

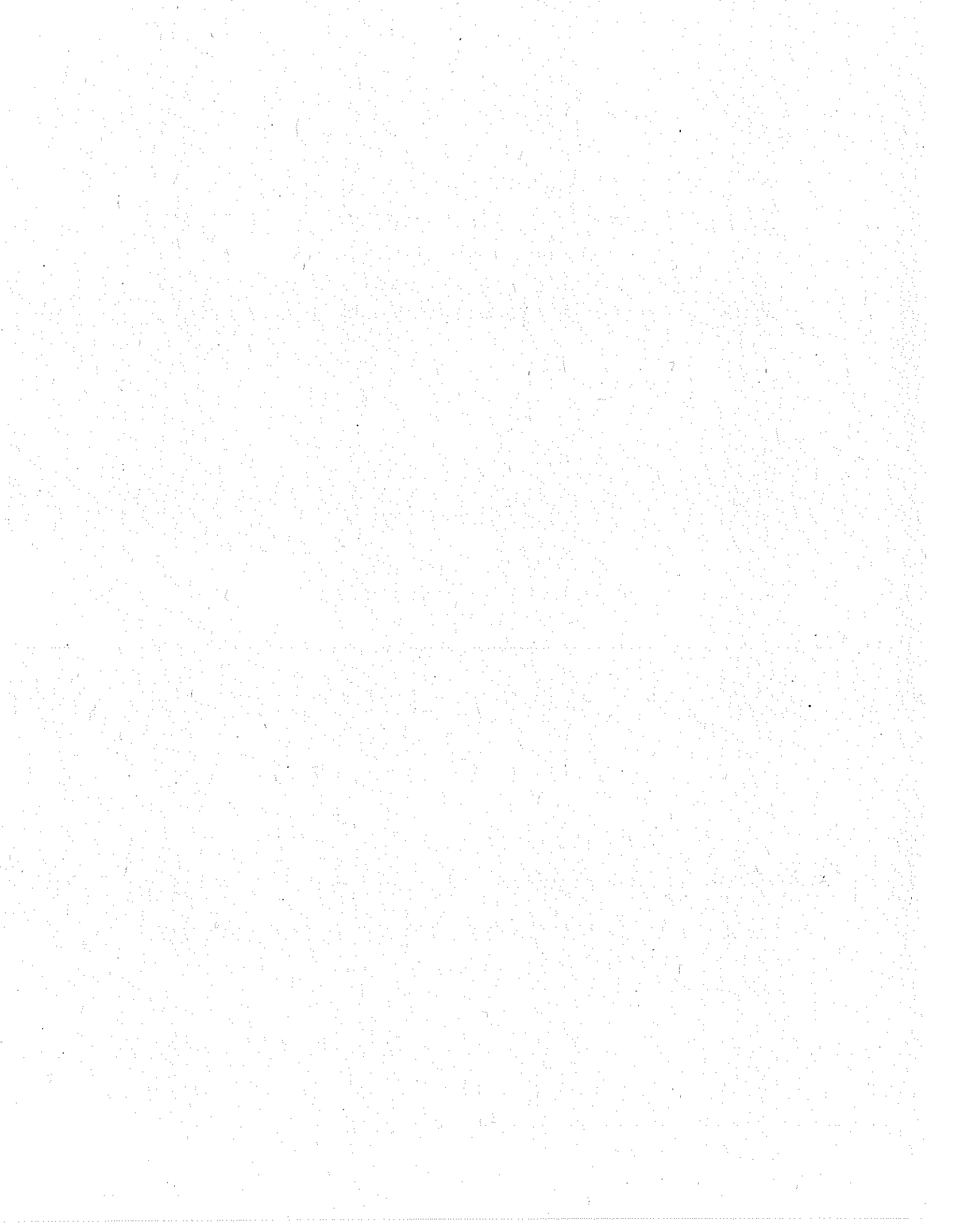
**HOW TO EFFECTIVELY MANAGE  
COLLEGE OR UNIVERSITY LEGAL AFFAIRS:**  
*A Protocol for Avoiding Litigation  
Effectively Managing Unavoidable Litigation  
Maintaining Ethical Standards in the Litigation Context*

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**How to Effectively Manage College or University Legal Affairs:  
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**I. Preventing Litigation**

In this legal environment, there is no way to prevent all litigation at a college or university. This is not to say, however, that efforts should not be consistently made to seek to avoid, or at least reduce, the likelihood of litigation. It is worth taking the time to review policies and strategies from time to time with this goal in mind.

