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MANAGING TOXIC CAMPUS CONDUCT: LEGAL AND STRATEGIC IMPERATIVES

OFFICE OF THE VICE PRESIDENT FOR INTERCULTURAL AFFAIRS

Pathways to Inclusive Excellence

MANAGING TOXIC CAMPUS CONDUCT: LEGAL AND STRATEGIC IMPERATIVES

REQUIRED READING

A. Jonathan R. Alger (2008). Legal Issues for Academic Leaders. *Effective Practices for Academic Leaders*, 3(2), 1-16.

B. Rinehart, K.A. and Babbitt, E.M. (June 29, 2011). *Conflict Coaching 2.0: Advanced Strategies and Skills for Supervisors to Manage Troublesome Campus Conflict*. National Association of College and University Attorneys (NACUA) Annual Conference. San Francisco: CA

STUDY QUESTIONS

Essay Questions

1. In academia, what are critical features of executive decision-making and organizational approach that create and maintain values-based work environments to support institutional mission?

2. What factors escalate campus conflict? What are the three "tools" that higher education institutions can leverage to promote a culture of supervisory effectiveness before conflicts degenerate into sources of serious legal risk?

3. What are some of the non-legal consequences of failing to respond promptly and appropriately to misconduct?

4. List and describe the four essentials that are important to keep in mind when selecting a form of dispute resolution?

LEGAL ISSUES FOR ACADEMIC LEADERS

JONATHAN R. ALGER

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About the Author

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Executive Summary

Colleges and universities are subject to increasing litigation, legislation, and regulation on a myriad of issues. The law affects virtually every aspect of academic life. Thus, academic leaders must possess an adequate familiarity with the law to know when and where to go when legal issues or complaints arise. They must also understand the different sources of law to which they are subject (e.g., federal, state, local). For example, public and private institutions have many similarities and are treated the same under many statutes but are not always subject to the same legal parameters. Furthermore, academic leaders must be conscious of the ways in which an institution's own promises, policies, and procedures can create expectations that may be legally binding and enforceable.

This briefing provides an overview of some of the most significant issues facing academic leaders today: academic freedom and free expression, faculty searches, promotion and tenure, discrimination, contracts, intellectual property, conflicts of interest and commitment, e-mail, student records, and managing the student-institutional relationship. The intent is not to provide legal advice but to raise awareness of key legal issues and how and when they may arise. The

briefing concludes with general recommendations regarding how to work with institutional counsel, who can be a key partner in helping academic leaders avoid or manage legal risks and liability.

INTRODUCTION

As a general counsel for a university, I am often asked by people outside the academy, Why do colleges and universities need lawyers? The implication of the question is that the ivory tower is simply a quiet, reflective place where people gather to study, discuss, and debate ideas. Academic leaders such as presidents, provosts, deans, and department chairs quickly realize, however, that legal issues permeate every aspect of academic life. Such leaders today must have a basic familiarity with a wide variety of legal principles and issues-or at least be able to identify situations and decisions with possible legal implications so that they can get the legal support they need when they need it.

Trends toward increased litigation and regulation in our society are reflected in higher education on a myriad of fronts. Higher education law is now a full-fledged legal specialty with its own large and growing national organization. Since its inception in 1960-61, the National Association of College and University Attorneys (NACUA) has grown from just a handful of institutions and a small group of attorneys to an organization with more than *3,500* attorneys representing about 700 institutions (and nearly *1,500* campuses) as it approaches the fiftieth anniversary of its founding (National Association of College and University Attorneys, http:/ /www.nacua.org/).

So why are all these lawyers necessary (insert your own lawyer joke here), and what do they do? As entities that (among other things) employ people in a wide variety of job classifications, enroll students of all ages and backgrounds, build and operate many different kinds of facilities, enter contracts for goods and services of all kinds (ranging from pencils and paper clips to extremely sophisticated scientific equipment and professional consultants such as architects and financial advisors), and welcome visitors onto their campuses throughout the year for a wide array of activities and events, colleges and universities are subject to a dizzying variety of laws and regulations. The list of legal issues that

academic leaders may encounter is ever changing and expanding. Therefore, this briefing touches on only the most prominent legal issues that academic leaders face on a regular basis.

In reviewing these issues, readers should keep in mind that some significant sources of law (such as constitutional law and various aspects of state law) apply only to public institutions, whereas many others (such as federal discrimination statutes) apply to public and private institutions alike. Other institution-specific policies and procedures can create contractual obligations that may be legally enforceable, such as collective bargaining agreements, faculty or student handbooks, or other university policies.

The information provided herein should not be construed as legal advice but, rather, as background information that may assist readers in asking campus counsel for further information when needed.

ACADEMIC FREEDOM AND FREE EXPRESSION

Some of the most controversial issues in higher education law involve the extent and limits of academic freedom and free expression. These are treasured concepts that undergird the educational mission, but they are also widely misunderstood. Academic freedom and free expression (-as protected by the First Amendment) are not identical, but they are related. Academic leaders must understand these principles and be prepared to defend them even in the heat of public controversy, while also acknowledging the limits of these principles and the types of responses that may be appropriate to address offensive or inappropriate expression on campus.

Academic freedom is a principle that protects expression and decision making related directly to the educational mission. There is a general principle of institutional academic freedom under which educational judgments of colleges and universities are entitled to deference from outside decision makers such as legislators and courts (also called institutional autonomy), and there are related but separate principles of academic freedom for individual faculty members and students in the educational context (Rabban, 1990).

Institutional academic freedom entails the freedom to determine who may teach, what may be taught, how the subject matter will be taught, and who may be admitted to study. It was first recognized by the U.S. Supreme Court in 1957 in a concurring opinion of Justice Frankfurter in the case of *Sweezy v. New Hampshire* (1957) (which has since been cited in many subsequent opinions). This principle can come into play whenever academic (rather than legal) judgments are at the heart of a decision-such as the criteria for admissions at an institution, grading, or evaluation of a faculty member for tenure.

Academic freedom for faculty is most famously summarized in the American Association of University Professors' Effective long-standing seminal statement on the subject, endorsed by many leading higher education organizations, which conspicuously recognizes that academic freedom entails responsibilities as well as rights *(1940 Statement of Principles).* With regard to teaching, for example, the 1940 Statement says the following: 'Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject" (p. 3).

The speech of a military history professor in the classroom about the nation's policy on torture of enemy combatants may be relevant to the subject matter of her course, but her continual commentary in that same classroom about the Catholic church's position on abortion involves a controversial topic that is not likely to be related to the subject matter and may therefore fall outside the scope of academic freedom protection. Similarly, a biology professor who refuses to teach the theory of evolution can be held responsible for teaching the curriculum deemed essential to a core introductory course by his departmental colleagues.

Academic freedom also applies to research, but once again it is not unlimited-and with this important right comes responsibility. As summarized in the 194·0 Statement, "Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other

academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution" (p. 3). Thus, professors cannot neglect their other responsibilities in the name of research, and they should disclose funding arrangements to ensure that the integrity of research is not compromised by financial or other interests. What about-a faculty member's speech outside the classroom? Once again, the 1940 Statement provides helpful guidance:

College and university teachers are citizens, members if a learned profession and Officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions if others, and should make every effort to indicate that they are not speaking for the institution (pp. 3-4).

Academic freedom is an academic norm that applies to public and private institutions, and many colleges and universities enshrine the 1940 Statement (or some variation thereof) into their own institutional policies. If they create strong, clear expectations in their policies that purport to guarantee academic freedom rights, private as well as public institutions may have enforceable obligations as a matter of contract law.

Religiously Affiliated Institutions

Often the question arises as to whether religiously affiliated institutions have a different set of obligations with regard to academic freedom, based on the faith traditions with which they are associated. As private entities, these institutions (as noted subsequently) are not subject to the First Amendment. They therefore have some latitude as a matter of policy to determine how they will treat expression on campus when it relates to their religious affiliation or the tenets of the relevant faith tradition. Regarding faculty members and how and what they teach, however, the 1940 Statement asserts that "limitations of

academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment" (*1940 Statement if Principles,* p. 3). In other words, professors should be fully apprised of the expectations of a religiously affiliated institution from the outset; the rules should not be established midstream after someone makes a controversial statement.

First Amendment

While academic freedom is a norm of educational institutions, the First Amendment of the U.S. Constitution protects the free expression of individuals on all topics (not just those that are related to education)-but only vis-a-vis *public* institutions. Individuals at *private* schools do not enjoy protections under the First Amendment with respect to those private institutions because the First Amendment does not apply to the actions or decisions of private, nongovernmental entities. Other sources of law or policy (as noted previously with reference to institutional policies, faculty or student handbooks, collective bargaining agreements, state law, etc.), however, may recognize and protect academic freedom and/ or free expression. For example, California has passed a statute known as the "Leonard Law" that requires private colleges in that state to follow the same standards regarding free expression as apply to public colleges under the First Amendment (Calif. Educ. Code § 94367).

For employees at public institutions, First Amendment protections extend only to speech on matters of public concern-not purely private or personal grievances (Kaplin & Lee 2006, pp. 605-613). Thus, a professor's speech about the college's admissions policy may be protected, but not his tirades about why he believes the department chair is mean or unfair to him personally. Furthermore, a public institution may act to address expression where it reasonably believes that the expression disrupts the learning environment (p. 608). The learning environment in higher education is expected to be a marketplace of ideas, however, so the mere fact that a faculty member's speech on relevant educational subject matter is offensive or provocative is not sufficient reason to discipline that individual. On the other hand, the professor can be disciplined if he claims

to be exercising his free expression rights by protesting university policy through refusing to show up for class or by disrupting classes taught by others.

