National Association of College and University Attorneys
Presents:

The Ethics of High Stakes Communications

Webinar

December 1, 2021

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Darryl Lunon
Georgia Institute of Technology

Gina Maisto Smith
Cozen O'Connor

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The Ethics of High Stakes Communications

Darryl W. Lunon is currently the Deputy General Counsel & Chief Ethics and Compliance Officer ("CECO") at the Georgia Institute of Technology ("Georgia Tech" or the "Institute"). Darryl's oversight responsibilities include litigation, transactions, intellectual property, employment matters, athletics, campus operations issues, and risk management. As CECO, Darryl responsibilities include the day-to-day management of the Office of Ethics & Compliance, including Institute-wide training, communications, programs, policies, subject-matter areas, and investigations.

Prior to joining Georgia Tech, Darryl was dual hatted as Associate General Counsel at the Pennsylvania State University ("PSU") as well as being the Chief Legal Officer and Director of Compliance at the Applied Research Laboratory ("ARL"), a Department of Defense University Affiliated Research Center. Prior to joining ARL/PSU, Darryl was Assistant Counsel for the U.S. Navy's Naval Facilities Engineering Command (NAVFAC), Mid-Atlantic in Norfolk, VA. While at NAVFAC, Darryl's practice included procurement, federal real estate, fiscal law, and ethics. Before joining NAVFAC, Darryl was Associate District Counsel for The U.S. Army Corps of Engineers (USACE) in Louisville, KY. While at USACE, Darryl's practice included procurement and federal real estate. Darryl's practice also included protecting the Government's interests in litigation before the Armed Services Board of Contract Appeals and Government Accountability Office. Darryl is also a commissioned officer in the U.S. Army Reserve's Judge Advocate Corps.

Prior to becoming an attorney, Darryl practiced as a civil engineer/construction manager for multi-billion dollar airport capital improvement projects both at Washington Dulles International Airport in Washington, DC and Hartsfield-Jackson International Airport in Atlanta, GA. Darryl earned a Bachelor of Science degree in Civil Engineering from The Georgia Institute of Technology and a Bachelor of Science degree in General Science from Morehouse College. Darryl earned his Juris Doctorate and Certificate of Legal Writing from the Walter F. George School of Law at Mercer University. Finally, Darryl earned his Executive Masters of Business Administrative (alternative) from the Harvard Business School.

Gina Maisto Smith, Chair of Cozen O'Connor's Institutional Response Group, focuses her practice on the institutional response to sexual and gender-based harassment and violence, child abuse, and other forms of harassment, discrimination, and criminal conduct. Gina provides consulting, counseling, and legal advice on all aspects of the institutional response to misconduct. She assists institutions in designing effective institutional responses that integrate the complex federal and state regulatory framework with the unique dynamics of trauma and the impacts of interpersonal violence on individuals and communities. Gina regularly advises educational and child-serving institutions including public and private K-12 schools and colleges and universities about policies, changes in the law, and investigations into allegations of child abuse and sexual misconduct, including sexual violence. She regularly conducts policy audits and assists in the development of policy and the design and implementation of internal operating procedures. In addition, Gina conducts training for K-12 administrators and multiple university constituencies, including Title IX coordinators, sexual assault response teams, judicial hearing boards, investigators, and members of the campus community. Before entering private practice, Gina spent nearly two decades in the Philadelphia District Attorney's Office where she investigated numerous cases, handled more than 100 jury trials, and developed unmatched experience in the investigation and prosecution of sex crimes, child abuse, and domestic violence.

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Webinar

The Ethics of High Stakes Communications

Gina Maisto Smith, Chair of Institutional Response, Cozen O'Connor

Darryl W. Lunon, II, Deputy General Counsel, Georgia Institute of Technology

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Presenters

Gina Maisto Smith

Chair, Institution Response Group, Cozen O'Connor

Darryl W. Lunon, II

Deputy General Counsel & CECO, Georgia Institute of Technology

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Framing the Conversation

- Dssdfdedn#P rgho#Jxdnv#ri#Surihvvlrqdo#Frqgxfw
- Suhsdudwlrq=#Suh#dqg#srvw0qflghqw#
- Vfhqdulrv#ghp rqvwudwlqj#wkh#qwhuvhfwlrq#ri#kljk0surilh#qflghqw#dqg#hwklfdo#frqvlghudwlrqv#z klfk#p d|#jlyh#ulvh#wr#hwklfdo#vvxhv#ru#kljkhu#hgxfdwlrq#dwwruqh|v

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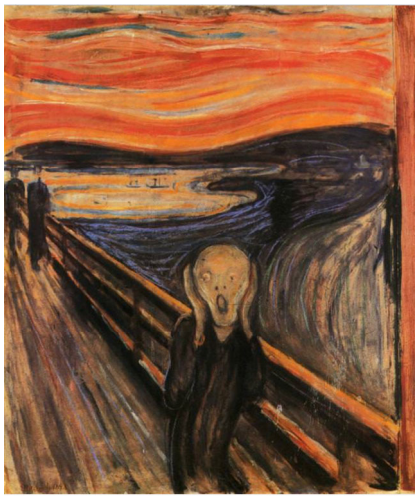
Crisis Communications



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Speak the truth, AND bite your tongue to find the words that may be heard…

she 100% teaches ccd

867K views · From **Marc Farz…**

7:08 PM · 11/21/21 · Twitter Web App

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What is the Most Important Thing You Can Do To Ethically Manage High Stakes Communications?

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One Size Does Not Fit All

Each institution is unique in:

- Institutional values
- Policies and procedures
- Resources
- Personnel
- Public vs. Private
- Culture
- Challenges

There is a True North

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Successful Preparation Integrates:

The law (federal, state, local - including applicable ethical rules)

A comprehensive understanding of the facts and the dynamics at issue

Your institutional culture, history, current climate, resources, policies, procedures, personnel, practices

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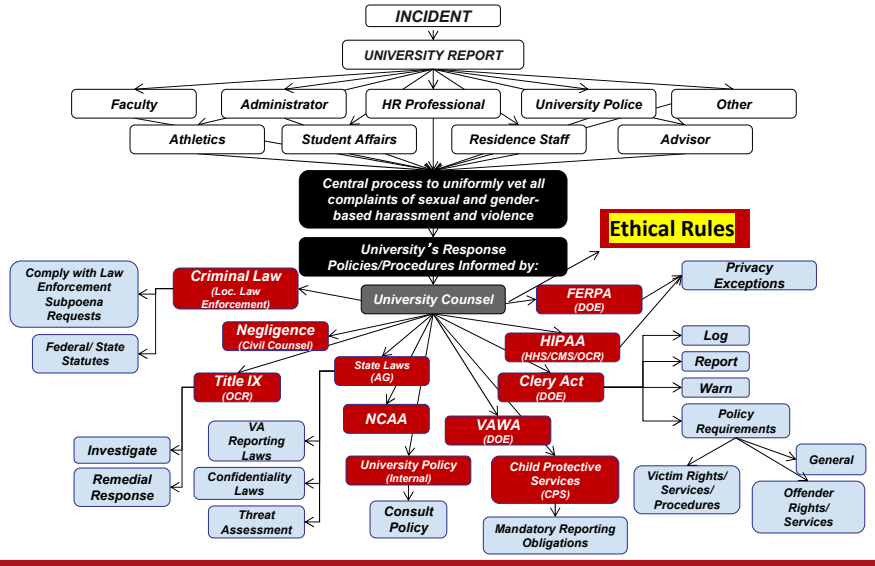
The Challenge of the Context



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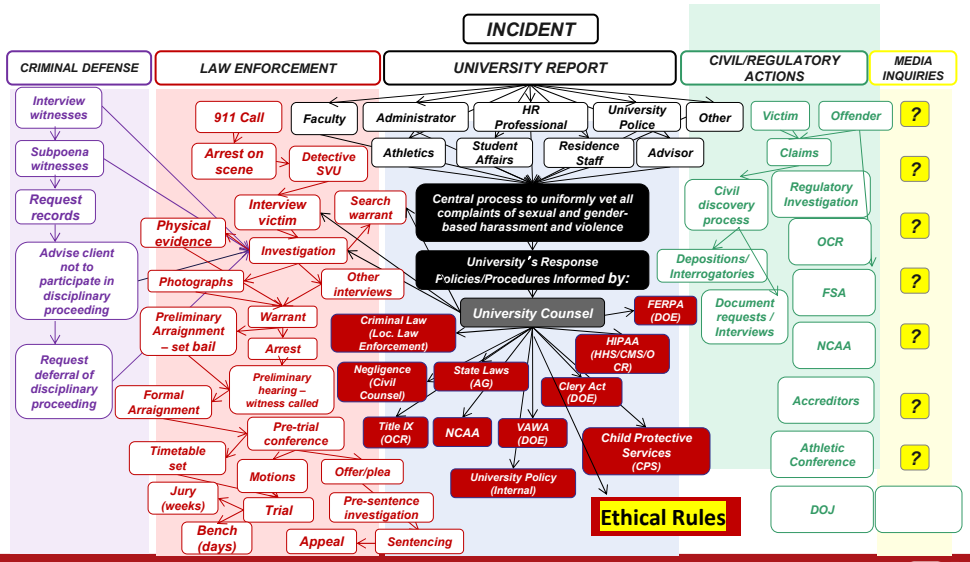
The Challenge of the Context



Note: Lists of report recipients and relevant laws is not exhaustive.

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I. Ethical Rules and Imperatives

- Rule 1.1 – Competence
- Rule 1.2 – Scope of Representation
- Rule 1.3 – Diligence
- Rule 1.4 – Communication
- Rule 1.13 – Organization as Client

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I. Ethical Rules and Imperatives

- Rule 2.1 – Counsel Advisor
- Rule 3.4 – Fairness to Opposing Party and Counsel
- Rule 3.6 – Trial Publicity
- Rule 4.1 – Truthfulness in Statements to Others
- Rule 4.3 – Dealing with Unrepresented Person
- Rule 8.4 – Misconduct

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II. Importance of Preparation

Preparation in advance of high stakes "episode"

- ✓ Establish emergency/incident response team
- ✓ Practice, Practice, Practice!
- ✓ Define role of Counsel on the incident team and to the executive leadership team

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Assessment and Planning

Conduct a privileged vulnerabilities assessment

Identify and prioritize areas of risk

- Faculty/Staff/Student conduct
- Institutional finances – cyber security
- Political speech/activities
- Greek life - Athletics
- Sexual/Racial harassment and violence
- Labor disputes
- Health and Safety considerations
- Evaluate all legal requirements
  - See *NACUA Higher Education Compliance Alliance Matrix*

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Crisis Communications Planning

Unique Context of Higher Education

- Privacy and Reporting Laws
- Significant Compliance Requirements
- Variety of Audiences
- Silo Structure
- Board Engagement
- Expanded Press Corp (campus, industry)
- Access to Alternative Information Platforms
- Speed and Velocity of the Information

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Crisis Communications Preparation

Crisis Preparedness

- ✓ Response Team in place
- ✓ Assignment of Roles
- ✓ Communication Expertise
- ✓ Subject Matter Expertise
- ✓ Prior relationships with press (external/internal)
- ✓ Response Protocols
- ✓ Document hygiene
  - *This will prove critical to respond to questions effectively, efficiently and confidently – and will avoid the **tyranny of temporal compression****

**Common phenomena in the institutional setting describing external audience judgement of institutional decisions based on the incorrect inference that ALL administrators knew ALL information at one point in time. GMS*

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Identification and Coordination of Response Team

Identifying your core response team

- The Response Team is responsible for all aspects of the institutional response.
- The quality and success of your institutional response is directly correlated to the functionality of the Response Team
- Crisis exacerbates pre-existing issues within leadership teams. Ensure you assemble a team that trusts each other.

- Composition: ***Need to know*** circle

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Identification and Coordination of Response Team

Composition: *Need to know* circle; may include:

- President or identified other members of senior leadership
- Student Affairs, Human Resources
- Provost
- Legal
- Communications – internal/External Crisis Communications consultant?
- Public Safety/Security
- Risk Management
- Title IX, Clery, Youth Protection
- Subject Matter Expert? (Internal/External)
- Board involvement?

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Identification and Coordination of Response Team

Designation of roles:

- ❑ Information gathering
- ❑ Decision-making
- ❑ Drafting
- ❑ Spokesperson: Liaising with external press corps
- ❑ Spokesperson: Liaising with internal stakeholders
- ❑ Liaising with Board
- ❑ Setting agenda topics
- ❑ Documenting progress and decisions
- ❑ Facilitating discussion

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II. Importance of Preparation (Cont'd)

Preparation value during high stakes "episode"

- Implement the emergency/incident response plan
- Remain involved/informed throughout the communication process
- Inform governing board when appropriate

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Response Team Initial Considerations

Response team training and preliminary reminders:

- Ethical Rules
- Attorney-Client Privilege, Work Product Protections
- Subject Matter Expertise
- Privacy Considerations
  - Family Educational Rights and Privacy Act (FERPA) considerations
  - HIPAA
- Open Records Laws
  - Open Records Act considerations
  - Freedom of Information (FOIA) considerations

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Response Team Initial Considerations

Initial Question for Response Team

- *What are your top three core values in the context of this crisis or incident?*
- Then assess all ensuing decisions by this values framework. An ethical response team has the courage to fall back on their values!