**A. Should the college or university conduct a legal audit?**

**1. The use of legal audits**

Legal audits have become more popular in recent years as a means of systematically evaluating the institution's compliance with various state laws and regulations and as a means of reviewing a college or universities own institutional policies and practices. Audits can be used to:

(a) Determine compliance with laws and regulations in many aspects of institutional administration and campus life including (1) employment practices; (2) environmental policies; (3) insurance and risk allocation; (4) student admissions; (5) sexual harassment and discrimination; (6) athletics; (7) physical facilities; (8) security; (9) intellectual property; (10) contract management; (11) gift policies; and (12) tax issues.

(b) Assess whether institutional governing documents and policies reflect the mission or goals of the college or university.

(c) Evaluate whether governing documents are internally consistent.

(d) Analyze whether institutional policies are consistent with policies and practices generally accepted as appropriate by the academic community.

## 2. Legal issues involving audits

While the potential benefits of a legal audit are apparent -- they can identify problems that can be remedied before litigation results -- a number of issues should be addressed before any legal audit is undertaken.

(a) What is the purpose of the audit? An audit should not be undertaken without a clear view of the purpose for which it is being done and a specific focus for the work. While a comprehensive audit may appear attractive at the outset, it is generally advisable to limit the audit to particular areas where there is a perceived need for review.

Recently, the most common subject area for a legal audit is in the employment context. These audits focus on such concerns as --

- compliance with federal and state discrimination law
- sexual harassment in the workplace
- wage and hour law compliance
- labor issues
- employee benefit matters and ERISA compliance
- drug and alcohol testing
- safety and OSHA compliance
- workplace torts such as negligent hiring or supervision
- privacy issues

(b) What will an audit cost? A legal audit has both direct and indirect costs associated with it. If outside investigators are used, a comprehensive legal audit could cost thousands of dollars. Even if the audit is done in-house, there are a number of costs to consider. First, the audit process itself can be time-consuming and burdensome for those who have to participate.. Overworked administrators may legitimately question spending time collecting the information required for the audit, without some demonstrable need for the effort.

In addition, audit can create new problems for the institution. Audits can create a paper-trail revealing problems that the institution may nor may not have known about before and may or may not be successful in remedying. Once the problems have been documented, however, there is a real risk that the audit itself

can be the cause of future litigation, rather than a means of avoiding it.

(c) Who should do the audit? While it is certainly less expensive to have the audit done by in-house counsel, as a general rule, it is preferable to hire outside legal counsel to do the work.. This is so for three reasons. First, inside counsel may not have adequate resources to do the audit. Second, it is useful to have an outside view of the issues raised to ensure the audits objectivity and accuracy -- and, more importantly, the appearance of objectivity and accuracy. Finally, if the audit is done by outside counsel there is a greater chance of protecting the investigation and results from disclosure under the attorney-client privilege and work product doctrines.

(d) Can the audit be kept confidential? The answer to this is maybe, at best. At the outset, it may well be that the institution does not want to keep the audit confidential. Disclosure may be in the interest of the college or university to show that the institution is responsibly pursuing and addressing the matters that were the subject of the audit. This is often, however, a decision that the institution will not want to make until the audit is completed.

### 3. Non-disclosure of legal audit results

Should the institution seek to keep the audit confidential, there are three theories which could support non-disclosure in the face of litigation discovery requests or, for public institutions, for requests pursuant to state right to know laws.

(a) Attorney - client privilege. The attorney-client privilege is grounded on the principle that clients should be encouraged to engage in full and frank discussions with their counsel. This underlying principle would arguably support a privilege for the investigative work done by counsel in conducting an audit.

The attorney-client privilege applies to communications by a client to his lawyer, outside the presence of strangers, for the purpose of securing legal advice. United States v. United Shoe Machinery, 89 F.Supp. 357 (D. Mass. 1950). For the privilege to apply to a legal audit, the institution must be able to show:

1. The audit was conducted for the purpose of securing legal advice

and not for some other reason; and

2. The information was communicated by the “client.”

Both of these requirements could be problems. First, in order to be protected, the audit must be done so as to provide counsel with a basis for providing legal advice to the institution. It is important to structure the audit so that this requirement is satisfied. Having outside counsel do the work -- rather than in-house lawyers -- is helpful. Further, it should be made clear at the beginning of the process, and so documented, that the audit is being done so as to secure legal advice. Finally, the lawyer should conclude the audit by offering legal advice, recommendations, and legal opinions.