Under federal case law, the role of the speaker and the context of expression must be considered. An academic leader must be clear when he or she is speaking on behalf of the institution, school, or department-as contrasted with speaking purely as an individual faculty member (*Jeffries v. Harleston,* 1995, p. 14). When speaking as an administrator on behalf of the institution or one of its component units, a president, provost, dean, or department chair does not have unfettered free speech rights; she is representing the institution, and listeners will likely impute the content of her speech to the institution. Accordingly, an administrative leadership role carries with it the responsibility to represent the interests of the institution in that role. Public criticism of one's institution's decisions or policies in such a role may not be legally protected.

Although individual faculty members without such administrative responsibilities may not ordinarily be perceived as speaking on behalf of their institution, they must take care to recognize their special status in the public's eyes and to be clear that their expression is not on behalf of their institution (*1940 Statement of Principles,* pp. 3-4).

What about academic freedom protections for grading? The cases on this subject generally distinguish between a faculty member's nondiscriminatory, good-faith evaluation of a student's work product (which is a protected form of expression) and the administration's right to make the final determination on what grade the student will receive on her transcript (Kaplin & Lee, 2006, pp. 644-648).

Thus, academic freedom is not unlimited. It en tails responsibilities as well as rights, and it does not protect conduct that disrupts the educational environment and undermines the educational mission. Conduct that constitutes harassment or discrimination, for example, can and must be addressed (as discussed later).

The Rights of Students

Students also enjoy free speech rights in the educational context (keep in mind the public/private distinction noted earlier regarding formal protection under constitutional law), but here too the law has limits. Students are permitted to express their own points of view in class or in their assignments- even if they disagree with the professor-but they must not disrupt the learning environment, and they can be held responsible for learning the content of a course *(Joint Statement,* p. 274). Thus, an individual student in a science class may not be required to affirm a belief in a particular scientific theory of creation but may be required to explain scientific theories regarding the origin of the planet or of particular species—even if the student disagrees with these theories.

FACULTY SEARCHES

At many institutions of higher education, decisions about hiring (especially regarding faculty and academic staff) are heavily decentralized. Departments and units often have primary authority and responsibility for determining what positions they want to fill, defining the criteria for those positions, and conducting the actual searches. In describing the nature of personnel decisions about faculty, Steven Poskanzer describes the process and the primacy of the faculty role as follows: 'While chairs, deans, provosts, and presidents (themselves typically holders of faculty rank) must approve such actions, most of the critical steps in these processes deciding whom to interview, whom to invite back for further consideration, whom to offer a position to, whom to reappoint, and whom to recommend for tenure--are largely controlled by the faculty of the affected unit" (Poskanzer, 2002, p. 144). While the law provides wide latitude for academic judgment when it comes to the criteria used to identify and evaluate candidates for faculty positions, there are still plenty of legal dos and don'ts when it comes to the hiring process.

Charges of discrimination are probably the most significant legal concern in the hiring of faculty. Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.)* prohibits discrimination on the basis of race, color, religion, sex, or

national origin at both public and private colleges and universities. Institutions that receive $10,000 or more in federal government contracts must also comply with Executive Order 11246 (Exec. Order No. 11246), which requires the filing of annual compliance reports with the federal government. In addition, colleges and universities must comply with federal statutes prohibiting discrimination on the basis of age and disability (discussed later). State and local laws may prohibit other forms of discrimination, such as on the basis of sexual orientation. In addition, many institutions have policies that prohibit forms of discrimination that go beyond the requirements of federal or even state law.

Many institutions also have affirmative action-related, antinepotism, and equal employment opportunity policies that govern at least some basics of the hiring process. The law does not require a national search for every position, but cutting corners and resorting to the "old boys' network" to hire friends and associates of existing faculty can lead to allegations of favoritism and discrimination.

One of the most frequently asked questions regarding the hiring of faculty is: Can characteristics such as race or gender be taken into account in order to diversify the faculty ranks at an institution, and if so, to what extent? While the law has addressed this question squarely in the student admissions context (upholding the educational benefits of a diverse student body as a compelling interest that can justify the consideration of race in certain circumstances) (*Grutter v. Bollinger,* 2003), it is much less clear when it comes to the hiring of faculty. Existing case law suggests that institutions may be able to take race or gender into account when there is a "manifest imbalance" with regard to particular groups in a "traditionally segregated" job category *(Johnson v. Transportation Agency, Santa Clara County,* 1987, p. 631). Reliance on this standard requires rigorous statistical analysis of current employment figures against the relevant labor pool. In the case of faculty members~ this means comparing current employment numbers (e.g., of women faculty or faculty of color in a particular department) with the pool of potentially available applicants in that particular discipline. Plans developed on this basis must not "unnecessarily trammel" the interests of other employees, or create an "absolute bar" to their

advancement (*Johnson v. Transportation Agency*, 1987, pp. 637-638). Any such plans must also be temporary, so as to eliminate the manifest imbalance, but not permanent, so as to maintain a particular racial or gender balance (*Johnson v. Transportation Agency*, 1987, pp. 639-640).

More generally, however, we know from a legal perspective that the more we do at the outset of the hiring process to expand the applicant pool so as to maximize its diversity, the better (Alger, 2008, p. 3). In developing descriptions of positions, for example, some basic strategies that can help to diversify the pool in a legally appropriate way include the following:

- Tie the description closely to the actual experience, expertise, and skills needed for the position, and then be consistent in applying those criteria throughout the process.
- Think beyond the immediacy of current needs (e.g., the need to offer a particular course in the next semester), and whenever possible focus instead on long-term needs related to the position and department.
- Consider non-race-based criteria such as the ability to work with diverse students or colleagues, or experience with a variety of teaching methods and curricular perspectives.
- Think about possibilities for interdisciplinary work, which could broaden the applicant pool.
- Do not delineate narrow or overly stringent criteria (e.g., requiring a certain number of years of experience) that are not necessary for the position and that could discourage whole categories of otherwise promising applicants from applying.

At each step of the process, institutions can stop and check the diversity of the applicant pool to ensure that they are doing everything possible to attract a wide variety of candidates. Studies have demonstrated that the best way to

increase faculty diversity is to "interrupt the usual" by steps such as changing the typical composition of search committees or providing training or other resources to such committees (Turner, 2003).

During the search process, questions and comments that reflect stereotypes or assumptions based on race, gender, or other similar characteristics should be avoided. Questions should be focused on the actual job qualifications required and should give all candidates the opportunity to explain their own circumstances. Professional expertise should not be equated with one's race or gender; for example, one should not assume that only an African American can teach African American literature, or that only a woman can teach a course on the role of women in politics.

Another method used to break out of the traditional hiring mold is to use so-called target-of-opportunity hires in which institutions affirmatively seek out specific outstanding candidates instead of relying on open-ended searches. This approach can be most helpful when it incorporates a broad definition of diversity-ideally incorporating considerations that go well beyond just race and gender so as to include unusual scholarly achievements, demonstrated experience and expertise with a variety of students and pedagogical techniques, or other special factors that will truly expand the diversity and excellence of the faculty (Alger, 2008, p .9).

Finally, individuals involved in the hiring process need to be aware of any applicable state law that might affect the factors that they are allowed to consider, For example, as a result of state ballot initiatives, California, Washington, and Michigan all prohibit the consideration of race or gender in most voluntary (nonremedial) decision making by public higher education institutions.

PROMOTION AND TENURE

The system by which colleges and universities award promotions and tenure is substantially a creation of academic norms, not of the law. The law does not dictate what criteria will be used in tenure decisions, nor does it specify how or when tenure decisions should be made. Thus, academic leaders must familiarize themselves with their own institutional policies and procedures regarding the handling of tenure and promotion decisions.

Perhaps the most important point from a legal perspective is to follow one's institutional procedures carefully and consistently, especially in situations in which tenure or promotions are denied. The criteria enumerated in a policy should match the criteria actually used. The same holds true for the materials and references considered-practice should follow policy and be consistent *(Good Practice,* 2000, p. 8). Academic leaders should be on the lookout for vague references to "collegiality" or "fit" where such criteria are not otherwise mentioned in institutional policies, as these sorts of subjective criteria can easily become smokescreens for subtle forms of discrimination.

From a legal perspective, regular, consistent, and candid communications on the criteria and process from the time individuals are first hired can be tremendously helpful in reducing misunderstandings and the eventual likelihood of legal action. Institutions can also reduce legal liability by taking special care to treat unsuccessful tenure candidates with professionalism and decency (e.g., by assisting them in finding another position that is suitable) *(Good Practice,* 2000, p. 23).

Academic leaders must also not fall into the trap of believing that everything they do in the tenure or promotion process is cloaked with permanent and unassailable secrecy. The reality is that tenure review files can be discoverable in litigation (e.g., when someone alleges discrimination on the basis of race or gender) *(Access to Faculty Personnel Files,* 1992, p. 67). Accordingly, while it is important to be candid in assessing candidates for promotion and tenure, academic leaders should encourage their colleagues to strive to ensure

that all written appraisals are carefully tied to facts and to the relevant, delineated standards at issue. References to race, gender, or other protected classifications generally have no place in such assessments.

KEY DISCRIMINATION ISSUES

As noted, allegations of discrimination are among the most feared and disruptive claims faced by academic leaders on a regular basis. Complaints of possible discrimination with regard to how people are treated can arise in the context of any actions or decisions affecting terms or conditions of employment (e.g., in tenure and promotions, pay raises, work assignments). When discrimination allegations arise, academic leaders must stay calm and resolve not to internalize such claims or to take them personally. A few key discrimination issues are discussed next.