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Response Team Initial Considerations

- **Allow room for dissent; all ideas are welcome**
  - **Even bad ideas can spawn good ones**
- **Let ideas "play" – come back to them as more information is gathered and more facts are known**

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Messaging

- Critical to gather known and *reasonably* available relevant facts before releasing any communication
  - Documents
  - Interviews with personnel
- Important to identify *all* constituencies for accurate, yet tailored messaging and communications
  - Students
  - Parents
  - Faculty and Staff
  - Alumni
  - Board
  - Public

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During A Crisis

- Media and many others most concerned with:
  - What happened?
  - Why did it happen?
  - Was it avoidable?
  - How seriously is the institution taking this?
  - Does the institution care about the people affected?
  - What is the institution doing to investigate what happened?
  - What is the institution doing to prevent a recurrence?

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Don't Forget About Language

- Language is more important than ever.
- Higher education has to be willing to look at the crisis communications and response experience of other industries.
- Counsel can ask: how have similar incidents played out in other industries?

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Don't Forget About Perception

- Counsel can also combat the instinct to keep everything in-house. Knowing when to hire competent outside counsel that is *free from conflict or appearance of conflict* can diffuse the situation.
- Can't just issue the same statements as other institutions. There can only be so many similar statements from a college president before "We take this seriously" is understood as "We know we have to issue this statement and we don't really take it that seriously."

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II. Importance of Preparation (Cont'd)

Preparation value after high stakes "episode"

- Assessment and Reflection
- Continue to protect confidential information

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Crisis Communications Manual

- Include standby statements and all past statements in a larger crisis communications manual
- Manual should include:
  - Step-by-step instructions for team members and to alert broader community
  - Clear delineation of responsibilities
  - Full internal and external contact list
  - Update regularly (at least annually)
- Test readiness of crisis communications team
  - Media train key spokespeople (primary and back-up)
  - Conduct tabletop or full drill
  - Evaluate team's handling
  - Modify crisis communications manual, as needed

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Implementation Rubric

Law	Regulations	Guidance
Policy	Higher Education Experience	Values

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III. Scenarios Highlighting the Application of Ethical Rules

Scenario No. 1

POTUS has signed an Executive Order requiring all federal contractors to have its employees vaccinated, except those with medical or religious accommodations. Additionally, all visitors must wear masks within buildings where federal contracts are conducted. Your university meets the 'federal contractor' definition because you receive federal funds.

- **What are the ethical and communications considerations?**

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III. Scenarios Highlighting the Application of Ethical Rules

Scenario No. 2

You have received an anonymous complaint of sexual harassment from three students (one former and two current students) against a long tenured professor. The students note in their complaint they plan to release this information on social media and national media outlets if the professor is not fired immediately.

- **What are the ethical and communications considerations?**

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III. Scenarios Highlighting the Application of Ethical Rules

Scenario No. 3

You receive a call from an Assistant United States Attorney that a Chinese American faculty member will be arrested next week by the FBI for her failure to disclose receipt of funding for collaborations with a foreign university. The AUSA plans to release a statement and is willing to discuss. Before you are able to connect with the AUSA, the faculty member appears on various cable news networks citing First Amendment and academic freedom concerns.

- **What are the ethical and communications considerations?**

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III. Scenarios Highlighting Ethical Rule Application

Scenario No. 4

You receive a call from the Chief Information Technology Officer noting a data breach of a third-party vendor who manages some of the university's Personally Identifiable Information. University Communications indicated the breach had been reported via social media and national news.

- **What are the ethical and communications considerations?**

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On the Horizon

- Increased compliance environment and expanded enforcement efforts (regulatory #metoo)
- Increased civil litigation from both complainants and respondents – mega cases
- New federal and state legislation
- Increased mass and social media attention

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V. Conclusion

- Ethical rules are counsels' true north
- Best crisis response is based on proper preparation, anticipation, and planning
- Success in high stakes communications is directly tied to excellence of effort that integrates the legal framework, comprehensive facts, and a commitment to institutional values – that effort can start today.

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THE ETHICS OF HIGH STAKES COMMUNICATIONS[1]

NACUA Webinar
December 1, 2021

Gina Maisto Smith
Chair, Institutional Response Group, Cozen O'Connor

Darryl Lunon, II
Deputy General Counsel, Georgia Institute of Technology

Introduction

It is difficult to quantify the far-reaching impacts high stakes issues, like the Covid-19 Pandemic, and mass tort litigation related to historical allegations of sexual abuse, have had on higher education. Vital matters such as mitigating risks to the health and safety of a campus community are followed by countless financial aid, antitrust, research employment, business continuity, student life, privacy, technology, athletics, contracts, procurement, public safety, public health, environmental safety, and litigation issues. Attorneys for higher education institutions are likely to find themselves serving their clients in each of these areas and more, as higher education institutions seek advice and counsel on how to respond to each legal and business challenge. Moreover, as non-attorney administrative offices in higher education need additional help to address Covid-19 and related high stakes issues, attorneys in higher education will likely find themselves providing general business counsel and advice, project management expertise, and working outside of their traditional areas, even if only temporarily.

What are the ethical considerations higher education attorneys in these situations must keep in mind? What ethics rules apply when attorneys are working in non-legal capacities for their institutions? Are privileges available to attorneys when they are providing legal advice, business (or other) advice, or a mix of both?

High stakes crises have thrust institutions of higher education into a careful and meticulous study of how to provide educational services going forward. It is essential that attorneys serving higher education review their ethical obligations in order to provide legal services of the highest quality. Ethical conduct is the true north of the legal profession, and the Model Rules of Professional Responsibility are the guideposts for adept navigation of the complex challenges facing counsel.

Crises come in different shapes and forms. Some, such as natural disasters, are outside of our control. But, for the purpose of this discussion, we will be examining the type of crises to which

[1] Adapted from *Counsel's Role in Managing The Aftermath of Crisis: A Professional Responsibility Lens (*NACUA 2018 ANNUAL CONFERENCE), Patrick O'Rourke, Gina Maisto Smith, Felicia Washington. Augmented by *Investigations, Ethics, and Attorney-Client Privilege/Work Product Protections: Critical Records Management Considerations* (NACUA Fall 2021 Virtual CLE Workshop), Christopher Holmes and Lisa Turner.

we can respond and exercise some degree of control. In other words, we are describing high stakes events that threaten institutional integrity and require time-sensitive judgments based on a delicate balance of fact-finding, legal analysis, and communications acumen.

An accepted definition of crisis management is: The process by which an organization deals with a disruptive and unexpected event that threatens to harm the organization, its stakeholders, or the general public. *Bundy, J.; Pfarrer, M. D.; Short, C. E.; Coombs, W. T. "Crises and crisis management: Integration, interpretation, and research development". Journal of Management*. And, in particular, the crises that the legal team is often asked to help manage can be classified as crises of "organizational misdeeds." In other words, the organization is charged with having done something wrong or not having responded appropriately to risks. Organizational misdeeds come in many categories, but can be seen as including: (1) crises of skewed management values – where the organization has taken actions that are inconsistent with the organizational mission; (2) crises of deception – where the organization conceals or misrepresents information when dealing with it constituents; and (3) crises of management misconduct – where the organization's leaders have acted illegally. *Lerbinger, O. (1997). The crisis manager: Facing risk and responsibility. Mahwah, NJ: Erlbaum.*

As we have seen in recent years, higher education is not immune from crises, and, in fact, because of the position that colleges and universities occupy in their communities, may face more scrutiny in times of crises than other organizations. Among the crises of the recent past, higher education can count fiscal misconduct, sexual misconduct, athletics misconduct, campus violence, and academic misconduct. And, if your organization has not experienced a crisis, consider yourself lucky, as one can arise at any time.

The focus of this presentation is not to prescribe responses to particular types of crises. Instead, our goal is to discuss some of the important principles that underlie effective high stakes communications and do it through the lens of a lawyer's professional obligations as articulated in the ABA Model Rules of Professional Conduct[2] (Appendix A). Informed by this legal framework, Section X discusses implementation principles. Recognizing that the synthesis of legal requirements, institutional values, and informed communications is not a "one size fits all," we share guidance developed through the multi-disciplinary lens of legal and communications experience in the higher education context.

I. Model Rule of Professional Conduct 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[2] With the exception of California all states have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct. For additional information on professional responsibility and state legal ethics rules, see https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html

A. Is This a Crisis?

The first step in responding to a crisis is recognizing that you have one. Many times, universities stumble in their initial response to a crisis because they have inaccurately assessed the matter as one that raises only internal concerns, only to later find that it generated significant external scrutiny. There are no hard and fast rules that allow a lawyer to gauge when an issue will move beyond the institution, but there are some questions that might help drive the answer:

1. Is there a party to a dispute that has an incentive to share the information within your community or seek publicity? Often adverse parties will believe that corporations and other institutions will fear the publicity that would accompany a controversy. In an effort to generate pressure to resolve an issue or a lawsuit, counsel for the aggrieved party may seek to publicize it.
2. Does the issue involve individuals whom the media or your broader community will find newsworthy? If the issue involves people of some notoriety, there is a greater likelihood that the media and your community will take interest. Athletics personnel, coaches, and senior institutional leaders raise particular risks.
3. Does the issue involve public officials? To the extent that the issue involves public officials who are alleged to have breached a duty owed to the public or abused their authority, there is a greater likelihood that your broader community, the public at large, and the media will take interest.
4. Does the issue involve issues of national or global significance? To the extent that an issue extends beyond the local jurisdiction, there is a greater likelihood that mass media will take interest.
5. Does the issue involve allegations of sexual misconduct? It remains true that allegations of prurient conduct attract the media.
6. Does the issue involve values that are vitally tied to the institutional mission?
7. Is there a lawsuit or a detailed account of the issue available through social or mass media platforms? Even if the issue is not available to the public or your community, certain issues may require action that may include self disclosure.
8. Does the issue have unique, far reaching and unpredictable trajectories that impact the health and safety of your constituents and in turn every aspect of the institutional mission?

In the context of the high stakes issues, the only predictability is that the arc of the impact is unpredictable. This is a scenario that requires the integration of a multi-disciplinary set of skills to craft a values-based and ethical response while fending off potential existential threats.

B. Can I Handle This By Myself?

All attorneys practicing within higher education necessarily field challenges and problems that arise in the day-to-day course of representation. But a crisis – in the sense that it poses a significant risk to the organization – brings significant external focus upon the organization, is disruptive to the organization's mission, involves a significant complexity, and may require a different set of skills to navigate effectively. If an attorney has not faced a true crisis situation,

the first question that arises is whether counsel is competent to advise the institution. In contrast to many situations where the lawyer has the ability to obtain the requisite legal skill and knowledge to be able to learn the field and master the nuances, crisis judgments often extend beyond a strictly legal analysis of the issue. While getting up-to-speed requires time, one hallmark of crisis response is that it demands immediate action.

Comment 3 to Rule 1.1 recognizes that **"in an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical."** Just as importantly, however, emergency assistance **"should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest."** In other words, a necessary first step for any lawyer facing an organizational crisis is to self assess whether counsel's office has the requisite expertise necessary to be able to address the crisis and, if not, what resources are available to help. Considered in this light, seeking additional legal assistance in times of crisis is not a sign of weakness, it is instead a professional responsibility.

C. What Is Going On?

To respond competently, the lawyer can't move forward without information. **Comment 5 to Rule 1.1** states that **"competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."** Moreover, Comment 8 to Rule 1.1 states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." The challenge is that crises often do not allow for information gathering in the way that lawyers prefer, and, in many cases, the information is voluminous, complex, evolving, and even contradictory.

As the public health information related to the COVID-19 pandemic is evolving, counsel too, must evolve to nimbly respond to the legal, moral, social, financial, operational, behavioral, emotional and physical impacts on the academic community.

In times of crisis, university counsel must determine what type of information is needed, what sources of information are available, and what resources exist to help gather and process information. As an initial step, the lawyer should attempt to identify the types of risk that the crisis poses – safety, social-emotional, legal, financial, operational, educational, and institutional integrity – and then determine what sources of information are most likely to inform an analysis of that risk. The lawyer should consider which individuals are available to obtain precise and reliable information, as well as what methods are available to obtain access to documents and electronic information.

In conducting this environmental assessment, counsel will naturally focus the majority of their attention to those sources of information within the organization's control, but it bears noting that information comes from many sources during a crisis. Monitoring the evolution of the

publicly available information, tasking communications personnel to monitor media coverage, and asking others within your organization to be receptive to information that may be brought to their attention, increases counsel's bandwidth to support an informed response. Further as institutions seek to gather information to inform safety for campus communities, counsel and senior leaders must consider the panoramic, overlapping, complex and at times competing interests between and among community stakeholders.

