



NACUA
Webinar

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Sharpening Your Skills: Best Practices for Conducting Internal Investigations

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Agenda

- Hypothetical and Role Analysis
- Pre-Investigation Considerations
- Audience Q&A
- Conducting Investigations
- Post-Investigation Strategies
- Audience Q&A and Closing Remarks

Hypothetical – Part I

- You are on your way to work after a relaxing weekend and receive an email from the dean of the business school who tells you that a group of students sent her a petition regarding a mandatory case study that was used in a Marketing course. The case study focused on factors that influence levels of engagement with a clothing company's Instagram posts.
- Students who signed the petition took issue with the sample, fictional Instagram posts that were used – one post included a video that showed non-consensual touching that was sexual in nature. Another post included a video where a model jokingly referred to another model using slang that some consider a racial slur.
- The case study represents 50% of the students' grade in the course. The students are asking for grades on the case study to be nullified and for the termination of the faculty member who wrote and administered the exam. The dean would like to know what action she can take today and would like to relieve the faculty member of teaching duties while she learns more about the situation.

Hypothetical – Part II

- Next, you receive an email from the faculty member, who has received a copy of the petition and was told by the students that if posted grades are not changed by close of business on Tuesday, the petition will be published on social media and shared with local and national media outlets.
- The faculty member defends their right to place students in challenging situations akin to real world challenges they may face, would like to know what the university will do to protect their reputation and the academic freedom of faculty, and whether student conduct charges will be brought against students if they publish the petition, which names the faculty member.
- The faculty member copied the head of the faculty senate on the email to you and has requested a response today.



Pre-Investigation Considerations

How Issues to Investigate are Uncovered

- Direct report, oral reference, or formal complaint(s)
- Anonymous complaint
- Discovery of deficiency/anomaly
- Periodic review/audit
- Media report
- Government investigation
- Lawsuit

Varying Concerns to Investigate

- What type of issue?
 - Violation of law
 - Violation of policy
 - Ethical or mission-based problem
- Who should be involved in assessing nature of multi-pronged mix of concerns?

Why Investigate?

- Legal compliance
 - Investigation required by law
 - Avoid or reduce liability exposure
 - Understand enough to determine if need to report outside the institution
- Institutional culture
 - Policies only meaningful if enforced
 - Build trust among constituencies
- Big "I" or little "i"?
 - "Intake" review to understand whether/how to conduct full review
 - Full investigation clearly needed, devote time and resources

DISCUSSION – Marketing Case Study

- Do student and faculty member concerns about case study and public statements about the situation raise legal or policy issues, or both?
- What institutional culture issues are in play here, and can any be addressed in real time before investigations have been completed?
- Is more information needed about any issue to determine whether to investigate?

Jurisdictional Issues

- Complexities of multi-pronged concerns that implicate multiple policies
 - Title IX
 - EEO policies
 - Faculty Handbook
 - Student Code of Conduct
 - Grade appeals
 - Academic Freedom
 - Research Misconduct
- Coordinating among people in different offices who enforce the various policies

Jurisdictional Issues

- Procedures, procedures, procedures
 - Often different policies invoke their own unique procedures
 - How to resolve discrepancies or conflicting provisions between different sets of applicable procedures?
- External or concurrent investigations or proceedings, and coordinating internal steps
 - Criminal investigations
 - Government investigation
 - Agency proceeding (e.g., OCR charge from one of the students)

DISCUSSION – Marketing Case Study

- Which institutional officials should be involved with assessing what policies are implicated by students and faculty member's concerns, and who should lead that group?
- If the academic freedom policy includes a process for a faculty member to initiate Faculty Senate review at the next regularly-scheduled meeting that is 45 days away, can the EEO office's investigation of students' discrimination concerns proceed or conclude before then?

Attorney-Client Privilege Issues

- Preserving confidentiality for the institution
 - Entire investigation attorney-client privileged?
 - If not, can portions of communications be privileged?
 - Any need to use results for post-investigation discipline?
- Assess and deliberate at the outset
 - Document any privileged investigation carefully
- More challenging to do when multiple processes in play at the same time

Attorney-Client Privilege Issues

- Potential future waiver
 - Can privilege be waived after ascertaining extent of issue?
 - What is the scope of such a waiver?
- "Control group" for privileged communications
 - Who is in that group?
 - What information do they receive?
 - How do they receive it?

DISCUSSION – Marketing Case Study

- Can any portion of investigation(s) here be set up as attorney-client privileged, and is that a good idea?
- What communication streams could be set up to have any attorney-client privilege protection?

Confidentiality/Communication Strategies

- Are issues "secret" or already "public" problem?
 - Potentially huge impact on how to structure investigation
 - Can influence timing, scope, and who needs to help manage process
- Privacy issues for parties to any investigation
 - Usually cannot promise complete protections
 - But should take any measures possible without compromising fact-gathering efforts
- Minimizing disruption within campus constituencies during pendency of any investigation
- Media planning or management – may deserve attention/care

DISCUSSION – Marketing Case Study

- Can or should the institution comment publicly on any of this, and would doing so violate any privacy rights or policy provisions?
- Should the students and/or faculty member be directed or encouraged not to publicly share information about the issues during pendency of investigation?
- If student press publishes any incorrect information about the faculty member, could the institution be liable? Does that warrant oversight of student press on this issue?



Conducting Investigations

What is the Purpose and Scope of the Investigation?