Harassment

Harassment is a form of discrimination that can take many different forms. Institutions are responsible for protecting employees and students from harassment by others within the campus community. If an academic leader is made aware of an allegation of sexual, racial, or other form of harassment within the institution, it is his or her responsibility to report it to the appropriate campus office for further investigation and review. Although it is tempting at times to offer complete confidentiality, the reality is that notice of such an allegation to an academic leader in some position of authority could be imputed to the institution as a whole. Deans and department chairs should not try to substitute their judgment for that of the trained professionals who deal with these issues regularly. Academic leaders can help their schools and departments by insisting on regular educational programs on this topic; such training has been found to be relevant and important in helping to limit an institution's liability.

Disabilities

More and more faculty, staff, and students are requesting accommodations for various physical and mental disabilities. Deans and department chairs need to be aware of the appropriate points of contact within their institutions when such requests are made. The law protects individuals with disabilities that impair a major life activity (such as walking or seeing), and who (with Or without a reasonable accommodation) are otherwise qualified to perform the work expected of them as a student or an employee (Americans With Disabilities Act of 1990; Section 504 of the Rehabilitation Act of 1973). Accommodations can take many different forms as long as they are reasonable and effective; an individual is not necessarily entitled to his or her first choice accommodation. Institutions do not need to waive essential program requirements or essential functions of a particular job.

Religion

As institutions become more diverse on multiple fronts, more claims for accommodation of varying religious beliefs are also coming forward (such as scheduling accommodations for religious observances). Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief' (42 U.S.C. § 2000e-2[e][2]). Even the most well-educated and enlightened leaders in higher education may be unaware of the tenets of less familiar religions. When requests for religious accommodations arise, the law generally requires that the accommodations be reasonable--taking into account the burdens imposed on the institution (Weitzner, 2006, p. 19). While it may certainly be appropriate to discuss and document the need for a particular religious accommodation, it is generally not a good idea for secular institutions to question the sincerity of an individual's professed religious belief. Private, religiously affiliated institutions, however, may take religion into account in the employment context in order to further their religious missions (Kaplin & Lee, 2006, pp. 456-457).

Pay Equity

Deans and department chairs may occasionally get complaints about pay equity based on gender or race among faculty in a particular department. Analyses of such allegations should take into account the many factors that go into salary determinations (including criteria for promotions and merit increases, and differences in levels of experience and productivity) (see generally West & Curtis, 2006). Institutions should also review the impact of their practices with regard to addressing institutions.

Age Discrimination

The federal Age Discrimination m Employment Act (ADEA) prohibits to persons who are at least 40 years old (29 U.S.C. § 621 *et seq.).* State laws can go even further, however, in preventing age discrimination against individuals regardless of age.

The ADEA applies to both public and private institutions and prohibits mandatory retirement for most employees, whether tenured or not. The ADEA also regulates early retirement incentive programs (Kaplin & Lee, 2006, pp. 432-4.3.3). The requirements of the ADEA for the design and implementation of early retirement programs are complex, so it is essential that academic leaders work closely with counsel before offering any such packages to groups of employees. In many instances, however, tailored retirement packages can be developed for individual employees by focusing on the specific needs and circumstances of those individuals.

Emerging Issues

Discrimination law is continually changing as new forms of discrimination are recognized and codified at the federal, state, and institutional levels. For example, issues related to transgender status and gender identity are becoming more prevalent in higher education, and many institutions have moved to include such categories in their antidiscrimination policies. Even though federal law does not currently address the subject, sexual orientation is included in

many college and university antidiscrimination policies. Academic leaders should be aware of the specific forms of discrimination prohibited at their institution as a matter of law and institutional policy, and they should ensure that those who report to them know whom to go to if and when they believe that they have been subjected to such discrimination.

Retaliation

Academic leaders must be especially careful not to retaliate against individuals who file discrimination claims. Such retaliation is considered a separate claim under most discrimination statutes, and individuals can successfully sue for retaliation even if they lose on the merits of their underlying discrimination complaints (Kaplin & Lee, 2006, pp. 1482-1484). Thus, if and when discrimination claims arise, it is a good idea to remind all individuals with supervisory authority vis-à-vis the complainant in writing that retaliation is against the law and will not be tolerated.

SIGNING OF CONTRACTS

Many academic institutions are highly decentralized, with various schools and units being responsible for their own budgets, sources of funding, and other business relationships: In an era of tightening budgets, there is often significant pressure on academic units to be entrepreneurial and to seek business partnerships with outside entities. Academic leaders who are asked to sign contracts must be aware of whether and to what extent (if any) they have signatory authority for such contracts- and if not, where to send such contracts for review and approval. This is critical from the institution's perspective, because to the outside world a dean or department chair might appear to have "apparent authority" to sign such agreements. Even if a document is called a memorandum of understanding, a letter of agreement, or some other such name, it could still be a binding contract if it creates enforceable expectations and obligations on both sides. When in doubt, therefore, academic leaders should check with legal counsel to determine who has the authority to sign such agreements.

INTELLECTUAL PROPERTY

In this age of information and rapid technological advancement, academic leaders need to be familiar~ with basic principles of intellectual property ownership and use, especially since institutions of higher education and their constituents are primary creators and users of intellectual property. The law applies to many more everyday work products than most people realize. It surprises many people to learn that intellectual property law is grounded in the U.S. Constitution, which authorizes Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective· writings and discoveries" (art. I, § 8, cl. 8). In other words, the fundamental purpose of intellectual property law is first and foremost to promote the advancement of knowledge and the dissemination of ideas-not to protect the economic interests of authors and inventors. Instead, the rights of creators are protected as a means to a greater societal end that itself reflects and reinforces the educational mission.

Copyright

Copyright law protects "original works of authorship fixed in any tangible medium of expression" (Copyright Act, 17 U.S.C. § 102). The tangible medium can take many different forms, such as a traditional paper copy, a recording, or some digital format.

Such works are protected from the moment of creation and fixation in the tangible medium. You do not need to file a form with the federal government or even put a copyright notice on a work to protect it. The requirement of originality is not based on the quality or sophistication of the work; a really bad poem, a poorly written article, or a sloppily done painting can all be protected by copyright as long as each one possesses some modicum of originality. Copyright law does have its limits, however. It does not protect facts (although compilations of facts may be protected insofar as they are arranged with sufficient originality) or ideas in and of themselves. After all, if ideas themselves

were protected, individual authors would essentially be able to lock up discussion of whole topics and theories.

The term of copyright protection has steadily expanded; the ordinary rule now is that works are protected under copyright law for the life of the owner plus 70 years. As a rule of thumb, lawyers will generally tell you that works created before 1923 are in the "public domain" and therefore free for all to use--but that one cannot make that assumption about works created later absent further information (Darley, Zanna, & Roediger, 2004, p. 225). The mere fact that a work can be found on the Internet does not make it part of the public domain, although some works are marked with special notices clarifying that they can be copied or otherwise disseminated freely.

Ownership

Under copyright law generally, the creator of the work is the owner-but one's employer is considered the owner of a "work for hire" created within the scope of one's employment (Darley et al., 2004, pp. 22936). Nevertheless, to protect academic freedom and in keeping with academic norms, most college and university policies acknowledge that faculty members own the rights to traditional scholarly works such as articles and books-absent some use of unusual institutional resources or other specific agreement to the contrary (p. 230). Works created specifically for a particular institutional use, however, would ordinarily be considered to be owned by the institution.

With ownership comes responsibility. The copyright owner has a "bundle of rights" (e.g., the right to copy, reproduce, distribute, perform, display, or add to the work) that can be shared with (or transferred to) other parties in whole or in part. Faculty members routinely sign publishing agreements that give away most or all of their rights. Deans and department chairs may want to encourage faculty-especially junior colleagues who are anxious to get their works published and who may be unfamiliar with the ramifications of signing away all of their rights-to preserve some rights for themselves and their institutions (e.g., the right

for themselves or their institutional colleagues to use their works in their own classroom teaching or when giving scholarly presentations).

Academic leaders must also understand that students are considered the owners of copyrightable works that they create in their capacity as students, which in turn must be distinguished from works that students might create in an employment capacity if they also serve as employees of the institution (e.g., graduate students who have teaching or other related responsibilities) (Darley et al., 2004, p. 237). That means faculty members who work with graduate or undergraduate students need to be clear about their expectations on projects when tangible work products (such as scholarly articles) are produced.

It is worth noting also that violation of copyright and plagiarism are not the same. Plagiarism is based on academic norms related to appropriate citation of other works, whereas copyright deals with the protection and use of works of authorship. Academic leaders must understand that one can avoid plagiarism by providing appropriate citations to other sources but still face charges of copyright violations.

Fair Use

Institutions of higher education rely on the ability to use materials from a wide variety of sources for teaching and research purposes. Fortunately, copyright law recognizes an exception to the monopoly rights granted to copyright owners through the concept of "fair use." Section 107 of the Copyright Act states, "The fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright" (17 U.S.C. § 107). The statute lists four factors that must be considered in determining whether a particular use is "fair" and therefore does not require permission from the copyright owner:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. and the effect of the use upon the potential market for or value of the copyrighted work.

Fair use is a balancing test involving an assessment of all of these factors together. Although over the years various educational organizations have developed guidelines to try to provide more clarity to this concept, the reality is that it is a fact-driven and context-driven analysis (Kaplin & Lee, 2006, pp. 1336-1337). As with many other issues, when in doubt about how to apply this balancing test, it is certainly appropriate to contact legal counsel.

Faculty members may have questions about what materials they can use in their coursepacks or on their course Web sites, or about how to seek permission to do so. In addition to institutional counsel, librarians are frequently a good resource on these subjects. In addition, faculty members can check their institution's library for any relevant contracts with publishers or other entities that permit certain types of uses of particular works. Of course, if there are no such relevant contracts and if fair use does not apply in a given situation, it is always possible to seek permission to use some portion of one or more works. The Copyright Clearance Center (http:/ /www.copyright.com/) is a major national entity that facilitates the granting of permission to use all sorts of copyrighted works.

