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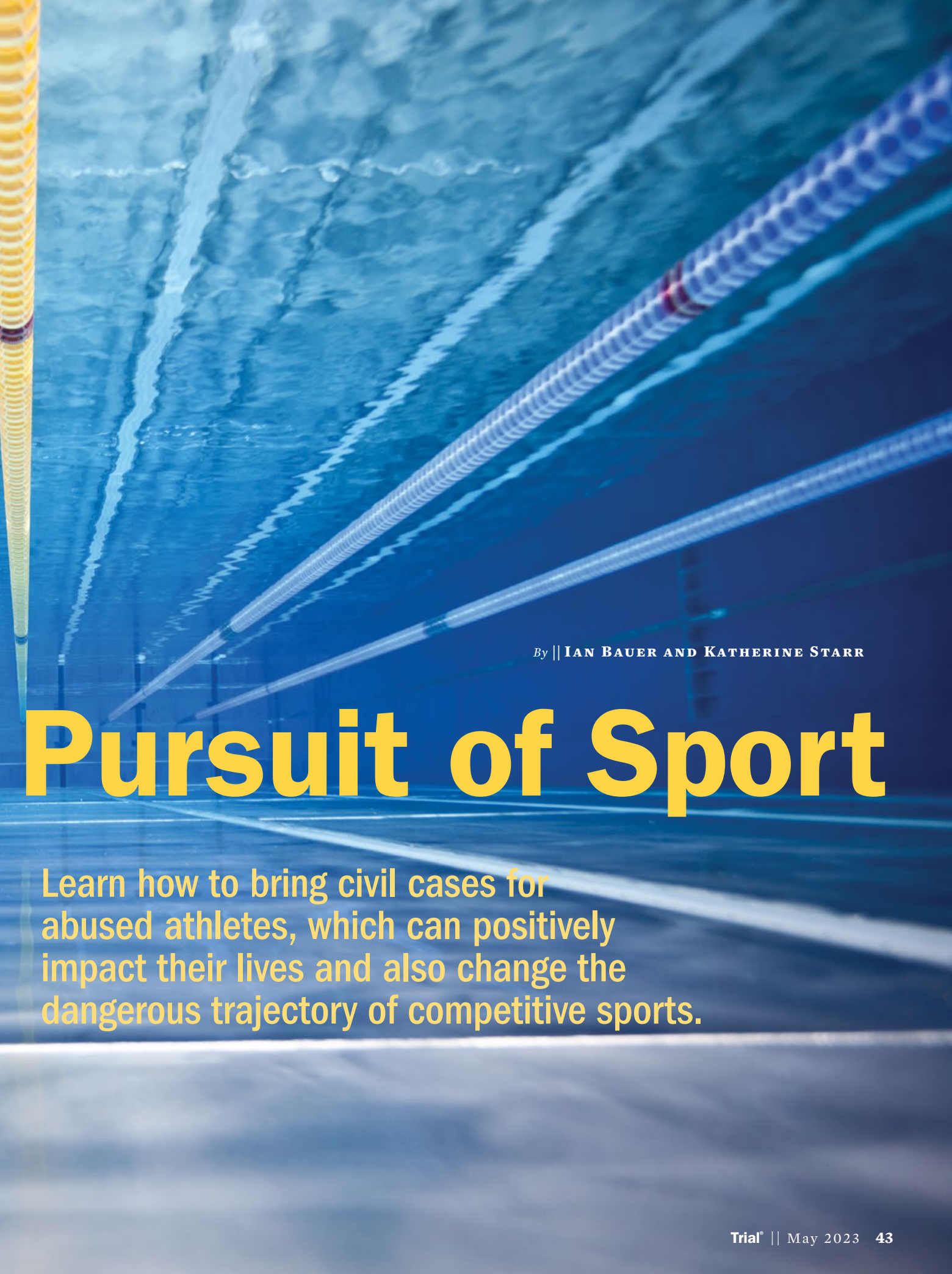

By || Ian Bauer and Katherine Starr

Pursuit of Sport

Learn how to bring civil cases for abused athletes, which can positively impact their lives and also change the dangerous trajectory of competitive sports.