In executing this professional obligation of competence, counsel often look to outside counsel and outside experts for assistance. Recognizing the need for efficient and informed advice in a time of crisis, the following are some considerations that may drive the decision to engage outside subject matter counsel:

1. Is the issue of such institutional concern that it requires an external lens to reinforce the institutional goals of objectivity and reliability?
2. Is the issue of such complexity that it requires special skill?
3. Do you have the expertise in-house to efficiently and effectively evaluate the potential trajectories of the issues given the time constraints?
4. Even if the answer is yes, does the issue involve contention among community members (students, faculty, staff, and alumni), senior leaders, or your board that having outside counsel would enhance the effectiveness of communication and execution of the institutional response?
5. Does the issue involve allegations of misconduct involving senior leadership that would create division among senior leaders or the board and prove difficult for in-house counsel to evaluate and advise without creating conflicts or repercussions on counsel's future ability to serve?
6. Is the issue one of national significance, requiring a broad and in depth understanding of the issues and impacts in the industry to inform an effective institutional response?
7. Does the issue require additional time and external resources to ensure the maintenance of ongoing operations?

While the decision to hire external counsel with subject matter expertise is a common and effective early response to crises, the choice of counsel and the framing of the scope of the engagement are critical and consequential decisions in crisis response. To the extent that institutions engage outside counsel, great care should be taken with the early decisions. Attention to the details of the *who* (choice of counsel) and the *what* (scope of engagement and role of counsel) will avoid thorny legal and communications issues.

Additionally, whether hiring outside counsel to conduct an in-house investigation, using an in-house auditor to help analyze data, or teaming with another college or university office to conduct interviews, the attorney must ensure that the conduct of any non-lawyers working under the attorney's authority is compatible with the professional obligations of the lawyer.[3] In these circumstances, there should also be documentation reflecting that the communications between the attorney's agent and others is for the purposes of facilitating the counsel's ability to render

[3] Model Rules of Professional Conduct, Rule 5.3(a).

legal services and advice to the institution.[4] As a matter of practice, steps should be taken to include language in the retention letter for outside counsel that clearly delineates the relationships and privilege, including that the outside counsel is working on behalf of the institution to help the institution understand its legal obligations and liabilities, and that the communications and materials produced are considered privileged. When directing employees to talk or work with the agent, they should be notified that such communication are privileged and for the purpose of the providing legal services.[5] Billing for any agents should go through the legal office.

D. Choice of Counsel.

Often institutions will select external counsel to provide subject matter expertise, bring objectivity, instill confidence in the outcome, and drive consistency and coordination, increase bandwidth, and remove the perception of bias. Ensure that counsel selected for this role does not have positional conflicts that undercut the desired goals of the external selection. In selecting external counsel consider the following:

1. Have you properly vetted counsel? (evaluate the depth and breadth of expertise, view samples of prior work, and check references)
2. Has counsel previously represented the institution such that the prior representation compromises the goals of the current representation?
3. Is counsel aligned with a party or organization that is subject to the review?
4. Embrace the tension and ask prospective counsel the hard question – is there anything about your work or history that would compromise the goals of hiring you as outside counsel?

While simple, these considerations are often overlooked and can result in early missteps that undercut the integrity of your institutional response.[6]

E. Scope of Engagement and Role of Counsel.

The deliberate and precise articulation of the scope of the engagement and the role of counsel is a critical element of an effective and competent institutional response. Is the engagement for independent fact-finding? Is it for the purpose of legal advice? Is the expectation that a report will be written? Shared? Is the expectation that the engagement enjoys attorney-client privilege and attorney work product protections? Investment in wrangling with early decisions related to

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[4] *See, e.g.*, *Waters v. Drake*, No. 2:14-cv-1704, 2015 WL 8281858 (S.D. Ohio Dec 8, 2015) (public relations firm hired by a university general counsel in anticipation of litigation to assist in crafting public announcements not covered by the attorney-client privilege); *United States v. ISS Marine Servs.*, 905 F. Supp.2d 121, 130 (D.D.C. 2012) (emphasizing the need for lawyers to be direct participants in an investigation rather than "arms-length" coaches).

[5] For university cases that addressed this issue, *see, Paterno, et. al. v. Nat'l Coll. Athletics Ass'n,* No. 2013-2082, 2014 WL 7803226 (Pa. Com. Pl. 2014) and associated appeal and amicus brief from the Association of Corporate Counsel at *Paterno v. NCAA*, No. 1709 MDA 2014 (Pa. Super. Ct. Apr. 10, 2015); *Doe 1-10 v. Baylor University*, Case 6:16-cv-173-RP, Order Doc. 168 (W.D. Tex.-Waco-2017).

[6] See, *In Nassar Case, Michigan State Wanted Famed Ex-Prosecutor to Both Examine and Defend It - The New York Times,* https://www.nytimes.com/2018/01/27/us/michigan-state-nassar-fitzgerald.html; *Mark Filip Pulled From Investigating UVA Rape - Business Insider,* http://www.businessinsider.com/mark-filip-pulled-from-investigating-uva-rape-2014-11.

the scope and purpose of the representation exponentially improves institutional flexibility and minimizes future risk in the minefield of unknown trajectories.[7]

Although crises are unpredictable, some preparation to inform institutional decisions can occur in advance and enhance counsel's competence. Legal counsel can drive preparation by investing in conversations with senior leadership to develop a nuanced understanding of issues impacting your industry; this will enhance your competence. Many institutions in higher education have engaged both internal (risk management, compliance, and audit functions), and external resources to audit the institutional understanding of the risks attendant to these complex issues.

Competent inquiry into the legal and factual elements of any problem can be advanced by proactive efforts to develop an understanding of your campus constituents. In a traditionally siloed environment developing an understanding of your campus constituents is vital to the quality of any crisis response. Similarly, the development of a multi-disciplinary team charged with assisting counsel to formulate an informed and panoramic view of the risks is essential to crisis preparedness and effective/efficient responses.

II. Model Rule of Professional Conduct 1.2: Scope of Representation and Allocation of Authority Between Lawyer and Client

[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. . . . A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities . . . . A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

A. What Are Our Goals?

In a time of crisis, the situation may be evolving and different constituents within the organization may have very different goals. Some might prefer to resolve a conflict as quickly and quietly as possible. Others may want to take a strong public stance defending the institution. But the key is actually clarifying what direction that university will take. Taking a moment to set forth the constituents' options and selecting a course of action is an exercise in informed consent. The lawyer should set forth the known and reasonably predictable risks, benefits, and alternatives of various courses of action. And, where there are unknowns, the lawyer should identify them.

B. How Can We Achieve Our Goals?

[7] See, *Jane Doe 1-10 v. Baylor University,* US District Court for the Western District of Texas, Waco Division Case 6:16-cv-00173-RP Document 168 Filed 08/11/17; https://www.govinfo.gov/content/pkg/USCOURTS-txwd-6_16-cv-00173/pdf/USCOURTS-txwd-6_16-cv-00173-2.pdf.

Under Rule 1.2, the constituent has the prerogative to establish the goals of the representation, but the lawyer presumptively has the ability to determine the means of accomplishing the goals. While this is true, it's more complicated than the rule would indicate, as universities are not only judged by what they do, but they will also be judged on how they do it. In the higher education setting, Comment 2 of Rule 1.2 may not aptly capture university counsel's experience, as it states that **"clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."** As a general matter, we believe that a truly informed discussion with constituents requires the lawyer not only establish the goals of the representation, but also discuss the strategies by which they might be achieved. Identifying the goals of the representation at the outset can serve as a foundation for future decisions. Implementation decisions should be viewed through the articulated goals of the representation. Many crisis decisions will be judgment calls. The early and agreed upon articulation of goals can serve as effective guideposts as you respond to the fast moving avalanche of implementation questions.

C. What If I Think My Client Is Wrong?

Rule 1.2 makes clear that the **client is able to determine the objectives** of the representation, as well as that the **lawyer's representation does not constitute an endorsement of the client's political, economic, social, or moral views or activities**. So, a lawyer can pursue the client's objectives even if the lawyer believes that the client is making an unwise or imprudent decision. What is important to remember, however, is that the lawyer should advise the clients of what they believe are the reasons why the client's course of action is not the best means to obtain the client's objectives. If, ultimately, the client is informed of the risk and benefits and decides to proceed with a lawful course of action, that is the client's decision to make. In a worst case scenario, **Rule 1.16 allows an attorney to withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."**

Comment 3 to Rule 1.13 further elucidates how these principles apply in the in-house setting. It states, **"When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."** But, if the lawyer believes that a constituent's decision is likely to violate a legal obligation of the organization, the lawyer must proceed in the best interest of the organization.

The fortitude of in-house counsel in speaking up to institutional leaders is easier said than done and infinitely more difficult in the midst of a crisis. Advance preparation and discussion of the intersection of legal and policy/operational issues is an essential step in crisis preparedness. Further, external counsel with subject matter expertise may assist in-house counsel in identifying and articulating legal consequences in a time of crisis.

III. Model Rule of Professional Conduct 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

A. What Is Timely?

Comment 3 to Rule 1.3 explains that a **"client's interests often can be adversely affected by the passage of time or the change in conditions."** This is especially true in times of crisis, as the nature of a crisis often requires an expedited response. At the same time, however, the lawyer wants to be careful not to take hasty action that will later impair the client's position. There is no perfect balance, but we tend to see lawyers who err on the side of not taking timely enough action because they lack complete information. In a crisis, lawyers have to recognize that complete information may not be immediately available and that information may change as the crisis evolves.

The proactive identification of the ways in which your institution documents and maintains information will advance counsel's reasonable diligence and promptness. This effort may also identify gaps in documentation and provide opportunities to enhance institutional practices. Counsel's pre-crisis familiarity with institutional processes and personnel will assist in the efficient gathering of information in the midst and aftermath of a crisis and improve your institution's capacity to respond in an informed and timely manner.

IV. Model Rule of Professional Conduct 1.4: Communication

A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter, [and] promptly comply with reasonable requests for information. . . . A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A. How Do I Determine My Client's Objectives During a Crisis?

In the context of Rule 1.4, communication means communications with your clients, not communications with the outside world, which are described later in this outline. To effectuate Rule 1.2's expectation that the client will be able to determine the objectives of the representation, the lawyer must communicate the situation to the client and provide them with information about the potential courses of action.

When compared to situations where lawyers have more time to fully analyze the situation and assess the potential courses of action, crises do not wait. In these settings, it may be difficult to determine the client's ultimate objectives because you don't have enough information to determine them. What is probably most necessary during a crisis, particularly in the outset, is to determine those decisions to be made immediately and identify the decisions that will await further developments. By framing those decisions that need to be made immediately, the lawyer can help to identify the objectives that the client seeks to pursue.

B. How Do I Keep My Client Reasonably Informed?

In a situation where you have both internal and external pressures to which you must respond, communicating with your clients is important, but challenging, particularly because you will be communicating with multiple constituents. Keeping them all reasonably informed and in possession of enough information to make decisions is the challenge.

One thing to consider is role-based communications. Trying to determine what information institutional actors need to be carrying out their duties helps you ensure that you are communicating effectively. Your governing board likely needs different information than your communications specialist. Your human resources department likely needs different information than IT professionals who are assisting with data collection. Consider having a key point of contact with each of these constituencies and task that person with the obligation to communicate information to those who need to know within that organization.

E-mail can be useful in keeping people informed, but please remember that information contained within e-mails is going to be privileged only to the extent that it is being used to provide legal advice and is being made confidentially. Ordinary business activities and communications made without the reasonable expectation of privacy[8] are not going to be privileged, and e-mail has the unfortunate effect of causing more e-mail to proliferate. Many constituents inaccurately assume that that an e-mail is privileged because a lawyer is one of the recipients. At the beginning of an investigation, the lawyer needs to review protocols for e-mails and ensure that constituents are not harboring inaccurate assumptions.

Finally, especially in the early stages of a matter, consider having a daily check-in with key leadership. This internal, multi-disciplinary leadership team should include those constituents who are in the "need to know' circle of individuals to respond to on the ground needs and to ensure informed communication.

V. Model Rule of Professional Conduct 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

[8] The United States District Court for the District of Columbia recently ruled that attorney-client privilege protections did not apply to the communications of a group of plaintiffs with their own counsel, in a case involving various claims against their supervisor at The George Washington University (GW). Because the relevant communications between plaintiffs' counsel and plaintiffs were made using plaintiffs' GW email addresses and occurred over GW's servers, the court determined that the communications were not made with the reasonable expectation of confidentiality, and the privilege therefore did not apply. *Doe v. The George Washington Univ.*, No. 18-CV-1391 (RBW) (D. D.C. Nov. 19, 2021).

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

- Knowing what information should be communicated, even during crises, by the attorney or by the client, or its agents, is critical when dealing with high stakes communications
- Attorney-Client Privilege and Work Product Doctrine
- Comment 3 to Rule 1.6: "*The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.* The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

VI. Model Rule of Professional Conduct 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice a lawyer may refer not only to law but to other

considerations such as moral, economic, social, and political factors that may be relevant to the client's situation . . .

A. Is This Really a "Legal" Issue?

In times of crisis when our clients are facing significant reputational and business threats, some lawyers perceive their roles as being limited to advising on the "legal" aspects of the problem. In many cases, however, the question is not one of legality vs. illegality, but instead is a question of choosing from an array of alternatives, all of which are "legal" but have the potential to advance or harm the client's interests.