Patents

The legal regime for patentable discoveries is somewhat different from copyright law. Federal patent law applies to inventions such as machines or processes that are "useful," "novel," and "nonobvious" (Patent Act, *35* U.S.C. § 101 *et seq.).* Like copyright law, the statute is given wide scope, but it is not unlimited. For example, the laws of nature, physical phenomena, and abstract ideas have been held not patentable (Kaplin & Lee, 2006, p. 1 356). Patent

applications must be filed with the government to be valid, and patent holders have the right to exclude others from the date the patent issues until 20 years after the date the patent application was filed.

Unlike traditional scholarly works subject to copyright law such as books and articles, when patentable inventions are created in the context of higher education, the general presumption is usually that the institution (rather than the individual) is the owner. For inventions developed as part of grant-funded research, the grant contracts typically contain provisions regarding patent ownership and use. Colleges and universities usually may obtain title to inventions developed with the assistance of federal funding (Patent Act, 35 U.S.C. § 202). For research that is privately funded, ownership and licensi11g rights are generally controlled by the funding agreement. Academic leaders should therefore make sure that faculty members are aware of the terms of the contracts that govern their research.

CONFLICTS OF INTEREST AND COMMITMENT

Technological changes making it easier for faculty and staff members to work with (or for) other entities outside our institutions are also leading to more questions about conflicts of interest and commitment. In this age of increased accountability for nonprofit institutions, colleges and universities are under increasing scrutiny to demonstrate that they are adhering to the highest possible ethical standards in discharging their business and academic affairs.

Potential conflicts are not necessarily a bad thing in and of themselves; they can arise in the ordinary course of business when well-intentioned people have a variety of relationships within and outside the walls of an academic institution. Colleges and universities should have in place procedures to disclose, review, and (if and when appropriate) manage conflicts of interest and commitment (American Council on Education, 2008, p.4). Annual written disclosures of outside employment or consulting can help to facilitate such conversations and are the norm at many institutions. Federal laws and regulations mandate certain requirements dealing with disclosure and management of conflicts of interest for

federally funded research, but they often give institutions some leeway to design their own standards and methods. For public institutions, state laws may also regulate disclosure and management of potential conflicts of interest and commitment, including outside employment.

E-MAIL AND RECORDS

The use of e-mail has become ubiquitous in higher education, and many people treat it as casually as they would a conversation with a friend by the water cooler. From a legal perspective, however, e-mails composed and sent in the context of one's employment can constitute official records of the institution. Indeed, state open-records laws may consider such e-mails at public institutions to be official public records that may be subject to disclosure absent some statutory exception (such as attorney-client privilege). E-mails may also be subject to record retention laws or policies.

The prudent thing to do, therefore, is to treat e-mail like a formal memorandum or any other official correspondence-- especially if you are an academic leader with administrative duties. Before sending a particularly inflammatory, provocative, or sarcastic email, ask yourself whether you would be comfortable seeing that message on the front page of the local newspaper-because when things go bad, that is a real possibility. While it can certainly be efficient, e-mail is not a good medium for conveying nuances of tone. If you have doubts about whether to put sensitive messages in electronic form, you might want to consider the old-fashioned method of having a real face-to-face conversation, or at least making a telephone call. Of course, e-mails can be handy when you are trying to document discussions or decisions for possible future use.

If litigation is imminent or already in play in a given situation, your lawyers may tell you that you must preserve all records (electronic and hard copy) using a "litigation hold" for possible discovery purposes. You should work with information technology support specialists to ensure that you comply with the terms of a litigation hold (Adler, 2007, p.83).

STUDENT RECORDS

In light of all the recent publicity surrounding the Virginia Tech massacre and other campus tragedies involving students, most academic leaders are well aware of the federal law that protects the privacy and handling of student education records: the Family Educational Rights and Privacy Act (FERPA) or so-called Buckley Amendment (20 U.S.C. § 1232g). FERPA applies to all public and private institutions of higher education that receive funds made available under programs administered by the U.S. Department of Education, including grant and loan programs. The statute permits students to inspect their own records, to request that corrections be made if the information in them was recorded inaccurately (or to have a hearing if the school refuses to do so), and to restrict others' access to personally identifiable records unless certain exceptions are met (Kaplin & Lee, 2006, p.1029). Education records are defined expansively so as to include all "those records that are (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for .the agency or institution" (FERPA, 20 U.S.C. § 1232g[a] [4][A]; 34 C.F.R. § 99.3). This definition covers more than records reflecting grades and student discipline; for example, it also applies to student course evaluation scores for courses taught by graduate students (Kaplin & Lee, 2006, p.1030).

The Family Policy Compliance Office (FPCO) of the U.S. Department of Education is responsible for the development, interpretation, and enforcement of FERPA regulations (http:/ *I* www.ed.gov /policy *I* gen/ guid/fpco/ ferpa/ index.html). Students can file complaints with the FPCO if they believe that their institution has not complied with FERPA.

Although it is very broad, the statute does not prohibit all disclosures of student records or information without a student's consent. Basic "directory information" about students (i.e., information that would not generally be considered harmful or an invasion of privacy if released), for example, is partially excluded from the prohibitions of FERPA. Disclosure is also permitted for other defined purposes such as accreditation, and in circumstances such as health and safety emergencies. NACUA has published a useful FERPA

compendium that includes the statute and regulations, sample forms and policies, technical assistance letters from the FPCO, and a list of additional resources (McDonald, 2002). Deans and department chairs faced with questions about access to student education records should be aware of the point of contact at their institution for FERPA compliance.

While FERPA applies to written records, it does not apply to mere information or observations about a student that are not captured in such records. Thus, academic leaders and faculty members may be permitted to share their own personal observations about an individual student's behavior with other people as needed to address particular situations.

In the wake of the Virginia Tech tragedy and confusion nationally about the precise contours of the statute, FERPA regulations are currently under review by the FPCO. Unlike many other federal laws, FERPA does not convey a private right of action on individuals to bring lawsuits against their institutions to federal court. Although it is an important statute applicable to institutions of higher education, FERPA should not paralyze academic leaders from acting in good faith when they believe that student information or records must be shared to prevent significant harm or danger.

THE STUDENT-INSTITUTIONAL RELATIONSHIP: SETTING AND MANAGING EXPECTATIONS

In keeping with notions of academic freedom and institutional autonomy, courts have generally applied contract law deferentially to institutions in their relationships with students. Colleges and universities are generally given "considerable latitude to select and interpret their own contract terms and to change the terms to which students are subjected as they progress through the institution" (Kaplin & Lee, 2006, p.728).

Courts have found some elements of the student-institutional relationship to be binding as a matter of contract law, however, when reasonable expectations are created and reinforced by institutional policies and practices. The more

explicit and unambiguous a promise of a particular benefit, the more likely it may be that a court will hold the institution to its word (especially if it is put in writing). Deans and chairs play an especially important role in helping to set and manage the expectations in the student-institutional relationship. They can help to ensure that academic program and course descriptions and requirements are clear and up-to-date. Course syllabi should include references to relevant policies of which students should be aware (e.g., policies on attendance, grading, academic integrity, and requests for accommodations), and they should set forth unambiguous expectations regarding learning goals or objectives, assignments, exams, and the bases for evaluation and grading (Davis, 1993).

Deans and department chairs should know where to refer allegations of academic misconduct, which is generally governed by institutional policy. They should also make an extra effort to ensure that part-time and adjunct faculty-who are often forgotten in departmental communications or educational programs-are aware of relevant institutional policies and procedures.

THE ONLINE ENVIRONMENT

The fact that many faculty-student interactions occur online rather than in the traditional brick-and-mortar setting does not mean that traditional legal concepts are irrelevant. For example, principles of free expression remain relevant in online courses. Likewise, copyright principles are just as important in the online environment as they are in face-to-face teaching (indeed, special provisions of copyright law come into play regarding online teaching and distance education) (Copyright Act, 17 U.S.C. § 101 *et seq.).*

GRIEVANCES, SUBPOENAS, AND OTHER LEGAL DOCUMENTS

As part of their administrative responsibilities, deans and department chairs will undoubtedly receive grievances or other complaints on all sorts of subjects from faculty, staff, and perhaps students as well. They may also receive subpoenas from lawyers seeking information about employees within their academic units, often in litigation that may be unrelated to the work of the

institution itself (e.g., related to divorce proceedings). Before responding to written grievances, subpoenas, or any other requests or demands for information or remedial action that seem to be legal in nature, academic leaders should check first with institutional counsel. For example, the processing of grievances will depend on the applicable institutional policies and procedures. Requests for records under state public records statutes should be coordinated with the appropriate institutional office that oversees such responses. Deans and department chairs should not panic at the sight of official-looking legal documents; many of them involve relatively harmless requests for information or can otherwise be disposed of easily.

CONCLUSION

By now, you should have a clear sense that the academic landscape is littered with potential legal land mines that can detonate on the unsuspecting academic leader. Academic leaders must be conscious of this complex legal landscape but not be paralyzed by it. There is risk in everything we do, and we can be sued no matter what we decide in many circumstances.

Thus, we must choose our risks wisely, based on our educational mission and academic judgment. It is also important to practice what you preach. Consistent application of an institution's policies and procedures is critical from a legal perspective. Seemingly arbitrary, capricious, or selective enforcement of policies and procedures can lead to suspicions of underlying motives and possible charges of discrimination.

So where to turn? These days most medium and large institutions or systems of higher education have their own counsel, work with the state attorney general's office, or use outside counsel. You need to be aware of any protocols within your institution regarding who may contact counsel- for legal advice. It is always better to err on the side of contacting counsel when you are uncertain whether there might be legal issues or ramifications in a given situation, and to do so sooner rather than later. While lawyers are used to responding to crises and lawsuits, they can actually be most helpful before problems erupt by assisting you in identifying risks and possible options.