Few things in life capture the collective attention, hopes, and dreams of our communities like competitive athletics. From the unbridled joy of watching your team win a championship to water cooler discussions about the quality of officiating, sports are central to the lives of countless people.

What has been ignored historically, however, is the impact of sporting glory on athletes. Coaches' abusive behaviors are tolerated or excused as simply the "price" to be paid if one wishes to achieve sporting excellence. What would be considered abuse in any other context is normalized and justified so long as titles and accolades follow. But this abusive behavior is not confined to elite and professional levels—it also occurs in youth, amateur, and collegiate athletics.

The Foundation for Global Sports Development notes that 2% to 20% of young athletes experience sexual harassment or abuse at the hands of coaches or authority figures in sport.[1] With an estimated 35 million children in the United States participating in organized sports annually, that translates to between 700,000 and 7 million children experiencing some form of sexual victimization annually.[2] And a multi-phase survey involving elite athletes found that more than 27% of female athletes experienced some form of sexual abuse,[3] while another study found that female and minority athletes face the greatest risk of harm.[4]

When an athlete approaches you after a coach has abused their authority, you need a thorough understanding of what standards apply and who can be held liable. Representing an abused athlete ensures that our clients get some measure of justice and helps make sporting environments safer for athletes of all ages and abilities.

A Power Imbalance

The pursuit of sports creates an imbalance of power between a coach and an athlete, given an athlete's determination to excel, the trust the athlete must place in their coach, and the coach's control over the sporting environment—control that may extend broadly into the athlete's life as they progress toward elite competition.

Predatory coaches require complete control over and loyalty of any bystanders—for example, parents, teammates, assistant coaches, and administrators. This level of control allows those coaches to methodically push the boundaries of the targeted athlete, testing the athlete's responses and reaction, without fear of disruption or meaningful oversight.[5]

Rarely is the abusive behavior a secret. Rather, the coach's temperament is known among the athletes and bystanders, some of whom may perceive success as flowing from objectively problematic coaching methodologies, even as others suffer. Lines are crossed when there is a lack of action and oversight within the team structure—and a lack of bystanders who will intercede.[6]

While these dynamics are at play across the entire spectrum of competitive sport, an athlete is most at risk of abuse right before they reach their competitive peak. In those sports where this peak occurs at an early age (such as gymnastics or swimming), the risk is increased because of the sexual immaturity of the athlete.[7] Child-athletes are particularly vulnerable because the trust placed in a coach can be near-total, by children and their parents. And at this stage of competitive development, classic grooming behaviors[8] have been historically tolerated as motivational or performance-enhancing techniques.[9]

Causes of Action

Based on the player-coach dynamics and bystander model discussed above, civil claims in cases involving coach misconduct are grounded in those special

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relationships between players, coaches, and the sports organizations responsible for overseeing player development and competition. These dynamics should always form the narrative and persuasive core of your case.

Claims against individuals. When asserting civil claims against a coach or other authority figure directly, the starting point for your analysis should be common law claims for assault,[10] battery,[11] and intentional infliction of emotional distress.[12] The nomenclature may be jurisdiction-specific (and there may be additional, viable claims), but these claims encompass a broad array of coach misconduct, including emotional abuse and manipulation, physical abuse, and sexual abuse.

When you take on a sports abuse case, start by asking your client how the coach exploited their hopes and dreams and how the coach weaponized the competitive environment. Don't simply identify the misconduct that occurred—contextualize it to convey the full narrative.

Claims against sports organizations. Do the same when considering common law negligence claims against sports organizations. Players and parents place a tremendous amount of trust in these organizations to create, nurture, and maintain a safe sporting environment. From screening to hiring and supervising coaches to ensuring the rules of play are adhered to, these organizations have the unique authority and responsibility to protect players from foreseeable harm.