Comment 2 to Rule 2.1 recognizes that "[a]dvice couched in narrow legal terms may be of little value to the client . . . Purely technical legal advice, therefore, can sometimes be inadequate." Remember, your clients are asking you to help them solve a problem, which can require the lawyer to move beyond the technical legal question, and Comment 2 further recognizes that a lawyer may **"refer to relevant moral and ethical considerations in giving advice."** While lawyers are not ethicists, "moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."

Effective responses to high profile issues facing higher education require a multi-disciplinary approach informed by the synthesis of the applicable legal framework and the moral and psychological impacts of the issue in the context of each institution's unique culture, climate, resources, history and needs. Counsel should invest in learning the language and impacts of institutional risk long before a crisis strikes. This approach is both effective and aligned with the expectation of the professional rules.

B. Should I Stay In My Lane?

In-house legal counsel occupy an interesting niche. Because these roles cross many of the organization's spheres, in-house counsel often work across organizational boundaries. For example, an in-house lawyer will likely work with the governing board, the chief executive, human resources, IT, communications, finance, governmental affairs, risk management, and internal audit. Because of this, in-house counsel sees connections that others in the organization may not always see.

But there is a difference between seeing those connections and attempting to displace those who are responsible for these functions, lawyers often are accused of interfering in other executives' areas of responsibility, and, when that occurs, it can cause dysfunction and resentment. Sometimes, other executives will respond to the lawyer's efforts by asking, "Is that really a legal issue?" And sometimes a client will tell a lawyer that they are "really only seeking a legal opinion."

Comment 3 to Rule 2.1 states that a client "may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value." But, not all clients are experienced in legal

matters, and **"the lawyer's responsibilities as advisor may include indicating that more may be involved than strictly legal considerations."**

We recommend that in-house lawyers view their roles not just as legal advisors, but as facilitators. While first respecting that others have leadership roles, counsel best serves the client by bringing constituents within the organization together to address an evolving issue. Rather than supplanting the expertise at the table, the lawyer can identify interests, gather information, and facilitate informed responses that encompass the myriad and complex issues to address the teams broader goals.

Finally, lawyers have an unfortunate habit of believing that they know more than they actually do. **Comment 4 recognizes that "matters that go beyond strictly legal questions may also be in the domain of another profession."** As such, we need to be willing to defer to others who have specialized knowledge beyond ours. **"Where consultation with a professional in another field is something a competent lawyer would recommend, the lawyer should make such a recommendation."**

Some practical guideposts for counsel to remain effective include recognizing: we may not know what we do not know; we must actively listen with an earnest intent to hear all perspectives; and working together we are better than the sum of our parts. This approach takes time and requires an investment in cross constituency communication in advance of any crisis.

VII. Model Rule of Professional Conduct 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

A. What Obligations Do I Have to Preserve Evidence?

Rule 3.4 states the obvious requirement that a lawyer cannot participate in the destruction of evidence. But the more significant question that has arisen in recent years is what obligations the lawyer has to ensure that evidence is preserved. A full discussion of litigation holds is beyond the scope of this presentation, but it is fair to say that crises and investigations are the types of matters that can lead to litigation. Opposing parties will often argue that the organization had a duty to preserve evidence even if a lawsuit had not yet been filed.

At the onset of a crisis or investigation, the lawyer should work with appropriate constituents to ensure that the organization maps out a plan for preserving evidence and ensuring that custodians are informed of their obligations. As part of this effort, the lawyer should attempt to identify what documents are likely to be privileged and take steps to ensure that the privilege is maintained.

Effective execution requires advance training and education about issues of attorney-client privilege and preservation requirements. This training should also include the intersecting considerations of open records requests for public institutions as well as the impact of Freedom

of Information Act requests from government agencies on both private and public institutions who have provided information pursuant to some regulatory action. Care should be taken in any document production to ensure thoroughness, consistency of approach, and precision of production. Investing in a systematic document labeling process and maintaining a digital searchable copy of all productions will enable the institution to consistently respond to all records requests and avoid the pitfalls of multiple record requests.

VIII. Model Rule of Professional Conduct 1.13: Organization As Client

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law; and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

A. Who Is My Client?

This question is fundamental, but raises important ethical and practical issues. In many cases, in-house counsel will work closely with senior leadership, administrators, and other constituents, but Rule 1.13 mandates that the lawyer "represents the organization acting through its duly authorized constituents," rather than representing those constituents in their individual capacities. Constituents include officers, directors, and employees, and the lawyer may need to resolve who is "duly authorized" to make particular decisions on behalf of the organization. In a crisis situation, vesting the responsibility for decisions in a particular individual may be necessary to allow the organization to respond appropriately.

B. What if the Crisis is One Where Constituents Are Accused of Wrongdoing?

Few situations are more uncomfortable than when a constituent with whom the lawyer has a working relationship is accused of wrongdoing or misfeasance towards the organization. In those circumstances, the lawyer has an obligation to: (1) provide legal advice that is in the best interests of the organization, rather than of the individual constituent; (2) ensure that the constituent understands that the lawyer represents the organization, rather than the individual constituent; (3) ensure that the constituent understands that communications with the lawyer do not create a privilege from disclosure within the organization; and (4) report violations of legal duties that the individual owes to the organization and violations of law that might be imputed to the organization to higher authorities within the organization.

When a constituent is accused of wrongdoing or the lawyer believes that the constituent's interests may be adverse to the organization, it is always appropriate to remind the constituent that they are not the constituent's personal counsel, and that the constituent may consult with personal counsel. If the organization commences an investigation, the organization should provide the constituent with an "Upjohn Warning" advising the constituent about the limitations upon the attorney-client relationship and that communications will not be privileged. Failing to do so may not only compromise the investigation, but could lead to disciplinary action against the in-house counsel. *United States v. Ruehle*, 583 F.3d 600 (9th Cir. Cal. 2009). In practical terms, when conducting interviews, be clear with the interviewee that the counsel represents the university or college and not the employee being interviewed. Under Model Rule 1.13, comment 10, when the organization's interests may be or may become adverse to the interviewee, counsel should not only clarify that they do not represent the interviewee, but should also state that the person may wish to

obtain independent legal representation. Similarly, explain that the attorney-client privilege (confidentiality) is between the lawyer and the institution rather than the interviewee, and tell the interviewee that the purpose of the interview is to provide legal advice to the institution. In many instances, counsel may also be able to tell the interviewee that he or she should keep the information confidential unless otherwise provided permission by General Counsel.[9]

C. What Fiduciary Obligations Does a Governing Board Owe to the Institution?

To advise a governing board in a time of crisis, a lawyer must first take a step backward and determine the nature of a governing board's obligations. Obviously, each governing board will face different challenges, but most commentators recognize that board members of public and nonprofit corporations owe fiduciary duties to the entities they serve. These include: (a) a duty of care; (b) a duty of loyalty; and (c) an emerging duty of obedience.

1. **Duty of Care.** The first of the fiduciary duties is a "duty of care," which requires members of governing boards to act in good faith and exercise the same degree of diligence and care that a reasonably prudent person would exercise when attending to their own affairs. Although the law protects board members who exercise their best judgment in light of the known circumstances, it will not protect those who fail to undertake their duties with the seriousness and attentiveness reasonably expected of them. Stated another way, although the law does not require board members to make perfect decisions, it requires thoughtful and informed decisions. Significantly, in most jurisdictions, a board member may rely upon information, reports, and statements prepared by others, as long as they have reason to believe that the person responsible for preparing and presenting the data is competent.

2. **Duty of Loyalty.** The second of the fiduciary duties is a "duty of loyalty," which requires board members to exercise their powers in pursuit of the corporation's best interests, not their own interests or any other person's interests. Stated more directly, the duty of loyalty requires a board member to concern themselves foremost with the entity of higher education's welfare, even when advancing the entity's needs and interests will be adverse to the director's personal or professional welfare. When faced with a question of whether a board member has fulfilled their duty of loyalty, a court will normally ask whether they acted in the same way that a disinterested person would have acted under the same circumstances.

   Conflicts of interest exist not only when a board member stands to realize a financial gain from a particular decision, but also when a board member has personal loyalties that might affect their ability to exercise independent judgment.

[9] The ability to direct an employee to maintain confidentiality in an investigation will depend upon a number of factors. For private institutions subject to the National Labor Relations Act, it is worth noting that the National Labor Relations Board recently overturned prior findings when it held that they would presume lawful an institution's blanket rules requiring confidentiality during an open investigation. *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019).

When a board member is asked to review the conduct of a university official with whom they have a personal relationship or may even have played a role in hiring, the board member must remain cognizant of whatever impulses might affect their ability to exercise independent judgment on behalf of the university.

3. **Duty of Obedience.** The third of the fiduciary duties is a "duty of obedience," which is an emerging duty that has not yet been universally recognized. Where it has been recognized, this duty requires directors to perform their duties consistently with the corporation's purposes, governing documents, and applicable statutes. In some ways, the duty of obedience combines aspects of the duty of care and the duty of loyalty. It requires directors to not only be familiar with the corporation's purposes and governing documents, but also to act consistently with them.

D. What Does My Board Need to Know About the Federal Sentencing Guidelines?

Beyond the common-law fiduciary duties, many states have statutes that define the duties of board members of nonprofit corporations. Reviewing these statutes is beyond the scope of this discussion, but there is an additional source of obligations that takes front-and-center when organizations face an ethical or leadership crisis.[10]

The Federal Sentencing Guidelines do not address crisis, but they serve as an important backdrop in determining whether a board has adequately prepared for a potential crisis involving its institution.

In 1991, the U. S. Sentencing Commission published federal sentencing guidelines to guide judges in imposing sentences upon those who engage in criminal conduct. One unique aspect of the federal sentencing guidelines is that they apply not only to individuals who engage in criminal conduct, but also to organizations. One only has to look to the major corporate scandals of the past decades – Enron, Arthur Andersen, and Bear Stearns come to mind – to realize that the conduct of corporate entities has the potential to inflict catastrophic harm upon individuals and societies. To discourage corporate wrongdoing, the federal sentencing guidelines are "designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct" (U.S. Sentencing Commission, p. 488).

The first question often raised when dealing with the federal sentencing guidelines is whether a particular entity is subject to them. The guidelines take a broad perspective and define an organization as "a person other than an individual," which is broad enough to capture all of the various forms that an institution of higher education might take, including "unincorporated organizations, governments and political subdivisions therefore, and non-profit organizations" (U.S. Sentencing Commission, p. 489). Consequently, all governing boards should become aware of the guidelines.

[10] See the U.S. Sentencing Commission's (2012) Guidelines Manual [http://www.ussc.gov/Guidelines/2013_Guidelines/index.cfm].

The federal sentencing guidelines provide a mechanism for calculating the sanctions that a court can levy against an organization that engages in criminal conduct. For the purposes of this discussion, the most crucial aspects of the guidelines are the provisions that mitigate sanctions when the organization has an "effective compliance and ethics program" (U.S. Sentencing Commission, p. 496). To avail themselves of these provisions, the organization must exercise due diligence to prevent and detect criminal conduct and promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. Although the Freeh Report did not explicitly mention the guidelines, the report's recommendations are certainly geared toward "promot[ing] an organizational culture that encourages ethical conduct and a commitment to compliance with the law," including a recommendation to "establish values and ethics-based decision making and adherence to the Penn State Principles as the standard for all university faculty, staff and students" (p. 129).

Similarly, in the aftermath of an investigation that involved Title IX, senior leadership, board governance, and athletic issues, the Baylor 105 recommendations squarely focused on organizational culture and compliance in its section "Governance, Leadership and Compliance."[11] Further, Baylor's efforts and precise steps taken to complete those recommendations are detailed and shared in a 755 page report.[12]

At a minimum, the guidelines require that "the organization's governing authority be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight" to ensure that the program operates effectively. Although the guidelines don't specify the contents, "a code of ethical conduct is a centerpiece of a compliance program" that meets the guidelines' intent (Gordon, 2012, p. 41). That code of conduct specifies that the organization expects lawful, ethical, and transparent behavior by employees, including a requirement that employees report unlawful conduct. Obviously, one element of effective oversight is a requirement, not just on paper, that the university's leadership report to the governing board any ethical breaches that represent a significant risk to the institution.

E. What is the Difference Between Governance vs. Management?

At this point, we know that governing boards have a duty to care that requires the members to be informed and knowledgeable when they make decisions that affect the institution. We also know that standards from the federal sentencing guidelines require the governing board to institute both ethical standards of conduct and a mechanism of oversight. The question then becomes how those elements actually come into play when the institution faces a crisis, particularly one that raises ethical and leadership concerns.

Before going further, it's important to distinguish between management and governance, and to define the roles between administration and the governing board. An effective governing board does not attempt to manage the institution on a day-to-day basis and instead delegates those functions to the president and the executive team. The governing board should not normally play

[11] See the Baylor University 105 Recommendations [https://www.baylor.edu/thefacts/doc.php/266597.pdf].

