, but:
 - a. The complainant(s) are current students or employees who would be entitled to a remedy if the allegations are true, even if discipline is not available to the District;
 - b. The alleged conduct describes conduct that is similar in nature to a complaint(s) that was investigated and sustained by the District within the last 4 years;
 - c. The alleged conduct, if true, indicates that the faculty member was not truthful in the application process or otherwise actively concealed material facts that, if known, would have caused the District not to hire the faculty member.
 - d. The allegations include a claim that the faculty member was convicted of an offense for which termination is mandatory.

G. Initiation of Investigation. If the District determines that an investigation is warranted, it shall provide notice to the affected employee and UNION that it is opening an investigation, the basis for opening the investigation under subsection F (above); and timeline for completion. The procedures and respective rights of the Union, member and District during the investigation are otherwise controlled by the general provisions in Article X.

H. Closure of Investigation. The general notices and rights regarding closure of investigations set forth in Article X apply equally to investigations triggered by social media accusations. In addition, if the allegations are investigated and determined to be unfounded, UNION, with the affected member's written consent, may request a public letter informing the public that the allegations were determined to be unfounded and the investigation closed.

I. Public statements by the District. Statements made by District officials, including in response to inquiries from the press and the public, shall not state the name or other identifying information of the complainant or accused without their written consent. Public comment shall include a statement of the District's neutrality while the matter is under review, and that members are presumed innocent until and unless the evidence shows otherwise. However, nothing in this section affects the District's duties under The CLERY Act to issue a Timely Warning, if legally required.