Lawyers are advisors, not policy makers, so you should not look to them to make hard educational policy judgments for you. It is important to remember that the client of institutional counsel is the institution as a whole-not you or any other person acting in his or her individual capacity. When you are ·acting as an agent or a representative of the institution, however, your decisions made in good faith are usually covered by your institution's indemnification policy-and your communications with your institution's lawyers are protected by attorney-client privilege. The privilege makes it easier to have candid communications and to discuss different situations without fear of public disclosure. When the going gets tough, your lawyers may be the best friends you can get.

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American Association of University Professors: Resources on legal issues (http:/ *I* www .aaup.org/ AA UP /issues/legal/legalissues- resources.htm)

The AAUP's Web site includes a large set of articles, outlines, presentations, policy documents, and other legal materials organized by topic (such as academic freedom, research, intellectual property, hiring and promotion, tenure, sexual harassment, and other forms of discrimination). ·

Brown, D. C. (Ed.). (2006). *Employment issues in higher education: A legal compendium* (Snd ed.). Washington, DC: National Association of College and University Attorneys.

This updated and expanded compendium covers a broad range of issues in higher education employment law, including topics such as hiring, discrimination and harassment, leave policies, and retaliation. It also includes an extensive listing of additional and supplemental resources and Web sites for further research.

Campus Legal Information Clearinghouse (http:/ /counsel.cua.edu/)

The Campus Legal Information Clearinghouse is a collaborative effort between the American Council on Education and The Catholic University of America's Office of General Counsel. Its freely available and user-friendly Web site provides information and materials on specific topics of federal higher education legal compliance as well as links to many other relevant resources. It also includes a wealth of training materials on higher education legal issues.

Darley, J. M., Zanna, M. P., & Roediger, H. L. III (Eds.). (2004). *The compleat academic: A career guide* (2nd ed.). Washington, DC: American Psychological Association.

This book provides practical advice to individuals new to academia on areas including the hiring process, intellectual property, and diversity. Although not primarily a legal text, it does provide useful information on a variety of legal topics of special concern to faculty.

Kaplin, W. A., & Lee, B. A. (2006). *The law if higher education* (4th eel.). San Francisco: Jossey-Bass.

This two-volume treatise provides a comprehensive guide to all aspects of higher education law, complete with discussions of relevant principles, cases, and statutes. It is regularly updated and is an indispensable resource for attorneys and others who follow legal developments affecting colleges and universities.

National Association of College and University Attorneys (http:/ /www.nacua.org/) NACUA enhances legal assistance to colleges and universities by educating attorneys and administrators on the nature of campus legal issues, and by providing continuing legal education for lawyers who represent institutions of higher education.

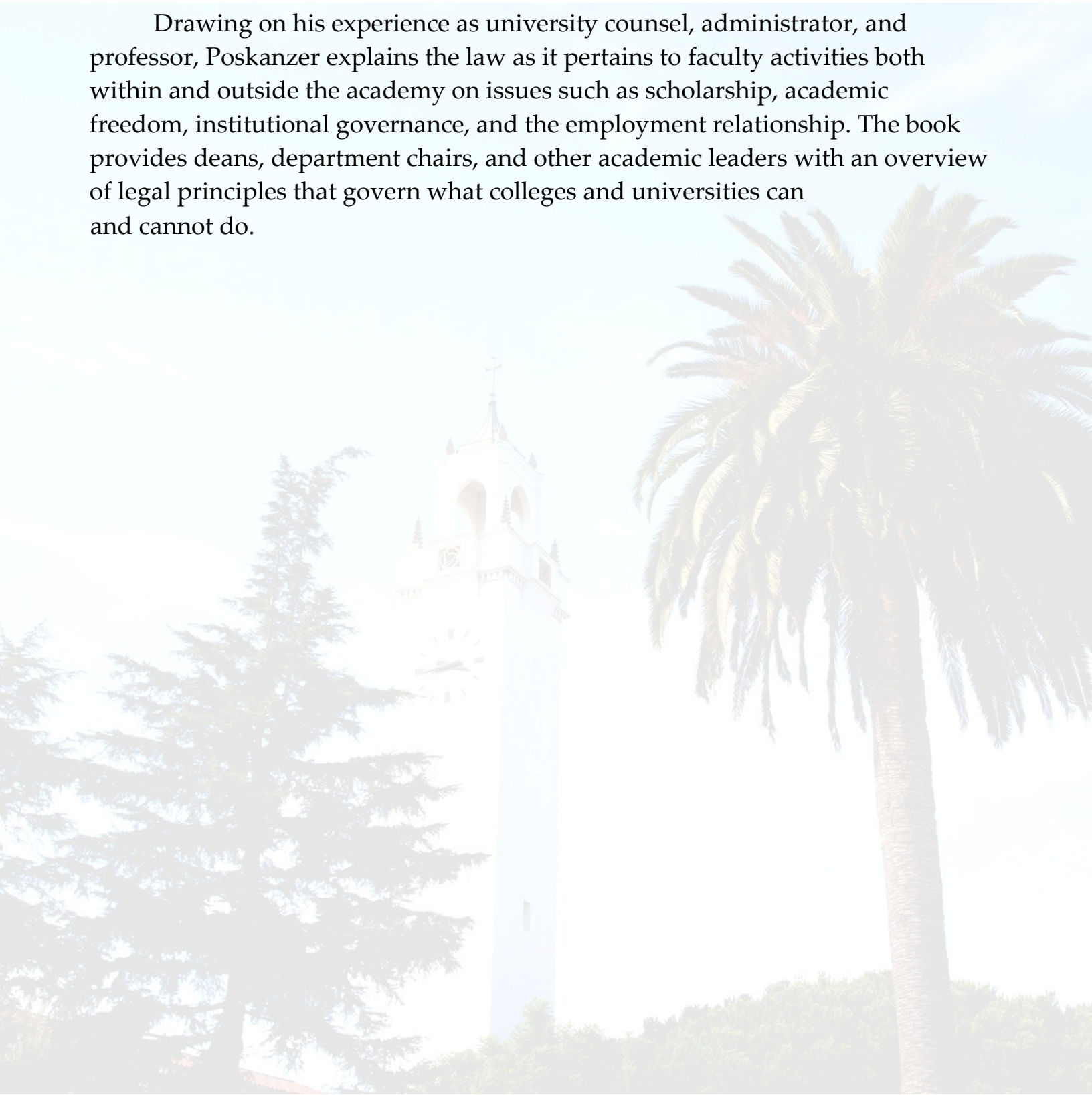
NACUA produces publications and sponsors seminars on legal issues in higher education. It also operates a clearinghouse through which attorneys on campuses are able to share resources, knowledge, and work products on current legal concerns and interests. Some aspects of the NACUA Web site are password protected and available only to attorneys who belong to the organization.

Olswang, S. G., & Cameron, C. A. (2006). *Academic freedom and tenure: wÓÌÎÈÓwcompendium.* Washington, DC: National Association of College and University Attorneys.

This two-volume compendium pulls together many of the most recent academic and legal writings on the critical subjects of academic freedom and tenure.

Poskanzer, S. G. (2002). *Higher education law: The faculty.* Baltimore, MD: The Johns Hopkins University Press.

Drawing on his experience as university counsel, administrator, and professor, Poskanzer explains the law as it pertains to faculty activities both within and outside the academy on issues such as scholarship, academic freedom, institutional governance, and the employment relationship. The book provides deans, department chairs, and other academic leaders with an overview of legal principles that govern what colleges and universities can and cannot do.



CONFLICT COACHING 2.0:

ADVANCED STRATEGIES AND SKILLS FOR SUPERVISORS TO MANAGE

TROUBLESOME CAMPUS CONFLICTS

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I. Risks Posed by Employment Disputes within Higher Education

Colleges and universities continue to experience frequent, and escalating, management issues. Examples of recurrent employment issues include abuse of attendance and leave policies; bullying and abuse towards colleagues and students; tenure disputes that result in costly and disruptive litigation; computer and social media misuse; issues arising from employee substance abuse or mental illness; and potentially dangerous employees. Few institutions have failed to confront one or more of these employment challenges; most have confronted them all.

A. Factors That Escalate Campus Conflict

Some of these problems are endemic within the corporate as well as academic world, and they may simply reflect the increasing complexity of employment compliance problems nationwide. Some, however, appear to stem from the unique nature of campus culture and organization. A few of the factors that may escalate campus employment issues include:

- Shared governance: lends itself to "Us vs. Them" mentality
- Inter- and intra-departmental competition for scarce resources
- Decentralized hiring and decision-making
  - Results in campus "silos"
  - And lack of oversight or centralized, institutional knowledge
- Culture of tolerance/misunderstanding of "academic freedom":
  - Poor or inappropriate behavior permitted (or enabled) to continue

- Unwillingness to "judge" until issues too significant to ignore
- Inherent tendency toward conflict avoidance

- Hostility toward/ignorance of H.R. "best practices":
  - Constituencies unaware of legal requirements and limitations
    - Or believe they do not apply
  - Failure to update policies or apply policies consistently
    - Requirement that faculty approve new policies freezes policy development
  - Inconsistent or missing documentation regarding evaluations or conduct expectations
- Failure to educate supervisors in the following principles and skills of management:
- Importance of "active management" and proper hiring, evaluation, and documentation techniques
- Specific techniques for hiring, critiquing, and documenting
- Specific strategies for managing leave and ADA accommodation requests
- Proper application of tenure evaluation, dismissal, appeal, and grievance policies
- Harmonizing legal requirements for EEO compliance with internal procedural rights of faculty members during tenure evaluation, denial, or dismissal proceedings

B. Legal and Other Risks Arising From Campus Conflict

For these reasons (among many others), units within academic institutions and, on occasion, entire institutions, can become dysfunctional and degenerate into sources of serious legal risk. *See* B. Lee & K. Rinehart, "Dealing with Troublesome College Faculty and Staff: Legal and Policy Issues," 37 J.C.U.L. 359, 360 & nn. 1 & 2 (2011) (noting that "the culture of colleges and universities may complicate efforts to ensure that faculty and staff perform their jobs appropriately and conduct themselves professionally"). All attorneys within higher education have experienced the frustration of having to unwind an employment dispute that could have been minimized, if not avoided entirely, through effective, early intervention — but which has instead been allowed to fester into a truly "toxic" dispute.