[12] See the Baylor University External Report [https://www.baylor.edu/thefacts/doc.php/301337.pdf].

an active role in ordinary decisions, such as human resources disputes, student discipline, and budget management, but instead should rely upon the administration to make those decisions. On the other hand, the governing board's obligation is to make sure that the institution has defined its policies and standards of conduct in a way that the administration can reliably and accurately administer those responsibilities. An effective governing board has to resist the temptation to micromanage, which is generally associated with excessive control or attention to detail that disempowers a person from performing the functions of their employment.

The temptation to micromanage is often most acute in times of crisis, which are stressful moments that have the potential to significantly affect the institution. And, although some crises occur outside of the public eye, many of them occur with a great amount of media attention and scrutiny. When media attention adds to the pressure on the institution, it is crucial that the governing board and administration both understand their roles and responsibilities and communicate consistent with those roles as they proceed. Otherwise, the institution faces the risk that the governing board and its administration appear to be on different pages, and worse, may contribute to inconsistent communications. When that occurs, the apparent dysfunction between them compounds the crisis that the institution already faces.

F. How Should I Communicate to the Governing Board in a Time of Crisis?

It's very difficult to anticipate the different circumstances that might give rise to a crisis. Indeed, if you look at the headlines from institutions of higher education in the past several years, you will find topics as diverse as sexual misconduct, abuse of student-athletes, violence perpetrated by students or faculty, fiscal misconduct, and other ethical or criminal conduct. Rather than attempting to define each of the particular subjects that might give rise to a crisis, the better strategy is for the governing board to define its expectations in broad terms that may be applied to the circumstances. The governing board may define its expectations in thinking about the basic questions:

- What matters should the administration bring to the governing board's attention?
- When should the administration bring matters to the governing board's attention?
- Who should be responsible for the communication?
- How should the communication occur?

1. **What to Report.** Before a crisis arises, the governing board must make its expectations clear about what information the administration should communicate to it.

   There are some areas where the governing board can reduce its expectations to a policy, such as to indicate that the governing board expects the administration to promptly inform it of any known or suspected material violations of university policy or criminal conduct that is reasonably anticipated to have a significant financial, operational, or reputational impact upon the institution. This standard has some degree of flexibility and requires the administration to exercise some discretion in determining which matters require reporting. If the president of the institution is charged with domestic abuse, that charge is likely to have an

operational or reputational impact upon the institution, although the same conduct by an employee in facilities maintenance would not have the same impact. By phrasing the expectation broadly and tying it to a significant potential impact upon the institution, the governing board can discharge its oversight responsibilities without unduly interfering in matters that are properly resolved at an administrative level.

At another level, however, there are some instances where the governing board should be informed, even if the standard of reporting isn't codified into policy. Although some of these instances fall within the range of common sense, there are a number of questions that the administration can use as guideposts in determining whether reporting is necessary or appropriate:

- Does the issue implicate the governing board's obligation to exercise oversight over the institution?
- Does the issue implicate the governing board's obligation to be knowledgeable about known or suspected criminal conduct in the institution?
- Does the issue implicate the governing board's obligation to ensure that the day-to-day leaders of the institution discharge their responsibilities with a high degree of ethics?
- Does the issue implicate the institution's fundamental mission?
- Does the issue implicate the institution's key stakeholders?
- Does the issue naturally attract the attention of the media or the public?
- Does the issue potentially affect the institution's ability to meet its financial obligations?
- Does the issue give rise to questions about the efficacy of either the institution's day-to-day leadership or its governing board?

If the answer to one or more of these questions is "yes," then it is most likely time to provide information to the governing board. Although the administration does not wish to overload the governing board with matters beyond its concern, it's also probably safe to say that most governing boards appreciate being informed of a potential problem, even if it does not materialize into an actual crisis.

The advance development of policies, procedures, and practices related to the respective roles and responsibilities of senior leadership and board members is critical to effective crisis response. Annual training and open lines of communication are key elements to the sustainability of high functioning institutional leadership.

2. **When to Report.** Once the governing board has defined its expectations about the types of matters that the administration should report, the question inevitably arises about when the reporting should occur. Many administrators do not want to take rumors and unconfirmed information to the governing board, which is understandable, but the window for informing the board is often narrow. In an age

where Twitter and Facebook have created the capacity for virtually anyone to transmit a rumor to the public at large, the administration has to be prepared for the possibility that it will be necessary to inform the governing board even before the facts are fully developed.

Nothing prevents the administration from reporting that it has received information about a matter of concern, that it will be investigating, and that it will provide additional information as it becomes available. Providing even this amount of communication keeps the governing board from feeling "in the dark" and gives the administration the ability to more fully develop the information that it will bring to the board's attention.

Once a crisis has erupted and the governing board has received an initial briefing, the administration acquires the obligation to provide ongoing updates. Again, it's difficult to estimate the governing board's need for information during a time of crisis, but many institutions run into difficulty because the administration believes that it is doing a better job of keeping the board informed than it actually is. Particularly when the media is active and will be publishing stories, even those of little consequence, maintaining steady communication with the governing board works to the administration's advantage. You can update the governing board frequently in initial stages of the crisis, sometimes just reporting on the developments of the day, because these updates allow the governing board to remain on top of the situation. As the media attention recedes, you may consider reducing the number of communications and provide updates as significant events occur. The frequency of the administration's initial efforts to provide information to the governing board as the crisis unfolds, can build a foundation of trust that allows the governing board to discharge its oversight obligations without becoming involved in the day-to-day decisions.

3. **Who Should Report.** Having reached the conclusion that it is the appropriate time to inform the governing board of a potential or pending crisis, the next question is who should make the communication. Absent extraordinary circumstances, there are normally two logical choices for such communications: the president of the institution or the general counsel. Often the choice between these two alternatives is driven by whether the nature of the crisis is one that generates potential liabilities to the institution. For example, if the crisis is a wildfire near campus that has prompted the evacuation of student housing facilities, there may not be significant liability concerns, and the president would be charged with informing the governing board about the institution's response to the wildfire. On the other hand, if the crisis is that a university official is being investigated for sexual misconduct with a student, that issue definitely raises significant legal concerns, and the communication would probably best occur through the general counsel.

   In assessing the question of who should make the communication, the issue is essentially whether there is an institutional need for the communication to be

subject to a legal privilege. Courts in every state, as well as the courts in the federal system, recognize the existence of the attorney-client privilege. The attorney-client privilege exists to encourage institutions to seek legal advice by protecting the communications between its officials and its attorney with confidentiality. When a communication is privileged, the institution generally has a valid justification for withholding that communication from third parties, and the communication normally would not be admissible in a civil or criminal trial. Communications made by the university's administration (other than the general counsel), are often not privileged (unless there is an independent legal basis for withholding the communication, for example that it raises a student privacy issue under FERPA) and would be discoverable during litigation.

Unfortunately, many institutions misinterpret the scope of the attorney-client privilege and assume that communications are privileged merely because an attorney had some role in the communication between the members of the governing board and the administration. But those assumptions are inaccurate because the attorney-client privilege only exists when: (1) communication is occurring between the client and the attorney; (2) the purpose of the communication is either for the client to seek or for the attorney to provide legal advice; (3) the communication is made in a manner that is confidential; and (4) the attorney-client privilege cannot be used as a mechanism to prevent discovery of purely factual information in the institution's possession.

Stated another way, the attorney-client privilege does not serve as a shield for communicating information to the governing board if the communication does not raise any legal issues or does not provide any legal advice.

4. **How to Report.** Crises, by their very nature, do not schedule themselves to occur at the most accommodating times, such as during an already-scheduled meeting of the governing board. Consequently, the administration often has to decide not only when to communicate with the governing board, but also how those communications should occur. Often this decision will be governed not only by the exigencies of the situation, but also by any formal requirements upon the board's ability to convene.

   For public institutions in particular, the governing board may be subject to open meeting laws that require advance notice before meetings. For example, in Colorado, the law states that "all meetings of two or more members of any state public body at which any pubic business is to be discussed are declared to be public meetings open to the public at all times" (Colorado Sunshine Law, 1972, (2)(a)). This requirement exists whether the meeting occurs in person, by teleconference, or by other electronic means. For any such meeting where a quorum of the governing board is in attendance, the institution is required to give "full and timely notice to the public" before the meeting occurs (Colorado Sunshine Law, 1972, (2)(c)). Obviously, even if the subject matter of this meeting is confidential and can be held in an executive session where the public does not

have the ability to attend, these requirements can affect how the administration provides information to the governing board.

Beyond any legal limitations upon the governing board's ability to meet as a whole, one of the first decisions the administration must make is whether to convene the board as a whole or to provide information to board members through individual communications. In most cases, the best strategy for approaching this decision is for the administration to first notify the chairperson of the governing board of the situation, explain the circumstances, and jointly determine the best course of action for informing the other members of the governing board. In some instances, where the communication is purely informational, it may be feasible to communicate with individual board members, but there are two drawbacks to this type of approach.

One is the possibility that different board members will ask different questions and consequently receive different information when communicating with administrators. The other is that it leaves the board members in a vacuum in determining what they should do in response to the information they've received. Often these individual communications are valuable as an initial medium to inform members of the governing board of a developing situation, but they should be considered a precursor to a more nuanced conversation involving the board as a whole.

Another consideration is whether communications with the board should take the form of oral or written transmissions. In an era of modern communication, we often have the inclination to communicate with groups of people through "blast" e-mails, but it's equally true that e-mail and other electronic forms of communication are imperfect. Notwithstanding the ease by which e-mail can be used to communicate with a large number of people, e-mail communications often do not provide sufficient context for meaningful communication, do not give an opportunity for people to respond to the information being provided to them (at least not without a flurry of additional e-mails), and can be inadvertently (or intentionally) forwarded to others who do not have a need for the information.

Additionally, for public institutions in many states, e-mail communications may fall within the requirements of open records laws that allow interested parties to request copies of any written communications. During a period of crisis, a governing board may not wish for its communications with the administration to be subject to open records requests, particularly as it determines how it will respond to a rapidly evolving situation. Moreover, even if the attorney-client privilege may protect an initial e-mail communication from the institution's general counsel from an open records request, subsequent communications between board members by e-mail may not retain the same privileged status. For these reasons, e-mail should be used only as a temporary means of providing information to the governing board in the interim until the board can be assembled, either in person or by electronic means, to discuss the situation. In any

such e-mail communications, the administration should remind the board member of any open records requirements that might apply to their communications and advise them of their fiduciary obligation to hold privileged information confidentially.

G. Should the Governing Board Respond?

Up until now, our discussion has focused primarily upon the administration's role in initiating communications with the governing board in a time of crisis. In some cases, the governing board may only need information and not take any response, but in other cases a response may be necessary. This need for the governing board to respond is particularly high when the crisis involves the possibility that the institution's leadership has engaged in criminal conduct, has acted unethically, or is unable to provide competent leadership.

Because "an effective board appreciates the limits of its proper role and delegates management of the institution to the president and senior administrators," the governing board's obligation may be supporting the administration.[13] As the Association of Governing Boards of Universities and Colleges (AGB) has recognized, "The president needs to know that when faced with taking controversial or unpopular actions, he or she can rely upon backing from the board," at least in those situations where the governing board does not have substantial disagreement with those decisions.[14]

Whether or not the governing board is called upon to respond independently of the administration is often driven by its fiduciary and legal duties. Consider a situation where the president of the institution is accused of having embezzled funds. Under those circumstances, from a duty of care perspective, would a reasonable and prudent governing board acting in the best interests of the institution remove the president's financial oversight pending the outcome of an investigation? Under the federal sentencing guidelines, would a governing board charged with promoting an organizational culture that encourages ethical conduct and a commitment to compliance with the law ask the Department of Internal Audit to investigate and report its findings to the governing board? In every crisis involving the university's leadership, the key question is, "Did the governing board take the actions reasonably necessary to protect the institution's constituents, resources, and reputation?"

Although it would be optimal if there were a decision tree that allowed the governing board to reach the "right" decision in response to an institutional crisis, that resource does not currently exist, and likely never will. Each governing board must be guided by its own conscience in formulating a response, but few boards will feel comfortable responding without guidance from legal counsel. There are times when the institution's legal counsel is perfectly competent to provide this advice. In other cases, the governing board may wish to seek independent legal counsel. A governing board should seek independent legal counsel when the general counsel has been accused of any misconduct, when the general counsel has advised an administrator on the

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[13] Association of Governing Boards of Universities and Colleges. (2010). *Effective governing boards: A guide for members of governing boards of independent colleges and universities.* Washington, DC: AGB Press.

[14] Association of Governing Boards of Universities and Colleges. (2010). *Effective governing boards: A guide for members of governing boards of independent colleges and universities.* Washington, DC: AGB Press.

subjects giving rise to the crisis, or when the general counsel has firsthand participation in the events giving rise to the crisis. Each of these situations arguably falls within the ambit of the **American Bar Association's Model Rules of Professional Conduct (2013) for an attorney, which prohibit an attorney from providing services where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer" (rule 1.7).** Stated another way, the governing board might feel the need to seek independent legal counsel in any situation where it reasonably believes that the general counsel has a conflict that would potentially impair their ability to provide the board with objective legal advice.