As a general rule, there is no actionable duty to prevent a third party from harming another, but courts have recognized the existence of special, protective relationships in contexts when one party is entrusted with the safety and well-being of another or has the duty to control the actions of a third party.[13] Classic examples include the relationships between schools and their students, hotels and their guests, and hospitals and their patients.[14] Similarly, the common law recognizes that an entity's affirmative conduct may also give rise to a duty to protect third parties from foreseeable harm.[15]

When preparing claims against sports organizations, ask:

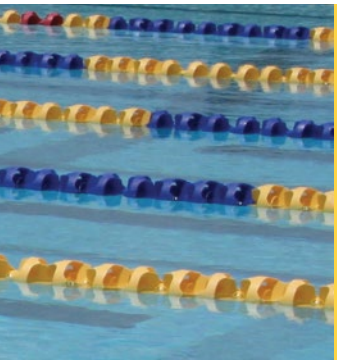
- What role did the organization have in ensuring that training and competition could occur in a safe environment for players?
- Was the organization responsible for screening, hiring, and supervising the coach?
- Did the organization receive warnings about a particular coach, or was it otherwise on notice of the coach's dangerous proclivities?
- Was the organization charged with establishing and enforcing standards applicable to coaches?

Focus on the organization's role and the fact that your client and other athletes trusted that the organization would act reasonably to ensure player safety.[16] Even elite athletes cannot be safe when the organizational and administrative authorities turn a blind eye to athlete safety.[17]

Statutory remedies. In addition to common law claims, many states have enacted statutory remedies that might apply in narrow circumstances, such as statutes creating liability for failure to report suspected child abuse[18] and strict liability for gender-based sexual harassment or assault.[19] Analyze the statutes in your jurisdiction, and keep an open mind. Even if courts have not extended a statutory claim to the factual circumstances of player-coach abuse, consider whether a good faith argument can be made for such an extension.

Federal claims. Also consider whether your client has viable federal claims. Though the complexity and broader scope of Title IX[20] are beyond the scope of this article, if gender-based harassment or abuse has occurred in an institution of higher education, carefully consider the procedures, protections, and remedies available under that statute.

Similarly, the Protecting Young Victims from Sexual Abuse and Safe



Focus on the sports organization's role and the fact that **your client and other athletes trusted that the organization would act reasonably** to ensure player safety.

Sport Authorization Act of 2017 strengthened federal protections for amateur athletes, imposing obligations on amateur sports organizations to protect players and creating the United States Center for SafeSport.[21] It also expanded the federal private cause of action under the Victims of Child Abuse Act of 1990 (18 U.S.C. §2258) to encompass failure to report suspected child abuse.[22] This statute may not provide redress for victims of historical abuse, but it can be invaluable as trial lawyers work to address the deeply rooted, entrenched issues surrounding abuse in sport.[23]

This statutory enactment, coupled with the subsequent abolition of the statute of limitations on federal civil claims,[24] demonstrates that establishing and safeguarding legal protections for children is and should be a bipartisan priority. Whether you find yourself advocating for broad application of legal principles in a particular case or supporting possible statutory amendments before your state legislature, these are powerful examples of how, all things being equal, as a matter of public policy we should err on the side of protecting survivors.

Framing the Case

Although abuse in sport has captured the public's attention in recent years, defendants in civil cases have sought to capitalize on this growing public awareness by claiming that abuse in sport is a newly understood concept. They typically claim that sports organizations historically did not have any reason to believe that athlete abuse was a concern, and that any standard of care was rudimentary, at best, until recent years. These tactics are a transparent attempt to excuse years of systemic, willful blindness on the part of sports organizations and administrators.

As with any case, work with your liability experts to articulate the applicable standard of care and identify the defendants' breaches. While historically there was no widespread adoption of standards and safeguards to protect players by sports organizations, don't let the defense characterize this phenomenon as evidence of an *absence* of a standard of care. Fundamental safeguards for athletes have been known, understood, and articulated for decades.

> Don't ask whether the sports organization knew about the dangerous proclivities of the coach at issue; rather, **ask whether the misconduct was *reasonably foreseeable*.**

Work with your liability expert to frame this absence of official standards as powerful, compelling evidence of the defendant's failure to take action; callous, shameful disregard for the health, safety, and well-being of athletes; and conflict of interest as they valued preserving the integrity of the organization over athlete safety.[25] Focus on that pattern of inaction, tolerance, and cover-up.