Second, there is a real issue as to who is the client for purposes of the privilege. In Upjohn v. United States, 449 U.S. 383 (1981), the Supreme Court addressed this issue in the context of the corporate client. Under the Upjohn analysis, an employee must be part of the “control group” in order to be covered by the privilege. In other words, to the extent that the lawyer conducting the audit interviews employees who are not considered managers of the institution, the privilege may not attach to the information they disclose. Not all jurisdictions follow Upjohn, and it is unclear how it applies in the university setting, but it is plainly an issue to explore.

(b) Work product doctrine. This doctrine, originating in the case of Hickman v. Taylor, 329 U.S. 495 (1947) protects from disclosure an attorney’s thought processes and work done in preparation for litigation. It is not an absolute privilege, however, and must be balanced against the articulated need for disclosing the information. This means when an attorney interviews a witness in preparation for litigation, generally, the lawyer’s interview notes are shielded from disclosure. The question, then, is does this doctrine apply to a legal audit? The difficult issue is whether the audit was prepared in “contemplation of litigation.” A lawsuit need not have been filed in order to satisfy this requirement. United States v. Davis, 636 F.2d 1028 (5th Cir. 1981). It is not entirely clear, however, how imminent litigation must be in order for the work product doctrine to control. The motivation for preparation of the document must be to aid in possible future litigation. United States v. Rockwell, 897 F.2d 1255 (3rd Cir. 1990).

(c) The privilege of critical self evaluation. Finally, there is a common law privilege designed to protect the confidentiality of self-evaluative reports. The seminal case defining this privilege is Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973). This privilege, however, is not universally accepted or defined. It is clear, however, that to take advantage of this doctrine the audit should (1) be maintained as confidential without wide circulation within the institution and (2) be explicitly designed to determine compliance with state and/or federal law.

#### **4. Materials needed for an audit**

The relevant materials for any particular audit will vary depending upon the subject matter covered and the scope of the audit. Collecting the relevant materials is one of the most important phases of the audit. Documents such as the following may be required, for example, for an employment audit: faculty and employee handbooks; personnel manuals; written policies and procedures; affirmative action plans; applicable court orders and settlement agreements, if any; recruitment, orientation, and training materials; collective bargaining agreements; and employee benefit plans.

#### **5. Implications for future litigation**

An analysis of all of the above-cited factors is needed in order to assess the value of an audit and as means of preventing litigation. In general, it is better to identify problems so they can be remedied before a crisis occurs. Nevertheless, in light of cost, burden, and disclosure concerns, legal audits should be focused and not overly ambitious.

#### **B. How should documents be handled by the institution?**

Much litigation results from and/or is aided by internal documents of the institution. The care and handling of documents should, accordingly, not be overlooked.

**1. Document creation.** It is critical that all employees -- especially managers and supervisors -- understand the importance of creating accurate, non-inflammatory

documents that will not come back to haunt the university later. For example, employment decisions should be carefully and appropriately recorded. The basis for the decisions should be determined and recorded with counsel's advice.

**2. Document retention.** Here are the basic rules of document handling:

(a) Documents are rarely destroyed, even when everyone thinks they have been. Someone always maintains a copy somewhere.

(b) The institution should, nevertheless, have a record retention policy that is clear and known to all employees. The policy should make clear what documents need to be retained and for how long. It is important if litigation results that such a policy be in existence and have been implemented.

(c) E-mail is dangerous. People write e-mail messages that they would never write on paper. E-mail is, however, discoverable in litigation. It can be very embarrassing. It is also unclear the extent to which e-mail messages are protected by attorney-client privilege since they are arguably not confidential. See e.g. Rogers, "Ethics, Malpractice Concerns cloud E-Mail, On-Line Advice" ABA/BNA Lawyer's Manual of Professional Conduct, Vol. 12 No. 3, (March 6, 1996) at 59.

