

27<sup>th</sup> Annual National Conference  
on Law & Higher Education  
Private Institutions & Personal  
Liability:  
Selected Issues

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Overview

- I. Personal Liability
- II. Indemnity & Representation
- III. Significant Liability Issues
- IV. Privacy
- V. Selected Cases

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I. Employees and Personal Liability

- It is not unusual for University employees to be named as defendants in a lawsuit against the University. When an individual is subjected to potential liability related to the performance of his/her job, they will look to the University to protect them from personal economic exposure

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Employees and Personal Liability  
(continued)

- The economic exposure of employees relates to the cost of representation during the litigation and damages resulting from any adverse decision.

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II. Indemnification & Representation

- Indemnify: To protect against damage, loss or injury or to compensate or reimburse another for a loss suffered because of a third party's act or default; to provide security against such a loss
- Immunity: Any exemption from a duty, liability, or service of process
- Representation: To speak with authority on behalf of another, i.e. a lawyer

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Indemnity & Immunity  
Sources

- State Statutes
- University Policies
- Insurance Provisions
- Contracts
- Case Law

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### Representation

- University employees named in lawsuits are understandably anxious about their personal exposure. As the legal action will ultimately address not only the issue of liability but also the issue of “fault,” they are understandably cautious about their role in the conflict and the possibility that liability may attach to their actions.

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### Separate Counsel

- Employees may seek outside counsel to provide advice and/or representation. They may ask the University to either provide separate counsel at no cost to them or seek to have the university reimburse them for the costs of separate counsel.

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### Requirements

- Alleged acts were
  - Made in good faith and
  - In conjunction with the discharge of his/her duties and responsibilities
- Indemnitee cooperates in defense of charges
- Institution directs defense

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### Violations of Indemnity Provisions

- Commits Criminal Acts
- Provides services outside of his/her duties and responsibilities
- Willfully and/or intentionally violates University policy
- Reckless in the discharge of ones duties

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### III. Significant Personal Liability Issues Related to:

- Negligence
- Defamation
- Criminal Acts
- Federal Regulations
- Contracts
- Privacy

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### Negligence

- Elements
  - Duty
  - Breach
  - Proximate Cause
  - Damages
- Bodily Injury
- Personal Injury
- Emotional Distress

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### Other Tort Actions

- Defamation
  - Libel
  - Slander
- False Imprisonment

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### Criminal Acts

- Mail and Wire Fraud
- Conspiracy
- Perjury
- Misprision of a Felony
- Embezzlement
- Breach of Fiduciary Duty
- Bribery & Kickbacks
- Obstruction of Justice
- RICO

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### Mail & Wire Fraud

- Mail fraud statute
  - 18 U.S.C. 1341
- Wire fraud statute
  - 18 U.S.C. 1343

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**Elements common to both  
Mail and Wire Fraud**

- A scheme or artifice to defraud;
- Use of the mails or wire (interstate electronic communications) for the purpose of carrying out the scheme; and
- A culpable participation by the defendant, either by direct use of the mails or wire, or by knowingly causing someone else to make such use.

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**Mail & Wire Fraud:  
Not Necessary to Prove**

- That anyone was, in fact, defrauded;
- That the perpetrator of the fraud derived monetary gain;
- That the perpetrator of the fraud intended to use mail or wire facilities in furtherance of the scheme; or
- That the matter mailed or transmitted was itself misleading or fraudulent

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**Perjury**

- Knowingly making false statements on material issues under oath.
- Can occur in a courtroom, during a deposition, congressional hearings, administrative hearings, and even statements made before a notary

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## Conspiracy

- Basic elements for proving a conspiracy
  - An Agreement
  - An unlawful goal
  - Knowledge, intent, and participation in the conspiracy
  - The commission by at least one conspirator of an overt act in furtherance of the conspiracy

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## Misprision of a Felony

- Having knowledge of the actual commission of a felony; failing to notify the authorities of the felony; and took steps to conceal the felony

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## Misprision of a Felony continued

- Examples
  - Changing, hiding or destroying official records in order to conceal the fraudulent act
  - Suppression of evidence regarding the fraudulent act
  - Directly or indirectly causing others to withhold or suppress information pertaining to fraudulent acts
  - Making false statements to investigators regarding the fraudulent act

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## Federal Regulations/Compliance

- Environmental Protection Act (EPA)
- Occupational Safety & Health Act (OSHA)
- National Security
  - USA Patriot Act
  - Office of Foreign Asset Control (OFAC)
  - Select Agents
  - SEVIS
- New Sentencing Guidelines

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## EPA

- Environmental statutes, including CERCLA & RCRA, contain both criminal and civil components regarding violations
- However, since the government cannot throw a company into jail, individuals are subject to criminal charges

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## National Security OFAC

- “Willful” violators subject to fines up to \$50,000 per violation under the Iranian or Sudanese rules
- \$1,000,000 for an institution that violates the Cuban rules
- A fine of up to \$100,000 and/or up to 10 years imprisonment for an individual violator of the Cuban/Iranian/Sudanese rules

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**OFAC**  
**continued**

- Also under the Cuban rules, an individual can be fined up to \$250,000 in criminal penalties for violating the act.
- An institution can be fined up to \$1,000,000 for criminal violation of the Cuban rules

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**National Security**  
**SEVIS**

- **Primary Purpose:** Provide tracking, monitoring, and access to accurate and current information on non-immigrant students and exchange visitors. SEVIS enables schools and program sponsors to transmit electronic information and event notifications via the internet to the BCIS and the Department of State throughout a student's or exchange visitor's stay in the United States, and it allows printing of the appropriate forms and also provides reminders, alerts, and basic reporting capabilities

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**V. Selected Cases**

- **Shin v. MIT**
  - Court permits negligence claims relating to a student's suicide to proceed against two MIT administrators – a counseling dean and a housemaster
- **Buchwald v. University of Minnesota**
  - Employee's request for indemnification of attorney's fees was denied
- **Harris v. Howard University**
  - University refused to indemnify Treasurer for fees incurred during an investigation

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