

# **A TWO PART LOOK AT LAWYER ETHICS**

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## A TWO-PART LOOK AT LAWYER ETHICS

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Let us begin with the obvious: Ethical issues for lawyers and clients in the higher education "business" are complex. They do not arise every day, but when they do, they involve what are frequently the most difficult personal, intellectual, and professional decisions we face. The ethical issues pose dilemmas for lawyers and frustration, confusion, and danger for clients. To help us all -- lawyers and clients -- think through these issues, which are ever more prevalent in our work, this paper first identifies several of the reasons for the complexity; it then identifies several recent trends and/or new developments in the practice of higher education law that have implications for lawyer ethics; and it concludes with several hypotheticals to help focus the discussion on specific fact patterns and problems.

### I. LAWYER RESPONSIBILITIES AND CLIENT RIGHTS

To understand how legal ethics affect lawyers and clients in their everyday work, it is helpful to begin with general principles.

1. Legal ethics are principles of law, not a set of morality rules. Legal ethics are not synonymous with human ethics or morals or common decency or other human values. They are certainly not always obvious or intuitive to a "good" person. Legal ethics are rules of law and, as such, they reflect many things other than morality -- they reflect public policy, regulatory requirements, the power of interest groups, the adversarial system, the ideology of legislators, the power and discretion of judges, the claims of opposing parties, the self-interest of clients, the monopoly position of the legal profession, the public perception of lawyers and the legal system, and all of the other factors that lead to judicial, legislative and administrative rules and decisions.

2. Legal ethics are ambiguous. Law seldom provides definitive, scientific answers. Law is what you get in a given situation after a process of analyzing, arguing, persuading, assimilating, divining, and other processes of decision-making. This is as true of "ethics" as it is of concepts like "due process" or "reasonableness."

3. Legal ethics bind and control lawyers, but they affect clients and third parties as well. Ethics regulate how lawyers relate to clients, client representatives, opposing parties, bystanders, etc. The interests of these non-lawyers can be seriously affected by the "ethical" choices lawyers make. Because of how individual lawyers decide a wide variety of questions of legal ethics, non-lawyers are fired, disciplined, fined, protected, helped, hurt, imprisoned. Careers are made and ruined. The rules of legal ethics, like other law, matter to non-lawyers.

4. The rules of legal ethics say that lawyers have responsibilities to clients, but the rules also say that lawyers have responsibilities to the public, opposing parties, courts and other third parties. Thus, at a simplistic but important level, clients cannot rely on lawyers, 100% and without doubt, to protect their interests because the lawyers' duties may run to others.

5. This fact of ambiguous and conflicting allegiances is especially true where the client is an institution, like a corporation, a non-profit, or a governmental entity. The client is the entity, not a person. The individuals who make up the entity are not clients. See Model Rule 1.13; Code of Professional Responsibility, EC 5-18.

6. The "entity as client" is an especially complex concept in higher education. The institutional client speaks, of course, through people, so the question is, who is authorized to speak? The client is the "authorized officer, employee, body or constituent overseeing the particular engagement." California Rules of Professional Conduct, Rule 3-600(A). In a college or university, the authorized body for any particular decision may be an administrator, a committee, the faculty, the President, the Board of Trustees or some combination. Further, determining who is "authorized" is seldom clear -- this requires a review and analysis of written and unwritten policies approved or issued by different constituents.

7. Much of what college and university lawyers deal with is alleged wrongdoing. When wrongdoing is involved, the lawyer may have obligations to the public that go beyond the client, and the client's interest is therefore not always the same as the lawyer's. See "Focus on Ethics and the University Attorney," 19 Journal of College and University Law 315 (Spring 1993).

8. College and university lawyers are also administrators and they help their institutions make decisions. These decisions may be academic, financial, political, employment related, public relations, and the like. In this decision-making role, the lawyer's legal and

ethical responsibilities begin to blur and the client's rights to make the decisions may be affected. The following two statements are both true: the lawyer may have ethical responsibilities to give advice on non-legal matters (see Rules 2.1 (lawyer as advisor), 1.1 (competence); 1.4 (lawyer must keep client reasonably informed)); but it is an ethical violation for a lawyer to usurp the client's decision-making role. See, e.g., Rule 1.2.

## II. ETHICS AND THE LATEST TRENDS

Many current trends and developments, both in the legal profession and in higher education, have implications for legal ethics. In these areas the rules of legal ethics are less useful as a policing mechanism controlling how lawyers act and more useful as a thoughtful set of ideas and guidelines for good lawyering.

1. Preventive Lawyering. Like preventive medicine, preventive lawyering can keep the client healthy, avoid costly legal disputes, and help the client make good decisions. Several ethical rules suggest that a lawyer must engage in preventive lawyering. Taken together, Rules 1.1, 1.3, 1.4, 1.13 and 2.1 suggest that a lawyer's obligations to act with competence and diligence, to communicate clearly, to exercise independent professional judgment, to be dedicated to the interests of the client and to represent the interests of the entity require a lawyer to engage in preventive lawyering. Educational programs on issues such as scientific fraud, sexual harassment, contract compliance, financial constraints, investment policies, antitrust, defamation and the like are not just good ideas; they are part of our ethical obligations.