To accomplish this, your expert must look beyond any written policies the defendant and similar organizations have implemented. The expert should also consider

- instances of abuse within sport as a whole and in the context of your client's claims, to demonstrate the foreseeability of harm
- the culture of silence and competition in athletics, and how that culture is exploited by predators to isolate, manipulate, and groom players
- witnesses who vocalized the need for safeguards and protections within the context of sport as a whole *and* in the context of your client's case
- red flag behaviors on the part of the coach at issue in your client's case
- the culture and environment of the defendant organization, which may have fostered, tolerated, or excused abusive behavior, including an assessment of *why* the defendant failed to take protective action.[26]

Identify the standards that the defendant failed to adhere to and work with your liability expert to contextualize that failure within the long-standing tolerance of abuse in sport.

Additional Considerations

When evaluating potential claims against coaches and sports organizations, here are various other strategic considerations.

Jurisdiction-specific concerns. Does your state have a common law discovery rule, or statutory derivation thereof, specific to child sexual abuse victims?[27] If so, do you need expert testimony to establish any applicable tolling provisions that might apply?

Also carefully consider the strategic and narrative impact of naming both the abuser and responsible sports organization in the complaint. What are the relevant jurisdiction's rules regarding allocation or segregation of liability or damages between intentional

and negligent tortfeasors? Is there joint and several liability between the named defendants?

It is also typical for sports organizations in cases involving player-athlete abuse to point the finger at the victim's parents, blaming them for not protecting their child and perhaps identifying them as a nonparty at fault. This argument often fails given intrafamily tort immunity in many jurisdictions—negligence on the part of a parent is not actionable and cannot be imputed to the child.[28]

Jurors. What expectations will jurors have based on the particular facts and circumstances of the case? Will juror outrage focused on the abuser support or detract from the claims against the negligent sports organization?

Anticipate the classic deflection technique that institutional defendants use in all manner of abuse cases: "We didn't know [the abuser] was a danger." If the case's theories, themes, and discovery focus solely on what was known about the particular abuser, you are playing right into the defendant's hands. So don't pose the question as to whether the organization knew about the dangerous proclivities of the coach at issue, rather, ask whether the misconduct was *reasonably foreseeable*. Contextualize your client's case by presenting jurors with broader notice evidence (nationwide standards and practices), as well as what was known locally and within the organization itself.

Finally, work with your liability expert to educate jurors on the difference between permissible and abusive coaching methodologies. Provide jurors with the tools to advance your arguments in the jury room and to push back on those who see no wrong in coaches pushing the boundaries of appropriate behavior in the pursuit of success. Some jurors may have experience in and even embrace a "win at any cost" mentality on the field.[29]

Today's jurors are more aware of how abusers manipulate power dynamics in a variety of settings—from the boardroom to the casting couch to the playing field. Yet sports abuse cases remain difficult cases to pursue. Institutional defendants will fight tooth and nail, especially in the "pay to play" youth sporting environment where the organization's reputation and future revenue streams are contingent on public perception. But as trial lawyers, we must recognize that with proper planning, preparation, and execution, these cases can impact the lives of our clients and change the trajectory of sports as a whole.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Notes