Legal risks that may arise due to employee misconduct or supervisory lapses include:

- Violation of federal/state background check requirements
- Violation of federal and state anti-discrimination or general employment laws (such as FLSA and FMLA)
- Failure to properly process visas or comply with immigration laws
- Failure to comply with contract obligations — which, in higher education, may be found in a variety of sources (including faculty handbooks, appointment letters, bylaws, "dual responsibility" administrative contracts, and administrative procedures or regulations)

- Deviation from requirements of collective bargaining agreements; and
- Violation of state constitutional, statutory, or regulatory requirements.

In addition, higher education tends to experience enhanced legal risk because certain employment laws and principles are difficult to apply in the academic workplace:

- FMLA, as applied to faculty
- FLSA, as applied to unique campus employment classifications such as admissions counselors, coaches, residence hall personnel, and interns
- The common-law of contract, as applied to faculty and student relationships memorialized in handbooks, appointment letters, catalogues, and department guidelines (and further complicated by decentralized decision-making processes).

As administrators and counsel are well aware, the risks involved in failing to manage employee misconduct are not just limited to "legal" risks. Perhaps even more serious is the damage done to the institution's educational environment and workplace. Whether the misconduct is a onetime occurrence or a pattern of inappropriate behavior, a failure to respond promptly and appropriately can initiate a "chain reaction," with some or all of the following consequences:

- Inability to retain personnel (either because salvageable employment relationships have not been well-managed or because other employees who are not involved in employment disputes seize opportunities to depart for institutions that they believe to be better managed)
- Lowered morale and productivity (where employees or students feel victimized or feel that the troublesome employee is "getting away with it")
- Compromised institutional reputation and mission, whenever a dispute becomes public and generates bad feeling among constituencies (including alumni donors
- Program accreditation difficulties; and
- An undermining of admissions, recruiting, or development initiatives — which, in turn, may jeopardize the institution's ability to meet its strategic goals and fulfill its educational mission.

Quite clearly, institutional employers must address a challenging array of legal compliance requirements, while also remaining sensitive to the needs and perceptions of a staggering array of campus constituents. Higher education can "no longer afford — either legally or strategically — to continue [its] culture of 'non- supervision supervision.'" B. Lee & K. Rinehart, 37 J.C.U.L at 391. Campuses can take significant strides toward managing intractable campus conflict by committing to a broad-based culture of engaged supervision.

II. Tools to Address Campus Employment Challenges

The following three recommendations are in the nature of a "toolbox" to assist supervisors in managing difficult employment conflict on campus. The first such "tool" involves an institutional commitment to modify and update what are usually outdated and obsolete campus employment policies. The policy development process is not only a cost-effective way to improve campus management but also, in many instances, helps initiate a serious discussion among senior administrators about the value of a more active management process.

The other "tools" discussed below focus on the more immediate needs of supervisors who must manage recurrent, difficult campus employment issues. The goal of both such tools is to help institutions promote a culture of supervisory effectiveness through more active management of employment issues — that is, through "early intervention" before issues mature into serious employment disputes. First, institutions should consider educating supervisors in "due diligence" principles. Second, institutions should consider importing into their internal practices dispute resolution techniques — such as "conflict coaching" — to help supervisors communicate effectively before difficult disputes arise. Use of these tools (particularly when they are coupled with a review and update of internal policies) should help an institution reduce employment risk, in all of its many forms. These three "tools" are discussed below. Also attached (as Appendix A) is a scenario and related questions intended to underscore the potential value of these strategies in preventing or managing serious employment disputes.

A. Update Policies to Conform with "Best" and Actual Practices

The number-one recommendation for any institution seeking to improve management of employment issues is to update and refine basic employment policies. Any institution can benefit from updating its policies and procedures to (i) incorporate evolving "best practices," and (ii) conform to procedures actually being used by the specific institution.

Many academic institutions are hampered by outdated, onerous employment policies. For instance, some campus staff handbooks do not include equal employment opportunity policies; this represents not only a substantial legal risk but also a missed opportunity to resolve issues internally and preserve a *Faragher/Ellerth* defense in the event of litigation[1]. Typically, the situation with faculty handbooks is even worse. Most faculty handbooks are seriously outdated.

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1. Since the U.S. Supreme Court decided the *Faragher* and *Ellerth* decisions in 1998, the so-called "Faragher/Ellerth" defense has afforded employers a powerful defense to many types of harassment allegations, where the institution undertakes a "prompt and thorough" investigation and achieves an effective resolution of a harassment claim. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Commentators have noted that, since 1998, the scope of the defense has broadened substantially to include not only harassment but some discrimination and retaliation claims. *See* cases and discussion in D. F. Vinik *et al.*, "The 'Quiet Revolution' in Employment Law and Its Implications for Colleges and Universities," 33 J.C.U.L. 33 (2006); E. Babbitt *et al.*, "The Quiet Revolution in Employment Law: An Update" (Outline, NACUA March CLE, Seattle, WA, 2008).

Often, they incorporate AAUP recommendations that were drafted in the mid-1970s (if not earlier) and do not harmonize with more current legal requirements[2]. Politically, it may be difficult for administrations to update these handbooks; and, indeed, some handbooks require that the faculty agree to any changes in the current handbook. Many institutions thus find themselves in a position of "policy paralysis" whereby policies and procedures may be frozen indefinitely, notwithstanding substantial changes in the law.

The risks in retaining outdated or unworkable procedures are numerous and potentially grave. If an institution is saddled with faculty tenure, discipline, or dismissal policies that are obsolete, unworkable, or unchangeable, "non-supervision supervision" tends to become the norm. Poor conduct may be permitted to continue (with no intervention and, sometimes, with no notice to the faculty member of any potential issues) until dismissal is the only option. In that situation, both the institution and the faculty member may have very legitimate grievances against the other, positions may become polarized, and disruptive litigation may result. At the very least, the institution may have missed a chance to help the faculty member correct performance issues and salvage his career prospects, as well as his professional relationships on campus.

Another problem arises when relevant internal procedures are so onerous or unworkable that the institution must choose to violate one set of internal procedures in favor of another – or even to violate *all* applicable procedures -- in order to protect student safety, comply with federal research integrity requirements, or uphold civil rights requirements. A related phenomenon is the development of "work-arounds." Where formal policies are too obsolete or onerous to be followed, they often are *not* followed. Instead, institutional representatives develop a "work around," unwritten procedure that is unauthorized or even inconsistent with the school's formal policies. This is a recipe for disaster whenever disputes arise about the process due to an employee.

The scenarios above are not hypotheticals but recurring issues for institutions trying to apply obsolete or unworkable policies. Difficult as it may be to complete a policy revision process, it is even more difficult to make high-stakes decisions, without litigation, when the institution is hampered by obsolete or unworkable policies. In short, most institutions will find it worth their while to undertake a policy revision process, notwithstanding the political difficulties involved in pursuing the process. At the very least, institutions should make an effort to align formal policies with the "work-arounds" that have invariably arisen over time.

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[2] *See, e.g.*, AAUP, "1958 Statement on Procedural Standards in Faculty Dismissal Proceedings," *Policy Documents & Reports* 12-15 (10th ed. 2006); AAUP, "Recommended Institutional Regulations on Academic Freedom and Tenure," *Policy Documents & Reports* 22-31 (10th ed. 2006). Both the 1958 Statement and RIRs were adopted before the ADA was passed, sexual harassment jurisprudence developed, or civil rights legislation became a major source of employment litigation. Consequently, even where the AAUP's recommended structure for faculty-related employment action is retained by an institution, those recommendations need to be edited substantially to incorporate and harmonize faculty procedural rights with modern compliance imperatives (such as the obligation to engage in "prompt and thorough" investigation of EEO complaints).

Even comprehensive policy updates, however, do not ensure against all serious employment risk. A policy revision process usually will not help an institution manage a dispute that is already underway (indeed, the pendency of an employment dispute may preclude an institution from even beginning such a process). In addition, even the most carefully updated and refined policy will not address every possibility; nor will the most evolved policy be useful if supervisors do not know how to apply it. The following two "tools" are intended to help supervisors develop the information and skills necessary for effective, active management of employment risk — whatever the status of institutional policy updates.

B. Exercise "Due Diligence" before Developing a Strategic Response

Campus supervisors and decision-makers frequently are forced to manage employment issues "on the fly" — and they often learn, after the fact, critical information that could have resulted in an effective management strategy and, perhaps, averted a serious dispute. *See* B. Lee & K. Rinehart, 37 J.C.U.L. at 400 (discussing the "shoulda, woulda, coulda" problem). Campus managers (in particular, academic leaders) are often highly educated but, usually, not in management skills. They may not know how to obtain information systematically prior to developing a management response. Indeed, they may not even understand that they *can* investigate before responding.

Encouraging supervisor use of a "due diligence checklist" can help managers obtain timely and critical contextual information. This almost invariably results in a better, more reasoned response — which may, in turn, offer the institution (and the employee under review) more options going forward.