2. Alternative Dispute Resolution. Alternatives to litigation may save time and money. A competent lawyer who has the interests of the client at heart will recommend ADR in many instances. See Colorado Rule of Professional Conduct 2.1: "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."

3. Cost Cutting. In-house college and university lawyers, like others in higher education, are constantly under pressure to cut costs. At some point, of course, cutting costs affects service, and cutting services can interfere with a lawyer's obligation to provide competent, diligent service to the client. See Rules 1.1 (competence) and 1.3 (diligence).

4. Outsourcing. A lawyer's obligation to provide independent, competent and diligent legal services may affect the decision to assign a particular matter to a particular lawyer, including outsourcing a specific matter or an entire function. If the in-house lawyer is more competent, because she knows the client better and has more experience in higher education matters, is it ethical to replace him or her with a less expensive but less experienced outside law firm? Or vice versa?

5. Decentralizing and Empowering. Colleges and universities may decentralize decision-making to units within a campus or, in a multi-campus system, from central administration to individual campuses. Should the lawyer function also be decentralized? This involves serious questions as to "who is the client" (Rule 1.13) and the "client's" right to make certain decisions (Rule 1.2). For example, a campus president may want her lawyer to take a certain position which is legal but contrary to the policy of the system's Board; or a University Hospital may want its assigned lawyer to institute personnel policies which are contrary to those in effect in the rest of the institution. Decentralization is thus likely to cause particular strains on a lawyer's ethical obligations to serve the "client."

### III. HYPOTHETICAL

Several of these hypothetical have been used before, but they retain their relevance and are useful to help work through the practical problems college and university lawyers and their clients face. See "Ethical Issues for the University Attorney," outline of presentation at the NACUA Annual Meeting in Montreal in 1991.

1. The President wants your legal advice on an issue involving possible misconduct by a senior officer to whom you regularly give legal advice. In the course of the investigation, you learn that the President may be implicated. What do you do?

2. The President of your institution is negotiating her employment contract with the Board of Trustees. Do you provide legal advice to either the Board or the President? Who does?

3. A member of the Board asks for your interpretation of the Board of Trustees' Bylaws. You know that the purpose of the question is to help this Board member in a contest with another Board member for the position of President of the Board.

4. The Board is faced with the question whether to appeal a particularly controversial judgment against the institution. The President is recommending against appeal. You have described the legal risks in a written opinion to the Board, but you have not given a bottom line recommendation on whether to appeal. Your personal recommendation is that the institution should appeal. The president disagrees and asks you not to tell the Board your recommendation. What do you do?

5. The Dean of your Medical School wants to sue a company which sold the Medical School \$1,000 worth of defective equipment. You believe the case has merit but is not worth the time. The Dean "orders" you to bring the suit. What do you do? Who decides?

6. The Dean of Students wants to expel a student. You believe the procedures used violate the student's rights, either due process or contractual. The Dean of Students says that broader policy issues lead her to conclude that the college is better off with expulsion even if the college loses a lawsuit brought by the student. What do you do?

7. A student has filed a sexual harassment case in an internal forum against a professor. The conduct at issue took place in the classroom during the course of a professor's lecture. The professor asks your office to represent him in the internal proceedings. Should you do so? The institution finds against the professor. The student sues and the professor tenders the defense to you. Do you provide him a lawyer? Can you represent him? What if the lawsuit predates an internal finding? Is the analysis different for alleged research fraud? For a Title VII case against the President personally based on his role in affirming a decision by an academic unit to deny tenure?

8. You believe your institution -- acting through a director-level manager -- has violated an employee's constitutional or contract rights in a termination proceeding. You believe the university will lose a case brought by the employee, although you believe there are possible arguments to the contrary. The director rejects your advice. What do you do?

9. The staff director of student services comes to you for legal advice about an affair he is currently having with a student. What do you tell him?

10. Your institution is planning a search for a new Vice President for Student Affairs. The EEO officer asks for your advice on equal opportunity/affirmative action

questions. Is your written advice to her protected by the attorney-client privilege? What do you do if the Acting Vice President, a candidate, asks to see the advice?

11. You are copied with all communications to and among the Vice Presidents and between the President and the Board. What procedures should you follow for determining which of these communications are protected by the attorney-client privilege? What instructions or warnings do you give these executives concerning your role and allegiances?

12. Your institution has been sued for sex discrimination in the firing of a coach. Are your discussions with other coaches about their views concerning the fired coach privileged? Can opposing counsel interview other coaches and staff without going through you as the institution's attorney?

13. Your institution is a participant in a joint venture with state and local governments and two other colleges to operate a major computer center. You did the legal work on behalf of all of the participants to establish the entity. One of the other colleges fails to make its required monetary contribution to the joint venture. Can you represent the entity against the member?

14. Your institution has a for-profit subsidiary which markets software owned by the college. The subsidiary contracts with third-party buyers and also with the college. Who provides legal advice to the subsidiary in these instances?

15. Individual professors share in royalties earned on their inventions. A professor asks the institution to sue a licensee for failure to market the patented product. The Vice President for Finance, who by custom has decided when the university should file a lawsuit, refuses to do so. The professor asks for your help. You believe the case is strong. What do you do?