(d) Maintaining good files is critical to protecting the institution from lawsuits and defending lawsuits if they come.

**C. To what extent should the institution conduct its own investigation into possible wrongdoing?**

When the college or university learns, through an audit or otherwise, that there may be possible wrongdoing by an employee, to what extent should the institution conduct an internal investigation and, if one is conducted, who should do it?

There is no simple answer to this question. There are a number of considerations:

1. Conducting an internal investigation when an issue arises may be



the best way to avoid litigation. The institution can find the facts and deal with the problem appropriately before litigation ensues.

2. In conducting an internal investigation, however, the institution is developing a record that it will have to live with should litigation result. Early investigations can be helpful because information is still available and memories are fresh. On the other hand, they can be dangerous because information gathered may not be precisely correct, but the written record will make it difficult to revise the record later.

3. In particularly sensitive matters, the institution can later be accused of deliberately “covering up” if the investigation does not uncover all facts that a litigant later believes to be relevant.

4. If no investigation is conducted, on the other hand, the institution will be said to have known about a problem and deliberately ignored it -- also not a good situation.

5. There is a question as to whether, and the extent to which, the investigative work product can be held confidential and protected from disclosure. The disclosure considerations and issues are much the same as those identified in connection with a legal audit. As a general rule, the institution should assume that, sooner or later, the investigation will be made public.

6. It is usually preferable to have lawyers conduct the investigation. Lawyers should be experienced at this kind of work. Moreover, to the extent that the work is done by counsel, there is a greater likelihood that at least some of the effort can be protected by attorney-client privilege or the work product doctrine. Again, while each situation should be considered separately, as a general rule, outside counsel should be used in order to ensure objectivity and the appearance of impartiality.

## **II. Handling Litigation**

No matter how good your preventive work might be, litigation cannot always be prevented. How then should litigation be handled?

## **A. Selecting Counsel**

It may be that the single most important litigation decision that the institution will make is who will handle the case. In addition to cost, which is always a consideration, there are other factors to take into account:

1. Does the lawyer have knowledge of the institution, its policies, practices and philosophy?
2. Does the lawyer have any particular expertise in the subject matter of the litigation?
3. How does the lawyer's style mesh with those involved in the litigation?

## **B. Litigation Strategy**

There are about as many ways to litigate a case as there are lawyers to handle it. The institution should have a role in crafting this strategy.

1. Do you want a "tough and aggressive" strategy? At first blush, that's what every client thinks it wants. But what does that mean? Do you want to "litigate" every issue that arises -- discovery, extensions of time, etc.? Do you want extensive discovery? Thoughtful litigation strategies, tailored to the individual case, is usually more successful in the long run than -- a "we are going to smash them" approach.

2. What approach to discovery is appropriate? Is it better to be open in responding to discovery requests -- or to read the requests more narrowly? Should the institution embark on an active discovery program -- take lots of depositions? Or not? Again, the answer depends upon the case. The important point is that more is not always better.

3. Costs are always a critical consideration. There are two questions to consider for any individual case. How much is this case worth to litigate? What is the impact that the individual case will have on future litigation? Does this latter consideration increase its value?

## C. Settlement Strategies

Every case has some settlement value -- even though at the beginning of litigation the institution may believe that the case is worth zero. Settlement strategies, similar to litigation decisions, cannot be universalized. There are certain general considerations:

1. Should you settle early or on the courthouse steps? There are, of course, advantages to both approaches. Sometimes a case can be settled early with less expense, publicity, and pain than after protracted litigation. This early settlement strategy may prove problematic, however if the settlement effort fails. In such circumstance, the early settlement proposals may dramatically drive up the ultimate settlement value of the case.

It is also often difficult to settle early because you are not really able to assess the merits of the case before discovery proceeds. You do often learn something in discovery. You may learn that your case is better -- or worse -- than you thought.

Settlement at the courthouse steps also has its obvious drawbacks. You may have spent considerable sums preparing for trial, that would have been avoided by early settlement. The settlement value may, however, be decreased if the plaintiff understands that you are really prepared to go to trial.

2. How do you assess the impact of settlement for future litigation? This, once again, is not an easy question to answer, but it is always important to consider. Particularly where your institution litigated frequently against certain law firms, your settlement history is relevant every time a new suit is filed. Prior settlement serve as baselines for negotiation. If you overpay in one case, you may find yourself overpaying over and over.