A typical hypothetical would involve a dean or provost receiving a complaint by one faculty member about a loutish comment allegedly made by another faculty member ("Professor X"). The dean is being pressured to reprimand Professor X immediately. We recommend offering such supervisors a "due diligence checklist," which includes the following questions and considerations:

- *How did we get here?* That is, what is the chronology relevant to the particular complaint or issue? A supervisor needs to understand not just the immediate problem — "Professor X said 'Y' and it's rude" — but also needs a clear, accurate and thorough chronology of Professor X's conduct in the workplace, in the classroom, and in his institutional dealings in general. This might be an atypical episode or it might be a pattern of bad behavior; the chronology may matter.

- *What do I know?* This addresses the related need to gather *all* necessary, relevant information and documentation, as well as the "back story," before assessing the options open to the institution. The supervisor would not, for example, want to develop a management plan to address Professor X's conduct toward another colleague without knowing that the colleague (i) was once Professor X's student, (ii) made several complaints against him while she was a student (all of which complaints were investigated and deemed unsubstantiated), and (iii) subsequently married Professor X's bitter enemy, whereupon the feud continued. This "back story" may not necessarily affect how a particular claim is investigated, but it might affect credibility assessment or appropriate discipline. Ideally, it should be teased out during the "due diligence" process, not learned in embarrassing circumstances after the fact.

- *What documents do I have and still need?* A supervisor must locate and review not only formal documentation but all relevant e-mails, notes, voicemails, or other memorializations. These now include Facebook and social media postings.

  Part of "due diligence" may involve educating supervisors that, in the new millennium, the most critical documentation often is not found in the "official files" of employees or students.

- *What policy or procedure(s) might be implicated?* This aspect of "due diligence" is absolutely critical and should, ideally, be one of the supervisor's first stops. Relevant policies and procedures include not only those currently posted in bulletins and catalogs (not to mention the institutional website) but also the all-important unwritten practices that supplement or supplant formal policies.

- *With whom should I speak -- immediately -- before developing a strategy?* "Due diligence" may involve immediate interviews, as in the case of a potential safety threat; or it may involve the need to speak with, and delegate investigation to, H.R. or other compliance officers (as with EEO or research misconduct complaints). This aspect of the information-gathering process should be done through live interviews (or, at least, by telephone), not through e-mailing (tempting though that may be to busy supervisors). It is important, both for informational and for political purposes, to have an interactive dialogue with the appropriate fact witnesses, resources *(e.g.,* counsel and Human Resources), and decision-makers before settling upon a responsive strategy. Generally, e-mail in this context is useful only for pinning down discrete, non-controversial facts, not for learning the critical information essential to developing a list of options.

- *What options/effective "next steps" exist?* This is an important aspect of "due diligence" that institutional decision makers often skip, on the assumption that there is only one possible response to a particular situation. That is almost never the case; and the fact institutional decision-makers jump to this conclusion may suggest that they have not finished the "due diligence" process.

This "due diligence checklist" is equally effective when employed by non-academic managers. Moreover, the advantage of this approach is not only that it tends to result in more informed decision-making but also that, over time, it helps supervisors develop skill and comfort levels in handling difficult situations. A careful, comprehensive approach may also help validate the institutional response in the eyes of the involved "parties" (or their internal allies). They may not agree with the eventual resolution, but they will have more difficulty dismissing it out of hand as a "frame-up" if it results from a deliberate process that acknowledges the context in which issues have arisen. For a more in-depth discussion of the "due diligence" approach, *see* B. Lee & K. Rinehart, 37 J.C.U.L at 396-99.

C. Promote a Culture of Supervisory Effectiveness Through Use of Dispute Resolution Techniques

Policy modifications — and tools such as a "due diligence" checklist -- are only useful if, in fact, they are employed effectively by supervisors at critical points in the employment process -- such as hiring, tenure evaluation, implementation of leaves of absence, discipline, or dismissal. Ironically, the education industry tends to neglect — perhaps even scorn — management education (which institutions do not dare term "training"); and, as noted above, higher education tends to select leaders based upon seniority or academic output, rather than management skill or experience. Training within higher education is often limited to periodic lecture sessions in which H.R., Academic Affairs, or even counsel describe the provisions of the institution's formal policies and offer dire warnings that these policies absolutely must be followed. This kind of session has its place but, for supervisors, is no substitute for education that explains the importance of engaging in "early intervention" and instructs supervisors specifically in effective management techniques. The simple fact is that, while higher education tends to neglect management education, there is a good argument that no industry needs it more.

Institutions should consider incorporating tools from the world of Dispute Resolution ("DR") for use in helping supervisors learn to manage effectively. Dispute resolution techniques are not limited simply to mediation or arbitration once litigation is threatened. On the contrary, dispute resolution techniques may be most effectively employed *before* conflicts "harden" into formal disputes that trigger grievances and/or litigation.

In order to select a form of dispute resolution that will work best for a particular institution, it is important to keep a number of essentials in mind:

- *Conflict* is emotionally defined, triggering a "core concern"[3] such as *appreciation* ("is my point of view being valued, heard?"); *affiliation* ("do I feel connected to others?"); *autonomy* ("do I have the power to make a decision?"); *status* ("do others recognize the value I bring to a situation?"); and *role* ("does the position I hold have meaning; does it reflect my skills, values, interests?")

- *Emotion* plays an integral role in a conflict, but it also plays an integral role in the decision making process used to resolve or better manage conflict and the disputes that may flow from conflict

- *Focus on the Future:* most effective problem-solving on campus will (or should) focus on the future, not the past. Litigation itself is a form of dispute resolution, but it requires the parties to look backward to assess accountability in the form of damages. By contrast, the long-term nature of employment relationships on campus actually requires parties to look forward in order to assess the collaborative options available that will permit the parties to prevent or better manage future conflict

- *"Drivers" of conflict:* a deeper understanding of the "drivers" of conflict in the workplace is required in order to assess the available options for dispute resolution. "Drivers" include (i) problematic communication (the lack of it; the misuse of it); (ii) the context in which the conflict initially arises, as well as the context created for resolution; and (iii) the emotional footprint that institutional representatives (particularly legal counsel and supervisors) bring to the setting (including tendencies toward conflict avoidance). All bear upon how to create effective options for resolution.

Some available techniques, and their potential use as "tools" for academic supervisors, include the following [4]:

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[3] *See* R. Fisher & D.L. Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Penguin Books 2005).

[4] The following resources offer further, valuable information about the nature and use of the dispute resolution tools discussed briefly in this outline: D. Stone, B. Patton, & S. Heen, *Difficult Conversations: How to Discuss What Matters Most* (Penguin Group USA 1999); K. Patterson, J. Grenny, R. McMillan, & A. Switzer, *Crucial Conversations: Tools for Talking When Stakes Are High* (McGraw-Hill Professional 2002); K. Patterson, J. Grenny, R. McMillan & A. Switzer, *Crucial Confrontations: Tools for Resolving Broken Promises, Violated Expectations, and Bad Behavior* (McGraw-Hill Professional 2004).

- **Conflict Coaching**

"Conflict coaching" may be seen by some as a misnomer, in that it involves teaching campus leadership — sometimes in groups but often in a one-on-one discussion — how to prevent or better manage conflict-producing situations. Typically, a conflict coach would be a trained "outsider" (not the institution's lawyer but an expert in communication techniques). A conflict coach can assist supervisors with the following:

- Understanding one's "hot buttons" and when they are triggered
- Learning how to lead and communicate through effective framing: selecting words and phrases that really mean something to the people we wish to influence and to reframe when necessary[5]
- Learning how to separate people from the underlying problem
- Focusing on interests, not positions
- Understanding and working with the context in which the conflict occurs

Conflict coaching may be used to assist campus leadership and supervisors in developing specific communication strategies and skills for use during the employee evaluation process. It is particularly valuable in educating academic affairs personnel about how to communicate difficult information to faculty members. This is a process often badly hampered by confusion over the limitations of academic freedom and also by academic supervisors' traditional discomfort with giving negative evaluations to professional colleagues. A conflict coach may be invaluable in such circumstances; a coach might prepare faculty committee members for upcoming committee processes or individual supervisors for conducting difficult faculty evaluation meetings that threaten to form the basis for future discipline or dismissal proceedings.

Conflict coaching is particularly effective in helping supervisors with a tendency toward conflict avoidance develop specific strategies for communicating directly. Another useful application of conflict coaching is to help supervisors understand the impact of gender and generational factors on communications.[6] In all such circumstances, the goal is to give institutional representatives specific strategies for conducting the difficult conversations that are so critical to active, effective management of academic workplaces.

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[5] *See* G. Fairhurst & R. Sarr, *The Art of Framing: Managing the Language of Leadership* (Jossey-Bass 1996).
[6] For a more in-depth discussion of the uses and specific techniques involved in conflict coaching, *see* T.S. Jones & R. Brinkert, *Conflict Coaching: Conflict Management Strategies and Skills for the Individual* (Sage Publishing 2008

- **Facilitation**

Facilitation is another dispute resolution technique in which an individual (again, usually a trained, outsider who is perceived as a "neutral") assists institutional representatives with difficult situations. As the term "facilitation" would suggest, facilitation moves one step closer along the continuum toward formal dispute resolution. Within higher education, facilitation can be very effectively used to assist dysfunctional departments in laying the groundwork for improving communication and productivity. For instance, where individuals within a department or school have significant difficulties working together or communicating, a facilitator might conduct colleague-to-colleague meetings, colleague-to-supervisor meetings, or supervisor-to-supervisor meetings, attempting to air grievances and resolve percolating disputes in a facilitated context.