1. Foundation for Global Sports Development, *Preventing Sexual Abuse in Sport*, https://globalsportsdevelopment.org/sexual-abuse-sport-prevention/. *See also, e.g.*, Celia H. Brackenridge et al., *The Characteristics of Sexual Abuse in Sport: A Multidimensional Scaling Analysis of Events Described in Media Reports*, 6 Int'l J. of Sport & Exercise Psychol. 385 (2008); Sandra Kirby & Guylaine Demers, *The Dome of Silence: Sexual Harassment and Abuse in Sport* (2000).
2. Foundation for Global Sports Development, *supra* note 1.
3. Katherine Starr, *Safe4Athletes: Survey on Types of Harassment in Sport*, Safe4Athletes, 2015, https://safe4athletes.org/safe4athletes-survery-results-understanding-types-of-harassment-in-sport/.
4. *See, e.g.*, Ingunn Bjørnseth & Attila Szabo, *Sexual Violence Against Children in Sports and Exercise: a Systematic Literature Review*, 27 J. of Child Sexual Abuse 365 (2018).
5. Note that predatory behavior is not necessarily limited to head coaches—assistant coaches and other peripheral members of a sports organization such as athletic trainers or physiologists can readily create this same atmosphere of control over matters within their dominion. In that scenario, the head coach becomes another bystander. *See, e.g.*, Katie Strang, *He Was a Friend, Confidant and Beloved Doctor. Now He is Accused of Sexually Abusing Athletes for Years*, The Athletic, Jan. 31, 2023, https://tinyurl.com/2m795kea.
6. This was the dynamic seen with the recent firing of University of California and former Olympic swimming coach Teri McKeever. *See Cal Fires Swim Coach McKeever Over Misconduct Allegations*, Assoc. Press, Jan. 31, 2023, https://tinyurl.com/bbm8hkdb.
7. *See also, e.g.*, Brackenridge et al., *supra* note 1; Kirby & Demers, *supra* note 1.
8. Classic grooming behaviors include a coach spending much more time with one particular athlete, adopting a very authoritarian attitude, exercising control over matters irrelevant to sport, being jealous of people the athlete socializes or is romantically involved with, and using (or threatening to use) physical violence if they disobey the coaches' commands.
9. Marianne Cense & Celia Brackenridge, *Temporal and Developmental Risk Factors for Sexual Harassment and Abuse in Sport*, 7 Eur. Phys. Ed. Rev. 1 (Feb. 2001). *See also* Sally Q. Yates, *Report of the Independent Investigation to the U.S. Soccer Federation Concerning Allegations of Abusive Behavior and Sexual Misconduct in Women's Professional Soccer* 96 (2022); Molly Hensley-Clancy, *Where Girls Compete but Men Rule*, Wash. Post, Nov. 18, 2022, https://www.washingtonpost.com/sports/2022/11/18/ecnl-girls-soccer-male-coaches/.
10. *The Restatement (Second) of Torts* §21(1) (Am. Law Inst. 1965) ("An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.").
11. *Id.* at §13 ("An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results."); *id.* at §18(1) ("An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive

contact with the person of the other directly or indirectly results.").