"If serious lapses occur at the highest levels of the institution's governance, confidence on and off campus in institutional oversight and integrity will inevitably suffer" (Association of Governing Boards of Universities and Colleges, 2010, p. 30). Although this is no doubt true, even the specter of such a serious lapse can cripple an institution unless it affirmatively responds to the allegations. In contrast to many lawyers who "unfortunately still regard public communication as a risk that is never really worth taking," the data is found compelling that many people presume entities to be guilty simply because they were accused, and "no comment" is perceived as, "They've got something to hide" (Levick & Smith, 2007, p. xviii).

Because "judgment is nearly instantaneous, often unforgiving, and increasingly permanent, sometimes with consequences in the criminal as well as civil justice system" (Levick & Smith, 2007, p. xviii), the institution cannot allow the media to formulate the narrative without its perspective. At best, silence will be received as a message that the institution is out of touch, and at worst, the public will draw the conclusion that the institution is unethical or corrupt. From a governing board's perspective, none of these messages is in the institution's best interests, so the question then becomes, "What message will the governing board send?"

The governing board must first determine the target audiences of its message. In a public institution of higher education, the communities that will receive the message can include students, parents, faculty, staff, alumni, donors, regulators, politicians, the community at large, and the media. Sometimes a press release will convey the messages that the governing board wishes to send to each of these communities, but there can be value in separate communications. If the president of the university is accused of embezzlement, donors may be concerned about the sources of the embezzled funds, whereas politicians might be more concerned about whether the institutions has implemented controls to prevent wrongdoing. If the governing board chooses separate communications to different stakeholders it should anticipate that those messages will not remain isolated and, therefore, ensure that each of them is factually and thematically consistent.

The governing board must next determine the content of its messages. Because of the nature of a crisis, the governing board may not have complete information, and it would naturally fear making statements that are later proven to be wrong. Fear of the unknown, however, is not a good enough reason to refrain from any comment. At a minimum, the institution can reinforce its commitment to its core values – honesty, ethical conduct, and transparency – even while stating that it is currently investigating the issues in a manner that will allow the governing board to

uphold its fiduciary obligations. If the institution is committed to doing the right thing, and the public believes that its leadership will ensure the proper resolution of a crisis, that confidence gives the governing board the flexibility to determine the right approach. As we saw with the Penn State scandal, it is when the public lacks confidence in the leadership's ability to respond that the governing board's actions appear rushed and ineffectual. Because Spanier miscalculated and immediately made statements expressing unconditional support for administrators who had been accused of serious crimes, the governing board was left with the task of trying to mitigate the public outrage, and was forced to relieve Spanier of his duties four days later.

As a general proposition, a governing board should structure its communications in a manner that does not blur its role with the administration. The president "ordinarily speaks for the institution," and when it is necessary for the governing board to speak, it's important to remember that the board is a collective entity, and none of the individual board members has the authority to act on its behalf (Ingram, 1995, p. 30). It is also true, as a general principle, that board members must be "willing to support decisions and policies approved by the board's majority," even if an individual board member disagrees with them (Ingram, 2003, p. 15). Times of crisis can test a governing board's adherence to these tenets.

When possible, it is best for a governing board to uphold the principle that "only the board chair speaks for the board and ordinarily is presumed to be delegated the responsibility to address controversial issues or board decisions with the media" (Ingram, 2003, p. 15). When it is not possible, and a board member feels the need to speak in disagreement with the actions of the governing board, that board member should make clear that they are voicing their personal opinion and is not speaking on behalf of the institution. The goal of these principles is not to quell dissent or any individual board member's ability to speak, but instead to ensure that the governing board does not send mixed messages about where it stands.

H. How Do I Help A Governing Board Plan for a Crisis?

One thing is certain: Every institution will likely face a crisis. Accepting that reality, and not knowing in advance from which corner of the institution the crisis will arise, the question then becomes, "Is there something that I can do now to prepare?" Every governing board should:

- Provide an orientation for each new member upon joining the board.
- Receive education on the fiduciary duties that it owes the institution, including the duty of care, duty of loyalty, and duty of obedience.
- Develop a conflict of interest policy for board members.
- Receive education on the federal sentencing guidelines and its role in promoting "organizational culture that encourages ethical conduct and a commitment to compliance with the law."
- Promulgate, in consultation with the administration and faculty, a code of institutional ethics that sets the governing board's expectations.
- Approve a compliance and ethics program and exercise reasonable oversight to ensure that the program operates effectively.
- Communicate to university leadership that it expects candid and timely reports of unlawful or unethical conduct.

- Annually evaluate the president on their efforts to promote a culture of ethics and compliance.
- Have an audit committee that exercises oversight over regulatory and ethical compliance, including an assessment of whether the institution has appropriated sufficient budget for compliance functions.
- Receive education on its obligations under open meetings and open records laws to ensure that it understands how its communications should occur in times of crisis.
- Receive education on the requirements of the attorney-client privilege and other applicable privileges so that it does not misapprehend whether certain communications will be protected from disclosure.
- Develop a crisis communication plan that allows members of the administration to communicate with board members during times of crisis.
- Consider and adopt protocols describing its role in public communications.

Each of these recommendations is targeted at setting effective and efficient structures that will allow the institution and its governing board to react appropriately when a crisis occurs. It is only by developing firm foundations that undergird the institution that a governing board can perform its duties.

IX. Model Rule of Professional Conduct 3.6: Trial Publicity

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Notwithstanding … that an investigation of a matter is in progress [and] a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

A. What is the Current Media Environment?

We live in an interconnected society, and the means by which people communicate with each other are growing daily. What we consider media has expanded beyond the traditional elements of the "news media" that "focus on delivering news to the general public or a target public" through traditional means, such as newspapers, radio, and television.[15]

Instead, there are multiple kinds of "media" that all have the potential to affect public perception.[16] These include:

- Broadcast media – communications delivered over mass electronic communication networks;

[15] http://en.wikipedia.org/wiki/News_media.
[16] http://en.wikipedia.org/wiki/News_media.

- Electronic media – communications delivered via electronic or electromechanical energy, such as a blast e-mail;
- Hypermedia – media with hyperlinks;
- Multimedia - communications that incorporate multiple forms of information content and processing;
- New media – a broad term encompassing the amalgamation of traditional media with the interactive power of computer and communications technology;
- News media – mass media focused on communicating news;
- Print media – communications delivered via paper or canvas; and
- Social media – media disseminated through social interactions.

Crisis regularly involves people and institutions in conflict. And, as you know, conflict sells newspapers. If you look at the newspapers, each day you will find a substantial number of stories about lawyers who approach a potential crisis without understanding or preparing for media attention are not serving their clients' interests. Because a client can suffer significant damage during a crisis, even when it prevails at the conclusion, an attorney's duties necessarily include attempting to minimize damage when possible.

B. What Should I Be Thinking About Public Relations?

One approach to public relations is referred to as "litigation public relations." It is defined as the management of the communications process during the course of any legal dispute or adjudicatory processing so as to affect the outcome or its impact on the client's overall reputation.[17] One of the key concepts of litigation public relations is "protect[ing] the client's reputation before and during the trial.

Among the key goals of litigation public relations are:

- Counteracting negative publicity;
- Making a client's viewpoint known;
- Ensuring balanced media coverage;
- Helping the media and the public understand complex legal issues;
- Defusing a hostile environment; and
- Helping resolve the conflict.

To achieve these goals, litigation public relations assumes that attorneys will play an active role in both developing a media strategy and in assisting the client in bringing information to the public's attention. In pursuing a media strategy through litigation public relations, an attorney must always remain mindful of the fact that litigation is a highly regulated environment and that the attorney's obligations to the court system take precedence over all other matters. In contrast to non-litigation public relations, the Rules of Professional Conduct and the other obligations that the attorney owes to the judicial system constrain the attorney's ability to influence public perception during litigation.

[17] Haggerty, J. F. (2003). In the court of public opinion: Winning your case with public relations. Hoboken, NJ: Wiley.

While not all crises in higher education involve legal issues or litigation, crises may have serious financial, operational, safety, and institutional integrity implications. The authenticity required in messaging for institutions of higher education transcends the litigation lens.

C. Does Rule 3.6 Apply?

The basic ethical standards governing publicity are found in Rule 3.6 of the Model Rules of Professional Conduct, which have been adopted in most jurisdictions. Rule 3.6(a) begins with a basic premise, which is that "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

In many instances, the rule is targeted towards litigation, but the inclusion of investigation is important and can certainly implicate a lawyer's duties during a crisis.

From the language of Rule 3.6(a), we can understand that lawyers should not make: (1) extrajudicial statements" that; (2) will be disseminated by means of a "public communication;" (3) when those statements will have a "substantial likelihood;" (4) of "materially prejudicing" an adjudicative proceeding.

Rule 3.6(a) does not come into play unless a lawyer makes an "extrajudicial statement." Consistent with other laws that protect statements made in judicial proceedings and the First Amendment interests attendant to public trials, Rule 3.6(a) does not implicate statements made either in court or in pleadings filed with the court. It should be noted, however, that the trial judge retains control of the judicial processes and may control them under the Rules of Evidence and the Rules of Civil Procedure.

Rule 3.6(a) also does not come into play unless a lawyer makes a statement that "will be disseminated by means of a public communication." The term "public communication" is not defined within the scope of Rule 3.6(a), but the clear implication of the terms "disseminated" and "public communication" is that the communication is intended for an audience broader than the participants to the proceedings. This is especially true when you consider that Comment [1] to Rule 3.6 speaks to the rule as being designed to protect the right of trial by jury.

Rule 3.6(a) is not implicated unless an attorney's extrajudicial statements have a "substantial likelihood" of "materially prejudicing" an adjudicative proceeding. Significantly, the rule itself does not contain a list of matters that are likely to result in a violation, but Comment [5] to Rule 3.6 provides a list of "certain subjects that are more likely than not to have material prejudice upon a proceeding, particularly when they refer to a civil matter triable to a jury . . ." The subjects most often implicated in civil proceedings include:

- The character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; and
- Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.

Comment [1] to Rule 3.6(a) makes clear that the rule is intended to strike a balance between "protecting the right to a fair trial and safeguarding the right of free expression." While it may be necessary to limit the public dissemination of some information, the rule also recognizes that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern."

D. What Are the Exceptions to Rule 3.6?

Recognizing that judicial proceedings are open to the public and that the public has an interest in them, Rule 3.6(b) creates a number of safe harbors where lawyers may comment upon pending investigations and litigation through public communications. The most relevant exceptions are that a lawyer may state:

- Information contained in a public record;
- That an investigation of a matter is in progress;
- The scheduling or result of any step in litigation;
- A request for assistance in obtaining evidence and information necessary thereto; and
- A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.

The exception for information contained in a public record is important. For public institutions, many of our records are going to be subject to open records requirements, which means that there are times when documents that might otherwise not be within the scope of Rule 3.6 are subject to release.

E. Can I Act to Protect My Client From Adverse Publicity?

Rule 3.6(c) contains an important exception to the general rules regarding extrajudicial statements. Even when a statement might otherwise be prohibited under Rule 3.6(a), "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the

lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity."

Rule 3.6(c) contains several requirements: (1) before a lawyer can avail themselves of this exception, their statement must be one that a "reasonable lawyer would believe is necessary to protect a client;" (2) from the "substantial undue prejudicial effect;" of (3) "recent publicity;" (4) that was "not initiated by the lawyer or the lawyer's client." Inherent in this rule is that a lawyer may not make a statement in anticipation of prejudicial publicity. Notably, Rule 3.6(c) does not require the "recent publicity" have been instigated by the opposing party or its counsel.

Comment [7] to Rule 3.6 states that "extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons." In those circumstances where "prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding." In any event, however, "such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others."

Notably, this rule must be interpreted in conjunction with the Family Educational Rights and Privacy Act (FERPA) requirement to maintain student records as private and limiting disclosure to the following exceptions: consent; health or safety emergency; litigation; accreditation process; judicial law or subpoena; and government official request. In the context of student matters where, for example, a party took to social media with an inaccurate account, a reasonable lawyer may believe it necessary to protect a client from the "substantial undue prejudicial effect" of "recent publicity" that was "not initiated by the lawyer or the lawyer's client." However, this exception in the professional rules is not necessarily available in the higher education student record context. In 2008 the Department of Education[18] noted,

> *We have not found and do not believe that parents and students generally waive their privacy rights under FERPA by sharing information with the media or other members of the general public. The fact that information is a matter of general public interest does not give an educational agency or institution permission to release the same or related information from education records without consent.*

In response to the University of Virginia's 2015 request to publicly issue a de-identified version of its independent report in response to the Rolling Stone debacle, the Family Policy Compliance Office (FPCO), charged with oversight of FERPA, issued a response letter finding in relevant part: (1) Personally Identifiable Information (PII) must be evaluated in light of re-identification risk associated with institutional data releases and other reasonably available information; and (2) Speaking with the media is not the basis for implied waiver of FERPA protections, rejecting the university need arguments (public interest, media scrutiny and fairness).[19]

[18] Department of Education's Discussion to Notice of Proposed Rulemaking, 73 FR 74806 (December 9, 2008)

[19] https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-va-attorney-general-mark-herring.pdf

Relatedly, in 2015, a University of Oregon student who said she had been sexually assaulted by three members of the Men's Basketball team sued the University. Because the suit alleged that the student had suffered emotional distress as a result of the assault, the University accessed the student's mental health records, without the student's consent, in order to prepare for the litigation. The student alleged that this constituted a violation of her privacy. Notably, FERPA did not explicitly allow for a student's health records to be accessed by an institution facing a lawsuit, but it did not bar such access either; therefore, the release of records was not considered to violate FERPA.[20] However, the University's own confidentiality and privacy policy at the time did not explicitly state that student health records could be released without consent in the context of an impending lawsuit. The University has since amended this policy to allow for release where a student's "emotional condition is being used as a claim or defense in a legal situation." However, in the wake of the lawsuit, the Oregon Board of Psychologist Examiners opened an investigation into several University employees who were involved with the release, and the Board ultimately sanctioned the University's Head of Student Counseling.