Departments and institutions often attempt to facilitate such discussions internally, but this can be a serious mistake. Academic supervisors usually are not trained as facilitators; and, in the unusual event that they are, they are usually perceived as being personally involved in the dispute, which reduces or eliminates the value of the facilitation in resolving issues going forward. This problem is even more pronounced where the facilitator is also the supervisor or direct report of one or more of the participants in the facilitation. In such circumstances, it is highly unlikely that participants will feel comfortable venting concerns (which is usually a precondition to achieving a negotiated resolution).

Institutions also have to be very careful not to use as "facilitators" those personnel who might later be required to participate in a formal internal proceeding, such as a faculty dismissal proceeding. A typical example would involve a Provost's unsuccessful attempt to facilitate a "phased retirement" agreement between the college and faculty member, followed by the Provost's then being required to make a final recommendation to the President regarding dismissal of that same faculty member. In that circumstance, the Provost and University could face serious allegations that the dismissal process was tainted by bias or conflict-of-interest, and the facilitation would have had the ironic result of injecting risk into the employment process, rather than laying the groundwork for a negotiated resolution. To avoid this and the other risks identified above, it is therefore preferable to use as a facilitator a trained "outsider" perceived as neutral by all parties to the process.

Many faculty and staff handbooks acknowledge the value of some form of "facilitation" during critical points in an evaluation or dismissal process; the AAUP's "1958 Statement" and "Recommended Institutional Regulations" also contemplate that a faculty committee might function in the nature of a "facilitator" prior to formal dismissal proceedings. *See* AAUP statements cited in n. 2 *supra.* While use of a faculty committee as "facilitator" could carry many of the same risks discussed above, this recognition within higher education of

the value of facilitation suggests that faculty members and other constituencies might respond positively to institutional attempts to build facilitation into faculty processes.

Institutions should consider strategic use of facilitation as an additional "tool" to reduce employment risk.

- **Mediation and Arbitration**

The use of mediation and arbitration as dispute resolution mechanisms within higher education is fairly well established. Arbitration, in particular, often is required under faculty collective bargaining agreements, and mediation often is used when disputes have degenerated into threatened or actual litigation.

As part of a consideration of tools short of litigation or quasi-litigation, however, it is worth noting that mediation takes many forms and some may be used to address disputes before they polarize into litigation. Mediators and mediation models vary widely. Mediation may be evaluative, which is the classic mediation model that most counsel expect to confront after litigation arises. The mediator in this model typically separates the parties and shuttles between caucus rooms, all the while using his/her own professional experience as a means to assess the merits/value of the case should the matter proceed to a bench or jury trial, and using that same experience to move the parties to a negotiated settlement.

By contrast, a mediator who uses a facilitative mediation model actively involves the parties themselves in the process — helping them identify not only the nature of the issues that led to the dispute, but also the mutual interests they may share. The facilitative model is most effective when the parties to a dispute acknowledge that their relationship (personal or professional) should or must continue. The facilitative mediator works with the parties not only to address the current dispute, but also to identify the tools to help the parties prevent or better manage future disputes.

The selection of the appropriate mediator and mediation model is a critical decision for the parties in dispute. Careful consideration must be given to the short and long-term interests of the parties and the context in which the dispute arose. Facilitative mediation is an underutilized technique that should be considered where institutions are seriously seeking a negotiated departure or other resolution that allows the various combatants to continue working together. More generally, institutions should be mindful that mediation, like other dispute resolution techniques, has significantly wider application than simply to head off filed or threatened litigation.

III. Appendix A

Attached to this outline is a scenario that is a composite of several, typical "meltdowns" that tend to occur within higher education. It is intended to illustrate circumstances in which the three "tools" discussed above (policy revision, "due diligence," and dispute resolution techniques) might be deployed to resolve issues before they develop into intractable disputes. It may also help counsel begin a dialogue with decisionmakers about the benefits to be gained from adding "tools" to campus supervisors' toolboxes.

APPENDIX A

Sour vs. Sweet ...

The Provost calls -- very upset. Associate Professors Sour and Sweet are the two finalists for chair of their department. During a recent meeting, the Dean indicated to Prof. Sour that she would not be the successful candidate of the two. Sour hates Sweet and is furious. Prof. Sour sends the Dean a long e-mail, accusing Prof. Sweet of being cynical and ineffective as a teacher. The Dean respectfully disagrees and confirms the appointment of Prof. Sweet as chair.

Prof. Sour now goes ballistic. She e-mails the Provost directly (with copies to the Dean and selected other members of the department). This e-mail charges that Prof. Sweet is a "drug pusher" and, two years ago, traded "Zoloft for Vicodin" with Student Joe, then a freshman.

The Provost is now the furious one. He wants to deny Prof. Sour's application for promotion (which has not yet hit his desk). He considers Prof. Sour's allegation utterly bogus. Two years ago, an upset Prof. Sweet did show the Dean a "weird" e-mail from Student Joe, a "scary" student who allegedly had been harassing her with unwelcome e-mails and calls. In the "weird" e-mail, Student Joe complained about a grade in Prof. Sweet's class, demanded that Prof. Sweet improve the grade, and then stated, seemingly out of nowhere, "Remember that time we traded Zoloft for Vicodin? I hope the College never finds out you're a pusher." The Dean and Prof. Sweet viewed this as an attempt to intimidate her into changing his grade. Prof. Sweet did not fall for it; she stood by the grade, Student Joe did not file a grade appeal, and Student Joe eventually dropped out of school at the end of freshman year. No investigation was conducted because the Dean (and Provost) did not want to dignify the allegation and were just glad that Student Joe was gone.

Now, two years later, Prof. Sour has resurrected the drug-trading rumor. How should counsel advise the administration?

- **How can the "due diligence" checklist be used to help the College develop a strategy for handling this situation?**
- **Is there anything else the Provost or Dean should do before acting on the promotion application or otherwise responding to Prof. Sour's e-mail?**
- **Is there any role for dispute resolution techniques at this point?**

Not so sweet ...

Pressured by counsel, the Provost reluctantly authorizes an investigation into the allegation that Prof. Sweet "traded drugs" with Student Joe. His hope is that Prof. Sweet's name can be quickly cleared, with Prof. Sour's promotion then denied on the grounds of uncollegial behavior.

The investigators first talk with Prof. Sour. She indicates that Student Joe confided in her, two years ago, about having unspecified "problems" with Prof. Sweet. Prof. Sour did not bring this to the attention of the College because Joe offered no specifics and had not made a written complaint. Now, however, Joe has showed Prof. Sour his "drug-trading" e-mail of two years ago, and Prof. Sour deems it her "moral duty" to raise this issue.

The investigators interview two of Student Joe's former suitemates. Both hate him and won't talk with him anymore (calling him "scary," "manipulative," and "needy"). Nonetheless, neither can confirm the drug allegations; neither saw him do drugs or ever heard him mention drugs. During their separate interviews, however, the two suitemates each note that Joe was constantly on the phone with Prof. Sweet. Reportedly, Joe talked with her every night and, sometimes, until 1 or 2 a.m. on the weekends. Both suitemates mention a rumor that Prof. Sweet likes to "befriend" male students and reward/punish them through use of grades; neither suitemate remembers how he learned of this rumor. Both suitemates identify other students who were allegedly "hit on" by Prof. Sweet.

At this point, no one has talked with Prof. Sweet or Student Joe about the drug or "befriending" allegations. How should counsel advise the administration?

- **How can the "due diligence" checklist be employed to help the Provost and Dean make sense of this situation?**

- **What forms of dispute resolution could help now? Would anything have helped, two years ago?**

- **Does the College have issues with its policies or training?**

All goes sour ...

The investigators interview Prof. Sweet about the original "drug-trading" allegation and the newer issues regarding "befriending" and retaliation. Prof. Sweet denies everything and is irate. She threatens to sue Prof. Sour, Student Joe, and the College (claiming that the College has no right to discipline, or even investigate, her on the basis of "rumors, innuendo, or oral complaints"). She sounds like she is quoting something verbatim. Prof. Sweet vows that, as incoming Chair of the department, she will not tolerate future uncollegial conduct from Prof. Sour.

Student Joe also talks with the investigators. He produces a huge set of e-mails and texts. They offer no support for the allegation of "drug-trading" but definitely confirm that Prof. Sweet and Joe had an extremely close friendship two years ago (and undermine Prof. Sweet's claim that Joe's e-mails and texts were "unwelcome"). Disturbingly, these e-mails also indicate that the entire student population is abuzz about Prof. Sweet's friendships with male students -- and that the administration is the last to know.

Student Joe reports that Prof. Sweet was "hitting on him" two years ago, that he tried to complain to Student Affairs, but that Student Affairs refused to investigate unless he filed a formal, written complaint. Student Affairs confirms that Joe did approach the office, but the office followed its consistent practice of refusing to investigate "oral" complaints about faculty. Student Affairs believed it was limited by a Faculty Handbook provision that protects faculty members from "investigation or discipline" on the basis of "rumors, innuendo, or oral complaints." (The current investigators have now identified Prof. Sweet's earlier reference).

Student Joe claims that, after he raised his harassment concerns directly with Prof. Sweet two years ago, she retaliated by giving him a low grade (prompting his "drug-trading" e-mail, which he admits to have been an ill-conceived attempt to intimidate her into improving his grade). Unashamed, he now threatens a sexual harassment and retaliation lawsuit against the College. Prof. Sour is also threatening legal action, anticipating retaliation from the Provost. Prof. Sweet, having already threatened legal action, is now Chair, preparing to supervise Prof. Sour and engage with a new set of students. How should counsel advise the administration?

- **How could "due diligence" and early intervention have helped the College head off this problem? How should the "due diligence" checklist be used at this point?**
- **Which dispute resolution techniques would have helped in the past? What could help now (short of program closure)?**
- **Which policy revisions might be needed to assist the College in EEO compliance?**