3. What are the institutional interests and constraints? Some cases just break all the rules. They may be particularly sensitive because of the publicity potential or the personalities of the relevant players. These interests and constraints should be evaluated early on in the litigation.

### III. Ethical Issues in Litigation

There are many ethical issues that may arise in the course of preparing for or conducting litigation. The difficulty of the issues should never be underestimated. The resolution of the issues is often not intuitively obvious. The best advice is always to proceed with caution.

#### A. Representing the Institution and its Employees

Rule 1.13 of the Model Rules of Professional Conduct provides that a lawyer may simultaneously represent an organization and any of its officers or employees as long as there is no conflict in the representations. While in many cases, there is no conflict -- or even an appearance of a conflict -- that is not always the case.

In employment litigation, for example, there may be specific allegations of wrongdoing by a supervisor. In cases involving government contracts or grants, there may be allegations of scientific or other misconduct by faculty members. In athletic department cases, there may be claims of knowing NCAA violations by athletic department employees. In such cases, what are the ethical obligations of the lawyer representing the institution in the litigation?

1. **The university as the client - the need for disclosure.** At the front-end of a case it is often difficult to determine whether it is appropriate to represent individuals as well as the institution. As a practical matter, however, it may be difficult to advise an individual to retain separate counsel. Where the situation is unclear, the first rule to follow is to disclose the potential issue to both the individual and the university. Model Rule 1.13(d) provides that a lawyer is required to “explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”

2. **The question of conflicts between the university and the employee.** If a decision is made to continue simultaneous representation in a case where a conflict could potentially arise, Model Rule 1.7 comes into play. Rule 1.7 deals generally with conflicts of interest. This rule provides that a lawyer may undertake joint representation of multiple defendants in a lawsuit if the lawyer reasonably believes that the representation of one co-defendant will not “be

materially limited by the lawyer's responsibilities to another client." It is important, however, in such a circumstance to get consent at the outset from both the individual and the university to provide dual representation. Consent of the clients is only effective, Rule 1.7 makes clear, if a disinterested lawyer could reasonably conclude that joint representation is appropriate.

**3. The risk of dual representation should a conflict later arise.** In the university setting, if the university has conducted an investigation of the facts before a lawsuit is filed, and has determined that university employees did not act improperly, joint representation is generally appropriate. The more difficult issue, and the one more likely to arise, is where the university has not conducted an investigation prior to suit or the threat of suit or the results of the investigation are unclear. In this case, the university lawyer must make the best judgment possible given the facts available and revisit the joint representation decision as the matter develops. There is a risk, however, that should a conflict arise later in the representation, the lawyer may have to withdraw from representing both the university and the individual employees.

**3. The need for separate counsel.** If and when a decision is made that separate counsel is necessary, the next question is should the university assist the individual in hiring separate counsel and should it pay for separate representation? Often the individual will seek guidance on retention of counsel, which the university may provide -- as long as the individual is free to select counsel of his or her choice. Whether to pay for counsel may depend upon such factors as insurance arrangements, university policy or practice, and the issues in the particular case.

**4. Depositions.** The question of simultaneous representation may arise in the context of a deposition of a university employee. The issue is whether university counsel can and/or should represent the employee for purposes of the deposition. The analysis is the same as that described above. As a general rule, the university counsel often will provide representation because it is in the interest of both clients to do so. If, however, there is reason to believe the interests of the two clients are not coexistent, then the wiser course may be not to provide the individual representation.

**5. Prior representations.** What if a chairman of a department is

charged with a grievance by a department faculty member. The university lawyer defends the chairman in an ongoing grievance proceeding. Meanwhile, the department chair is accused of scientific misconduct and comes to the university lawyer for representation. The department chair makes clear that he is a client of the university counsel and, at the very least, the university lawyer may not represent the university in the scientific misconduct case so as to adversely affect his interests. In such a case, the university lawyer is faced with the clear rule that a lawyer may not take on a representation adverse to an existing client. Before proceeding, the university counsel must make sure that she does not violate this rule.

## **B. Learning of wrongdoing**

It is not unheard of in the course of investigating a problem, or in preparing for litigation, or in the ordinary course of business that a lawyer for the university learns of possible wrongdoing by the institution. What are the lawyer's ethical obligations in such circumstance?