F. Are There Rules Governing the Media?

Attorneys make a mistake when they assume that "media" means newspapers, radio, and television. While this may have been true twenty years ago, changes in technology have allowed regular citizens to expand the reach of their communications without the assistance of traditional media representatives. Indeed, non-traditional outlets like The Drudge Report, Gawker, and Deadspin have all been credited with breaking stories ahead of regular media outlets.

The fact that there are many different types of media does not mean that attorneys are obligated to treat each of them equally. In fact, attorneys are under no obligation to interact with the media, so they can exercise discretion with whom they choose to interact.

Generally speaking, it's important to know whether the media outlet with whom you are communicating is a member of the Associated Press (the "AP"). The AP is a multinational nonprofit news agency owned by its contributing newspaper, radio, and television stations in the United States. The AP's membership consists of more than 1400 newspapers and thousands of television and radio stations.[21] The significance of dealing with an AP organization is that a story published by an AP member is more likely to be picked up and published by other AP members. A story published in a "local publication," like the Boulder Daily Camera, can be reprinted in a variety of other news outlets.

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[20] https://www.insidehighered.com/news/2015/08/03/privacy-loophole-remains-open-after-outrage-over-u-oregons-handling-therapy-records.

The United States Department of Education subsequently issued guidance in an August 24, 2016 Dear Colleague Letter that "without a court order or written consent, institutions that are involved in litigation between the institution and [a] student should not share, without consent, student medical records with the institution's attorneys or courts unless the litigation in question relates directly to the medical treatment itself . . . ." https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf.

[21] http://www.ap.org/company/FAQs.

Beyond the AP, it's also important to recognize that specialized publications have significant reach to their particular constituents. In representing Colleges and Universities, we must consider not only the AP members, but must also provide close attention to The Chronicle of Higher Education and Inside Higher Education. Although these publications are not well known outside of higher education, a large number of faculty and staff subscribe to them.

When contacted by any organization, it is advisable to develop an understanding of how it operates, whom it considers its target audiences, and the nature and tone of its stories. Depending upon the nature of the organization, an attorney may choose to interact with it, to provide very limited information in response to specific inquiries, or forego any interaction in favor of responding through other media.

It is important not to lose sight of the fact that the people operating websites and blogs may not view themselves as traditional journalists and may not follow the Society of Professional Journalists' Code of Ethics.[22] This code, which many news organizations subscribe to voluntarily, contains several precepts important to attorneys in their dealings with media organizations, including that journalists should:

- Test the accuracy of information from all sources and exercise care to avoid inadvertent error.
- Diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.
- Identify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability.
- Make certain that headlines, news teases and promotional material, photos, video, audio, graphics, sound bites and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.
- Avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance, or social status.
- Distinguish between advocacy and news reporting. Analysis and commentary should be labeled and not misrepresent fact or context.

Consequently, when intersecting with media organizations, it is important to recognize the evolving standards of journalism and to clarify the ground rules when initiating a conversation.

G. Can I Speak Off the Record?

One of the precepts contained in the Society of Professional Journalists' Code of Ethics is that a journalist should "always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises." Inherent in this statement is the notion that journalists should honor their promises of anonymity.

One area that is likely to be subject to confusion is what it means to have a conversation "off the record." One potential meaning of this phrase is that "whatever the journalist is told can be

[22] http://www.spj.org/ethicscode.asp.

reported so long as it is not attributed to the person who said it." A person speaking off-the-record is often "identified by a descriptor such as 'a source,' 'a senior insider,' 'a party official,' or 'a colleague.' Sometimes they may be given an alias so the story has a strong narrative and the audience can identify with the source's plight. The important thing is that the identity is not revealed."[23]

Another potential meaning of this phrase "is that neither the identity of the source or the information they've passed on can be revealed. This is important when someone needs a reporter to know the context of a story but can't reveal their identity or the actual information because it would prejudice them."[24]

The difference is significant. In one case, the person speaking with the journalist has given the journalist permission to print information, without identifying the person. In the other case, the person has given the journalist information that the journalist cannot publish unless the journalist is able to develop the information through an independent source. Understanding the journalist's commitment can be significant when providing background information. It is also worth identifying with the journalist what information is being provided for attribution.

H. Shouldn't I Just Say No Comment?

One of the most dangerous phrases for organizations involved in crisis is, "No comment." Only slightly better is, "We don't comment on pending litigation or personnel matters." To the layperson, these responses are synonymous with "guilty as charged." In a PR Crisis, "There's No Room for 'No Comment.'"[25]

Too often, when counsel is asked to comment upon a newly initiated matter, an attorney's initial response is to refrain from any comment because the attorney doesn't have a handle on all the facts, and the attorney is concerned that any response might later be used against the client in a lawsuit. All of these are legitimate concerns, but they should not be the attorney's only concerns. Preserving the client's reputation counsels in favor of making some type of response, particularly when you consider:

- Liability is usually not the only issue. Your client faces loss of students, strain on important relationships and other damage to its reputation;
- The lawsuits will be resolved months or years in the future, but the court of public opinion judges your client immediately;
- People form lasting impressions about individuals and organizations in crisis; and
- Litigation Is No Reason To Say "No Comment."[26]

Deciding to speak, however, does not mean that you have to commit to a position or to potentially make any admissions that might later be used against your client. To the contrary,

[23] http://mediamanoeuvres.com.au/newsletters/off-the-record-what-does-it-really-mean.

[24] http://mediamanoeuvres.com.au/newsletters/off-the-record-what-does-it-really-mean.

[25] http://www.entrepreneur.com/article/223718

[26] http://www.workplaceviolence911.com/node/34

you will normally have the ability to say something that is non-harmful and that will support your clients' values and mission. For example, if asked about an allegation that involves an alleged sexual assault on campus, you might not have the ability to respond about the particular factual allegations. You will always have the ability, however, to stress the university's commitment to ensuring that the campus is safe for all students, that the leadership is committed to ensuring that perpetrators of sexual violence are held accountable, and that the University will continue to devote resources to ending sexual violence on campus.

I. Should We Put Out Our Own Statements? Your Client's Message vs. Media's Message

When approaching interactions with the media, an attorney should not lose sight of the fact that the journalist and the attorney have two different goals. The journalist is attempting to produce a story that will be of interest to the publication's audience. The attorney is seeking to protect or enhance institutional integrity consistent with the client's values.

Consequently, attorneys should not expect journalists to serve as the mouthpiece by which the attorney conveys a message to the public. To the contrary, just as the attorney may decide not to speak with a journalist, the journalist may determine what information is relevant to the story. There are some tools available to the attorney that increase the likelihood that your client's message will be carried into the journalist's story.

Primary among these tools is the journalist's obligation to "give [the subjects of news stories] the opportunity to respond to allegations of wrongdoing."[27] As a matter of fundamental fairness, journalists should neither publish stories without giving those accused of wrongdoing an opportunity to respond nor omit their responses from the story. Most journalists view themselves as neutral and will consider the evidence necessary to present a complete picture of a disputed event.

Attorneys should also not lose sight of the fact that some journalists do not fully understand the issues that they are covering. Not only are matters involving universities often complicated, but the underlying subjects may be beyond a layperson's experience. In those situations, attorneys can aid journalists by referring them to other sources, including people not involved in the crisis, who can assist them in understanding the issues.

Our discussion to this point has assumed that attorneys and their clients are entirely dependent upon others to frame and deliver a message. Another benefit (and potential drawback) of technology is that it allows those involved in a crisis to deliver their own messages to important constituents. Organizations can send e-mail communications to their employees, and they can also post messages to their website and use social media tools, including Facebook and Twitter, as a means of getting out their message.

What is undeniably true, however, is that a client's own communications can be admitted against them as party admissions when the communication was either "made by the party in an

[27] http://www.spj.org/ethicscode.asp.

individual or representative capacity" or "made by a person whom the party authorized to make a statement on the subject."[28] Consequently, attorneys should discuss the means by which a client might self-generate any statements related to a matter in litigation, discuss who is authorized to make those statements, and discuss a protocol by which the client will make those statements.

J. Should I Advise My Client to Hire a PR Firm?

One of the areas where some (but not all) attorneys are deficient is in dealing with the media. While we have expertise in crafting messages for a judicial audience, we have less experience in crafting a message for the general public. Consequently, attorneys who are involved in high-profile crises or litigation should consider enlisting the help of a consultant to assist in managing the public relations aspect of the matter. There is no shortage of consultants who are willing and able to lend their expertise to such a venture.

When hiring a public relations consultant, the attorney will want to ensure that the consultant's work is protected, to the extent possible, by the attorney-client privilege and the attorney work-product doctrine. Accordingly, the consulting engagement should: (1) specify that the public relations consultant is being retained to assist counsel in defense of claims against the client; (2) indicate that the consultant is acting as an agent of the attorney for the purpose of assisting counsel in the defense of claims against the client; (3) state that the consultant will have access to privileged information and information that has been developed for the purpose of defense or in anticipation of claims against the client; (4) obligate the consultant to maintain the confidentiality of any privileged information or work product; and (5) require the consultant to coordinate all public statements with counsel.[29]

K. Who Speaks?

An important consideration in any public communications is not only what to say, but who should say it.

In many instances, attorneys will automatically want to be in control of the communications and may believe that they are best able to communicate on behalf of their clients. In some situations this may be true, but attorneys should not automatically default to serving in this role. As a threshold matter, surveys shows that the general public does not view attorneys favorably.[30] And not only are we viewed suspiciously, there is also the danger that our clients will be viewed as

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[28] Federal Rule of Evidence 801(d)(2).

[29] Even with these precautions in place, communications with third party consultants such as PR firms may ultimately be deemed by a court to be non-privileged. The contours of the attorney-client privilege with respect to such consultants are necessarily fact- and jurisdiction-specific. Courts in California and New York, for instance, have recently declined to extend the attorney-client privilege to PR firms where such firms were determined not to be reasonably necessary for counsel's representation of a client or for achieving a specific legal goal. *See, e.g., Behunin* v. *Superior Court*, 9 Cal. App. 5th 833 (Cal. Ct. App. 2017); *Anderson* v. *SeaWorld Parks and Entertainment*, 329 F.R.D. 628 (N.D. Cal. 2019); *Pearlstein v. Blackberry,* No. 13-cv-07060, 2019 WL 1259382 (S.D.N.Y. March 19, 2019); and *Universal Standard, Inc. v. Target Corp.,* 331 F.R.D. 80 (S.D.N.Y. 2019).

[30] http://www.gallup.com/poll/122342/Automobile-Banking-Industry-Images-Slide-Further.aspx.

hiding behind their lawyers. Beyond public perception, having the lawyer speak with the media raises the possibility that the lawyer's statements will transform them into a witness.

Unfortunately, many clients are also not well suited to serve as their own media representatives. A large number of clients have hurt their cases in the court of public opinion through ill-conceived media appearances. If the client is large enough to have a trained spokesperson, the attorney should consider using that person's skills. If such a person does not exist, or the circumstances call for a particular representative of the organization to speak with the media, consider employing a public relations consultant to prepare the representative.

Finally, consider the ability to request that the media organization submit questions in writing for a written response.

X. Model Rule of Professional Conduct 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

- Comment 1: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4."
- What should counsel do when statements are being contemplated to include misrepresentations, omissions, or misleading information? Does this raise ethical issues? How is counsel obligated to respond?

XI. Model Rule of Professional Conduct 4.3: Dealing with Unrepresented Persons

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

- Context: Upjohn Warnings, especially when the unrepresented person may be adverse to the interests of your client.

XII. Model Rule of Professional Conduct 8.4: Misconduct

It is professional misconduct for a lawyer to:

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

. . .

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

- Again, what should counsel do when statements are being contemplated to include misrepresentations, omissions, or misleading information? What are the ethical issues? How is counsel obligated to respond?

XIII. Preparing for a Crisis: How Legal and Communications Teams Can Take Action Now

When faced with a crisis, clients look to their legal and communications teams to assess risk, develop strategy, and prepare stakeholder communications, often in a rapidly evolving dynamic that involves multiple internal and external parties. In the wake of crisis, institutions frequently struggle with "the tyranny of temporal compression,"[31] a common phenomena occurring in the aftermath of institutional crisis that describes how external audiences judge institutional decisions - on the incorrect inference that *all* administrators knew *all* information at one point in time. This compression of time and data spins the external narrative and often does not reflect the reality of what occurred. Institutions make decisions iteratively, based on information received in a piecemeal fashion, either because they do not have systems that readily aggregate all information available, or the information was not initially available. Either way, the institution sits in an untenable place, having to explain its actions and why it did not have all the available information. Navigating this conundrum in an environment governed by a web of intersecting, overlapping and at times conflicting laws and interests is a daunting challenge.[32]

This challenge is amplified by a natural tension between legal and communications professionals that centers on decisions about the nature and quantity of information that should be released. On the legal end of the spectrum, counsel often opts for a *less is more* approach, frequently citing privacy laws and the impacts of waiving attorney-client privilege and work product protections. On the communications side, crisis professionals often opt for more of a modified *open book* approach, citing the need for transparency and trust.