- Be clear about purpose and scope – Is it one investigation or two?
- What decisions will the investigation help you make?
 - Was a university policy violated?
 - Is any disciplinary action warranted?
 - What resolution is appropriate?
- What risks are you trying to address?
 - Harassment
 - Retaliation
 - Academic freedom
 - Reputational

DISCUSSION– Marketing Case Study

- Is there one investigation or more than one?
 - ***"[O]ne post included a video that showed non-consensual touching that was sexual in nature. Another post included a video where a model jokingly referred to another model using slang that some consider a racial slur."***
 - ***"The students are asking for grades on the case study to be nullified and for the termination of the faculty member who wrote and administered the exam."***
 - ***"The faculty member . . . would like to know what the university will do to protect their reputation and the academic freedom of faculty, and whether student conduct charges will be brought against students if they publish the petition, which names the faculty member."***

Who Should Conduct the Investigation?

- Considerations:
 - Objectivity/Impartiality
 - Required training
 - Expertise/credibility
 - Timeliness
 - Privilege
 - State law requirements related to qualifications
- Application:
 - Faculty Affairs
 - Title IX, other civil rights investigators
 - Student Conduct
 - Compliance
 - OGC
 - Outside Counsel

To Whom Should the Investigator Report?

- Relates to decision of who should conduct the investigation, privilege, jurisdictional issues
- Objectivity/impartiality
- Consider path for appeals

DISCUSSION– Marketing Case Study

- Who investigates allegations of sexual harassment in course material?
- Could an investigation of alleged sexual harassment result in a grade change and, if not, who else needs to be involved in the investigation?
- Who investigates alleged violations of reputational harm and violations of academic freedom?
- What role does the Dean have, if any, in investigating or evaluating the issues?
- Can the Dean perform the role objectively?
- What type of expertise is necessary to conduct the investigation?

Is Interim Action Necessary?

- Interim supportive measures
- Suspension pending investigation
- Protection against retaliation
- Communications/PR

DISCUSSION – Marketing Case Study

"The dean would like to know what action she can take today and would like to relieve the faculty member of teaching duties while she learns more about the situation."

The "faculty member . . . was told by the students that if posted grades are not changed by close of business on Tuesday, the petition will be published on social media and shared with local and national media outlets."

- Does the situation warrant suspension pending investigation?
- Can/should grades be removed pending investigation?
- What communications plan should be put in place in the event the petition is published?
- Should the university encourage the students not to publish the petition?
- What steps should the university take to protect against retaliation?

Initial Steps in the Investigation

- Notices
- Dismissal of any allegations that will not be investigated
- Opportunity to challenge investigator based on bias
- Setting up electronic data room
- Investigation plan
- Will interviews be recorded?
- How will review of interview summaries or transcripts of interviews be handled for parties and witnesses?
- Will advisors be permitted and what is their role?

Common Issues that Arise

- Cross-complaints
- New claims
- Refusal to participate
- Allegations that the investigator is biased
- Complainant or respondent leaves the university
- Privacy, confidentiality, FERPA
- Threat of, or possible, retaliation
- Publicity

DISCUSSION – Marketing Case Study

- If no additional facts are uncovered, has the faculty member's academic freedom been violated by the petition?
- If academic freedom has not been violated, should that determination be documented as a dismissal?
- Is the faculty member's email a complaint? A cross-complaint?
- Would pursuit of conduct charges against the students be considered retaliation?

What Happens When the Scope Changes?

- Revisit:
 - Why are we investigating?
 - What is the purpose and scope of the investigation?
 - What policies/offices are at issue?
 - What procedures apply?
 - Who should conduct the investigation?
 - Have issues related to privilege changed?
 - To whom should the investigator report?
 - Is interim action necessary?
 - Should there be a change in communications strategy?
 - Is litigation now anticipated?

Hypothetical – Part III

- *"The students publish the petition on X/Twitter and Instagram. They include the videos, which results in inquiries from the student press and national media outlets."*

Hypothetical – Part IV

"Students, faculty, and staff become interested in the faculty member's academic background."

"The dean receives an anonymous complaint alleging that the faculty member falsified participant names/information and fabricated data for the nonexistent participants in connection with a federally sponsored research grant."

DISCUSSION – Marketing Case Study

"The dean receives an anonymous complaint alleging that the faculty member falsified participant names/information and fabricated data for the nonexistent participants in connection with a federally sponsored research grant. "

- What can be done about anonymous research misconduct complaint and does faculty member need to know of its existence before any next step?
- If research misconduct procedures allow anonymity protections for complainants but EEO procedures do not, how to handle situation if we learn same person has reported both?

DISCUSSION – Marketing Case Study

- Now that the petition has been published, how does that change the scope of the investigation?
- What impact does inquiry from the press have on the scope?
- Now there is an allegation of research misconduct, who handles that investigation and how does it relate to pending investigations?



Post-Investigation Strategies

Form of Report

- Written, oral, or combination
 - Executive summary or detailed full written report
 - May depend on expected use of information and extent to which any aspect of investigation set as attorney-client privileged
 - Public records laws often influence such decisions
- Who receives or will have access to any report?
 - Internally
 - Externally
 - Media – voluntary publication or public records requests
- Litigation issues
 - Existing claims or proceedings already ongoing?
 - Potential future claims?

Efforts to Redress Confirmed Problems

- Consider extent to which constituents involved can learn information about outcome of investigation or steps institution chooses to take to redress any concerns
 - Often limited by confidentiality concerns regarding employee discipline
 - Policies or procedures may dictate what can be shared
 - Sharing something with complainants may help prevent ensuing litigation

DISCUSSION – Marketing Case Study

- How many different reports might result here, and will each be accessible by the same group of people?
- Given public nature of students' social media posts, should faculty member be allowed to publish any report if helpful to restore reputational concerns?
- Can the institution place any limits on students publishing written report of outcome and should that influence decisions about how any such reports are structured?

A magnifying glass with a black handle and frame is positioned over a stack of papers. The papers are slightly blurred, showing various colors and textures. The word "Questions?" is written in a large, bold, white sans-serif font across the center of the image.

Questions?

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