12. *The Restatement (Third) of Torts* §46 (Am. Law Inst. 2012) ("An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.").
13. *The Restatement (Second) of Torts* at §315 ("There is no duty to so control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."). *See also, e.g.*, *N.L. v. Bethel Sch. Dist.*, 378 P.3d 162, 167 (Wash. 2016) (a school district had a duty to protect a student from an older student who was a known sex offender); *Bradshaw v. Daniel*, 854 S.W.2d 865, 871–72 (Tenn. 1993) (recognizing the duty of a physician to foreseeable third parties with respect to risks associated with the spread of contagious diseases, analogizing to *Tarasoff* and citing similar cases in various jurisdictions); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976) (the relationship between mental health professionals and an outpatient client was sufficient enough to impose an affirmative duty to protect the foreseeable victims of their patients).
14. *See The Restatement (Second) of Torts* §314A (identifying examples of special relationships giving rise to duty to aid or protect). *See also, e.g.*, *Gross v. Fam. Servs. Agency, Inc.*, 716 So. 2d 337, 338–39 (Fla. 1998) ("Among the recognized 'special relationships' where defendants have been held liable for failure to exercise reasonable care when injuries have actually been inflicted by third parties are employer-employee; landlord-tenant; landowner-invitee; and school-minor student.") (citations omitted); *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 255 P.2d 360, 362 (Wash. 1953) (schools have a duty to protect students in their custody from reasonably anticipated dangers).
15. *The Restatement (Second) of Torts* §302(b) ("A negligent act or omission may be one which involves an unreasonable risk of harm to another through . . . the foreseeable action of . . . a third person[.]"); *id.* at §302 B ("An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.").
16. Of course, if your client was a child at the time of the underlying events, your client's parents (or guardians) also would have placed this trust in the organization.
17. *See, e.g.*, Lauren Fleshman, *Good for a Girl: A Woman Running in a Man's World* (2023); Sally Q. Yates, *supra* note 9 at 37; *A Case-Study of Systemic Abuse in Sports Perpetrated by Larry Nassar*, Game Over Comm'n to Protect Youth Athletes 72 (2022).
18. While all states have mandatory child abuse reporting laws, only some states provide for both criminal and civil liability for failure to make a report. *See, e.g.*, N.Y. Soc. Serv. Law §420(2) (McKinney 1973) ("Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure."); Colo. Rev. Stat. §19-3-304(4)(b) (2023) ("Any person who willfully [fails to make a mandated report of child abuse] [s]hall be liable for damages proximately caused thereby.").
19. *See, e.g.*, *W.H. v. Olympia Sch. Dist.*, 465 P.3d 322, 324 (Wash. 2020) (en banc) (recognizing that, under the Washington Law Against Discrimination, RCW 49.60, "places of public accommodation" are strictly liable for the discriminatory acts of their agents, including sexual harassment and abuse); *Floeting v. Group Health Coop.*, 434 P.3d 39, 45 (Wash. 2019) (en banc) (same).
20. 20 U.S.C. §1681 (1986). For more on Title IX, see Irene Lax & Sam Mukiibi, *Failure on Campus—Litigating Title IX*, Trial, Sept. 2022, at 44; Jill Zwagerman & Lori Bullock, *An Unequal Playing Field*, Trial, Oct. 2021, at 32; Adele Kimmel & Alexandra Brodsky, *A Step Back for Student Sexual Harassment Claimants*, Trial News, Oct. 9, 2020.
21. *See* 36 U.S.C. §220530 (2020).
22. *Id.* at §220530(a)(1).
23. *See, e.g.*, Fleshman, *supra* note 17; Yates, *supra* note 9; *A Case-Study of Systemic Abuse in Sports Perpetrated by Larry Nassar*, *supra* note 17.
24. *See* The Eliminating Limits to Justice for Child Sex Abuse Victims Act of 2022, Pub. L. 117–176, 136 Stat. 2108 (Sept. 16, 2022).
25. This practice also has been widely reported in the educational system, where teachers who have engaged in misconduct are encouraged to seek other employment in exchange for non-referral to authorities and a neutral employment reference. *See, e.g.*, Katrina Homel, *Legally Speaking: "Pass the Trash" Update: One Year Later*, 50 Sch. Leader 1, 12 (Jul./Aug. 2019), https://tinyurl.com/2kemhnaw.
26. Consider the persuasive impact of this assessment. The jury will want to know why an organization tolerated the misconduct and abuse at issue in your case. Were the people in charge complicit or compromised in some way? Were they engaging in similar misconduct? Developing evidence of such a culture is imperative, where it exists.
27. *See, e.g.*, ChildUSA, *Statute of Limitations Tracker*, https://www.childusa.org/law; Nat'l Conf. of State Legislatures, *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, https://www.ncsl.org/human-services/state-civil-statutes-of-limitations-in-child-sexual-abuse-cases.
28. Many jurisdictions use some form of intrafamily parental immunity for negligence claims to protect and promote family harmony and tranquility, such that tort liability does not arise from traditional parenting decisions. However, gross negligence and intentional conduct are often treated differently. Again, it is imperative that you familiarize yourself with the particular immunity and standards that may apply in your jurisdiction. *See, e.g.*, *Zellmer v. Zellmer*, 188 P.3d 497, 501 (Wash. 2008) ("There now appears to be nearly universal consensus that children may sue their parents for personal injuries caused by intentionally wrongful conduct. However, the overwhelming majority of jurisdictions hold parents are not liable for negligent supervision of their child, whether stated in terms of a limited parental immunity [. . .], parental privilege [. . .], or lack of an actionable parental duty to supervise.") (internal footnote and citations omitted). *Contra, e.g.*, *Gibson v. Gibson*, 479 P.2d 648, 652–53 (Cal. 1971) (abrogating the "legal deadwood" of parental immunity; "We reject the implication [. . .] that "the parent has *carte blanche* to act negligently toward his child.").
29. *See, e.g.*, Jeff Carlisle, *Berhalter vs. Reyna Explained: Does the Drama Trace its Roots to Overbearing Parents in the U.S.?*, ESPN, Jan. 12, 2023, https://www.espn.com/soccer/united-states-usa/story/4850423/berhalter-reyna-explained-drama-owes-to-overbearing-parents; Emine Saner, *Are Pushy Parents Putting Children Off Sport?*, The Guardian, Sept. 12, 2015, https://www.theguardian.com/sport/2015/sep/12/are-pushy-parents-putting-children-off-sport.