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[31] Gina Maisto Smith, Chair, Institutional Response Group, Cozen O'Connor

[32] See DTH Media v. Folt, April 17, 2018 North Carolina Court of Appeals decision discussing the intersection of Open Records Act requests and the FERPA "crime of violence" exception. https://appellate.nccourts.org/opinions/?c=2&pdf=36792

Settling on the right message for your institution requires a synthesis of the following considerations: the unique context of higher education; the unique context of your institution: the complex legal framework that applies based on the issue at hand; and the nature and seriousness of the issue.

Managing the complexities of a developing crisis marked by the myriad legal and communication trajectories requires a coordinated and pressure-tested plan to address challenges as they arise. With advanced preparation, legal and communications teams have the best opportunity to prepare clients for crises before they occur.

A. Assess and Plan

Assessing risks and developing plans based on identified anticipated threats will ensure communications are strategic, representative of all prospective audiences, and mitigate negative attention. This exercise requires institutional leadership and buy-in. It should: prioritize coordination; leverage existing successful operations; evaluate conflicting and overlapping laws, policies, and practices; breakdown barriers of the silo environment; and create "breathable cylinders of excellence."[33]

In advance of a crisis occurring, clients should work with their legal and communications teams to:

1. Identify and prioritize areas of risk
    a. General counsel directed to maintain privilege
    b. Consider assistance of Internal Audit, Risk Management, or Compliance Functions
    c. In developing risk assessments consider legal compliance requirements (NACUA Higher Education Compliance Alliance Matrix and Resources[34]) and industry issues including:
        1. Faculty, Staff, Student Conduct
        2. Institutional practices – finances/cyber security
        3. Political speech/activities
        4. Greek life – Athletics
        5. Sexual/Racial harassment and violence
        6. All civil rights issues
        7. Protection of Minors
        8. Labor disputes

2. Interview key stakeholders to identify concerns and vulnerabilities
3. Identify and prepare crisis response team
    a. President or identified other members of senior leadership
    b. Student Affairs
    c. Provost

[33] Robert F. Roach, former Vice President and Chief Global Compliance Officer at New York University
[34] http://www.higheredcompliance.org/index.php

d. Legal
e. Internal Communications
f. Public Safety/Security
g. Risk Management
h. Human Resources
i. Development?
j. Board representative? Special committee?
k. External crisis communications consultant?
l. Subject matter expert (external/internal)?

4. Develop and vet (via legal) approaches and messages for most likely issues (e.g. media statements, potential questions and suggested response documents, talking points for senior leadership, statements to key audiences – both internal and external, etc.). Messages should:
    a. Use plain language;
    b. Prioritize clarity and simplicity;
    c. Focus the message (What happened? How are we responding? Why did it happen? Was it avoidable? How seriously is the institution taking this? Does the institution care about the people affected? What is the institution doing to investigate what happened? What is the institution doing to prevent a recurrence?);
    d. Maintain empathy; and
    e. Identify point person and contact information for questions.
5. Test readiness of communications team and messages through media trainings and drills (and modify as needed)

B. Forming a Response Team

The response team is responsible for all aspects of the institutional response. The quality and success of the response is directly correlated to the functionality of the response team. By forming a team before a crisis occurs, you can help your organization prepare for issues as they inevitably arise. Together, this team can provide counsel and insight that can inform messages and delivery that support the institution's response. Some considerations when forming a crisis response team include:

- Determining which internal stakeholders should be a part of the team (e.g. senior leadership, communications lead, legal team, human resources, board representative, etc.)
- Designating roles and responsibilities:
    - Decision-maker
    - Logistics lead (leads brainstorming sessions, identifies issues, coordinates check-ins)
    - Media and internal stakeholders spokesperson (consider institutional role, availability, skills, nature of the issue, and optics in selecting spokesperson)
    - Communications lead (responsible for developing first drafts of key messages, talking points, FAQs, and other materials as needed)

- Law enforcement lead (ensures statements do not interfere with ongoing criminal investigations)

C. Responding During a Crisis

During a crisis, facts often evolve as more people become involved or exposed to more information about a specific incident. When a decision has been made to respond to crises publicly (through media or internal communications), legal and communications teams should review all statements and messages to ensure they elevate the clients' values, protect your community, and minimize further risks. In drafting communications consider your institutional mission and values including the responsibility to educate and protect your community and the expectation of transparency as it is related to continuing trust. Keep in mind that information moves quickly in a concentrated community with pre-existing social media connections. Consider each communication through the lens of the variety of audiences - and the logistics of effectively messaging constituents residing in diverse institutional silos.

Consider the following when choosing to respond to issues publicly:

- Communicate early and often – become the preferred source of information
- Use multiple channels to disseminate information (online and offline)
- Monitor carefully – bulletin boards, daily media, trade media, social media, blogs – respond when necessary (to correct inaccurate or alarming information)
- Be sure not to get ahead of authorities – especially law enforcement/emergency responders

Together, communications professionals, legal teams, and other institutional leaders have the opportunity to provide important information and shape messages to effectively support the client's objectives and and mission. By preparing now, clients can feel assured they will be ready to respond thoughtfully should a crisis occur. Communications and legal teams can work together to provide clients with a cohesive strategy that ensures they achieve the best outcome legally and with internal and external stakeholders.[35]

[35] Additional resources: Appendix B – *What To Do Before, During, & After A Crisis – 10 Tips;* Appendix C – 2017 NACUA Conference Materials, *Media Training: How to Help Your Client Get Ready to Answer Tough Questions*, [https://www.pathlms.com/nacua/events/832/slide_presentations/61775]

APPENDIX A

Model Rules of Professional Conduct - Table of Contents

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Maintaining the Integrity of the Profession

APPENDIX B

WHAT TO DO BEFORE, DURING & AFTER A CRISIS 10 TIPS

BEFORE

PREPARE BY:

1 HAVING A PLAN

Reality is much more creative than we can predict, but you can anticipate threats and scenarios to plan around them. Make your plan easy to work with; keep it up to date and familiar to the team that will be implementing it. All too often these plans are either not reviewed regularly or are too complex to be an effective tool during a crisis. This can slow reaction time dramatically.

2 DEFINING ROLES

Clearly define roles now. Too much time could be lost defining them during a communications crisis. Instead, pre-determine who is doing what, with whom they'll work and what resources they may need.

3 TRAINING & TESTING

A solid plan is nothing if the key players don't know how to use it. Take the time to hold regular drills of relevant crisis scenarios to ensure your plan will work seamlessly when a real-life crisis hits. Make necessary changes based on what your team discovers, and then train again.

DURING

LET THESE PRINCIPLES GUIDE YOU:

4 SPEED

The first 4, 8 and 24 hours are critical. Acknowledge that you are listening. Start asking the hard questions. But remember – speed doesn't outweigh accuracy.

5 ACCURACY

"THIS IS WHAT WE KNOW RIGHT NOW." Learn this phrase, and use it. Wait to get it right; never speculate, and when in doubt, tell the truth. You can acknowledge a situation without overexposing yourself to more risk.

6 AUTHENTICITY

Be true to you. The news always gets out, so it's in your best interest to communicate your key messages early. Work with your crisis communications team to make what you say authentic to you and your brand, and make it consistent across audiences.

7 EMPATHY

Let your internal and external stakeholders know you care as quickly as possible. Put a human face on what you say and on what you do. Tell them that you will find the answers to who, what, when, where, why and how it will be fixed.

AFTER

LEARN FROM EXPERIENCE:

8 DEBRIEF

After a crisis hits, take a step back. What worked? What didn't work? Are there areas for improvement? This time after an event is crucial to protecting yourself from the next.

9 EVOLVE

Your work isn't done when the news cycle changes. Implement any necessary changes to your plan. Externally, it's important to do what you said you'd do during the crisis. Make sure your audiences know you still care.

10 OR, CALL TIERNEY

Does all of this seem overwhelming? Don't worry; that's where we step in. The Tierney team has more than 20 years of crisis and issues management experience and expertise in providing communications strategies for numerous organizations. We help organizations prepare and, if needed, shape conversations that create momentum, preserve trust, and ultimately, enhance reputation.

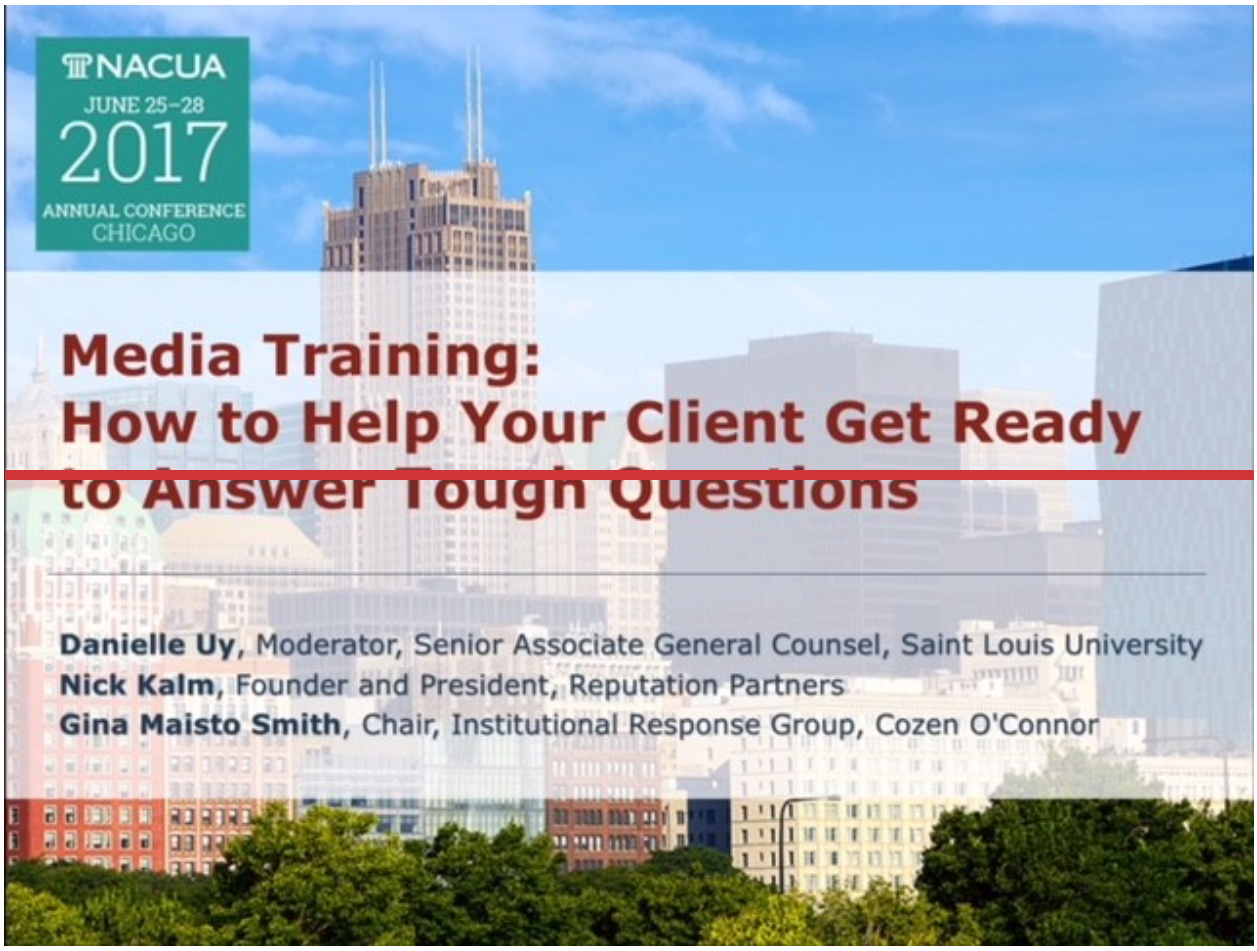
"Pairing transparency with action is right and can only be made better by consistency."

- Mary Stengel Austen, CEO, Tierney

"Crisis of the Week: Deloitte CEO Resigns After Compliance Failures," The Wall Street Journal

Tim Spreitzer | tspreitzer@tierneyagency.com | 215-790-4417 | hellotierney.com

APPENDIX C


NACUA
JUNE 25–28
2017
ANNUAL CONFERENCE
CHICAGO
Media Training:
How to Help Your Client Get Ready to Answer Tough Questions
Danielle Uy, Moderator, Senior Associate General Counsel, Saint Louis University
Nick Kalm, Founder and President, Reputation Partners
Gina Maisto Smith, Chair, Institutional Response Group, Cozen O'Connor