**1. The formation of an attorney-client relationship - or not.** The first issue that may arise is how to respond when a university employee approaches the institutional lawyer to provide information about wrongdoing. Should the lawyer listen to the employee or must she first advise the employee that as the university lawyer she represents the university and not the employee? This is referred to as a "Miranda warning." The complexity of this question is thoughtfully explored in G. Hazard, Ethics in the Practice of Law, Yale University Press 1978.

(a) It is in the interest of the university to learn what the employee has to say. Providing a "Miranda warning" may discourage this disclosure.

(b) Failure to provide the warning, however, leaves the employee believing that he is confiding in his lawyer and that his disclosure is confidential.

(c) Even if the lawyer is clear that she represents the university and not the employee, the lawyer may have some -- not well-defined responsibilities with respect to the employee. There may be confidential relationships before an attorney-client relationship attaches.

(d) The decision a lawyer faces as to how to handle these sensitive disclosures will have to be determined on a case-by-case basis. When in doubt, it is best to stop the conversation to be able to think the matter through *before* proceeding further.

2. **Reporting to the client - whoever that is.** Once learning of the possible wrongdoing, the university lawyer then has to decide to whom to disclose the information -- a Vice-President, the President, the Board? The answer will depend on the structure of the university and the nature of the charge -- e.g. scientific misconduct, athletics department issues, student life matters, etc.

3. **Confidentiality concerns.** The next issue involves reporting obligations outside the university. These issues are largely governed by statute or other regulations --e.g. government contract rules, NCAA regulations, etc. In satisfying these obligations, the lawyer must struggle with Model Rule 1.6 which deals with the disclosure of confidential information. This Rule provides that a lawyer should not disclose confidential information under such disclosure is necessary "to prevent a client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial harm. . . ." State law provisions may go further to permit disclosure in the case of fraud.

4. **Are you the lawyer or a witness?** A further issue that may arise involves the role and responsibilities of university counsel. If university counsel has participated in drafting relevant underlying documents or has conducted an investigation into the conduct at issue, the lawyer may be a witness in resulting litigation. Under Model Rule 3.7, if a lawyer is the sole witness to critical conduct or statements, it is likely to result in disqualification in later litigation.

## Conclusion

A discussion of ethical issues always raises more questions than it answers. There are rarely black letter law answers for the real and difficult issues that arise -- all the time. The most important rule is to be sensitive to the problems -- multiple representation; conflicts; confidentiality; need for disclosure; and the role and responsibilities of university counsel.

## Resources

Popper, Lewis. *How to Conduct a Workplace Legal Audit as a Tool to Reducing Employment Liability*, National Center for Preventive Law, Preventive Law Reporter, Vol. 12. No. 3 (Fall 1993).

Lee, Barbara. *Bullet-Proofing the Workplace: Minimizing Employment Liability Through Operations Audits and Training* (June 24, 1993).

Hopkins, Bruce. *How to Perform a Legal Audit for a Nonprofit Organization*, *The Practical Lawyer*, vol. 31 No. 7 (1985)

Marshall, Alison. *Employment Liability Audit*, Miller, Canfield Paddock and Stone, Washington D.C.

Weeks, Kent. *The Legal Audit*, *Lex Collegii*, Vol. 4 No. 3 (Winter 1981).

Thompson, Larry. *Discovery of Employment Audits: Can They Be Protected?*, United Educators Insurance Risk Retention Group, Inc. , Chevy Chase, MD. (June 21, 1993).

Schmidt, Judith Yost. *Facing the Demons: Special Problems of Counsel in Higher Education - Multiple Representation and Investigations*, NACUA Annual Conference (June 22, 1995).

Connell, Mary Ann. *Ethics Issues for the College/University Lawyer*, NACUA Annual Conference (June 16, 1996).

Dunham, Stephen. *Ethics Issues for the College/University Lawyer*, NACUA Annual Conference (June 16-19, 1996).

Dunham, Stephen. *Case Studies of Wrongdoing on Campus: Ethics and the Lawyer's Role* , NACUA Annual Conference (June 29, 1996).

O'Neil, Robert M., *The Lawyer and the Client in the Campus Setting: Who Is the Client, What Does the Client Expect and How May the Attorney Respond?*, NACUA Ethics Project (March 1992).