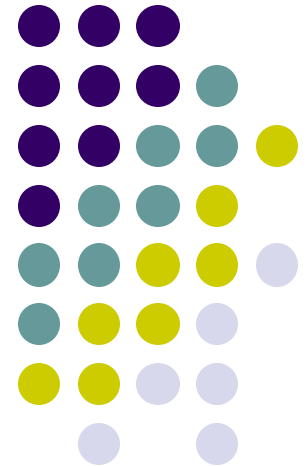
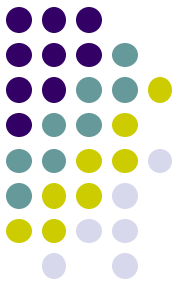


Legal Potholes and Landmines: Navigation Advice for Academic Leaders ©

Kathleen B. Rogers, Esq.
Simmons University, Boston (retired)
SVP, General Counsel & Chief of Staff

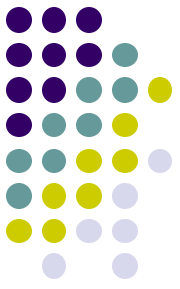




Today's Topics:

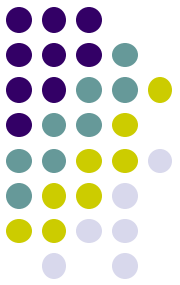
- What's the role of in-house counsel?
- Common legal potholes and landmines
- Steps for good decision-making
- Tips for building an effective relationship with your in-house counsel

Why spend time with a lawyer at NADD?



- Deans/Directors spend significant time with legal counsel.
- Our culture is litigious and you are targets.
- Students see a “property interest” in a degree.
- Your decisions are often viewed as personal, not policy.
- Social media has changed everything.

University counsel should serve as campus traffic lights

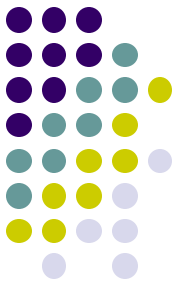


Red = Policy issues

Yellow = Hybrid issues

Green = Legal issues

Pilot vs. Navigator

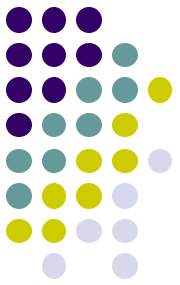


“The job of university counsel is to identify and evaluate the various risks and benefits of proposed projects and concerns from the various **perspectives of the university**, and to articulate those risks and benefits so that everybody understands what the issues are.

I don't think the university counsel is a decision maker. Rather, our job is to analyze all the various interests, suggest how they might play out, propose solutions, provide advice and then let others resolve those issues.”

Wendy White, SVP & General Counsel
University of Pennsylvania

2001 AAUP Interview

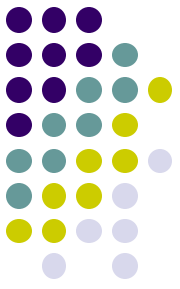


Who is the client in the university setting?

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

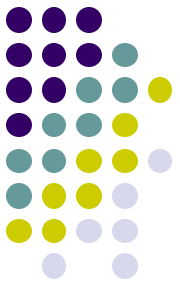
ABA Model Rule 1.13

What does that mean for you?

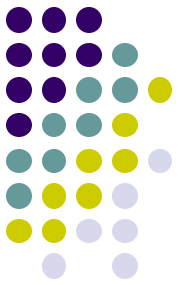


- So long as your actions are **consistent with your job responsibilities**, you will remain a “constituent.”
- Errors of judgment don’t typically negate your rights to advice and representation from in-house counsel.
- But failing to take action or to discharge your responsibilities could raise questions.
- Evidence of retaliation, harassment, intentional discrimination or deliberate indifference are grounds to withdraw in-house legal support or indemnification.

How can you reduce your legal risk?

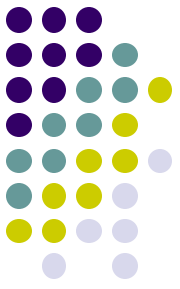


Here are seven tips for keeping yourself and those you manage out of trouble...



Tip #1

Know your job responsibilities
(and perform them).



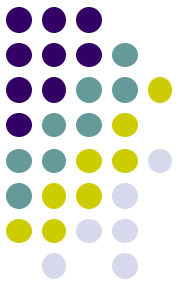
The Star-Ledger

Freeh report: Penn State officials' emails offer evidence of school's failure to take action



The Washington Post

Former Penn State president Graham Spanier sentenced to jail for child endangerment in Jerry Sandusky abuse case



Los Angeles Times

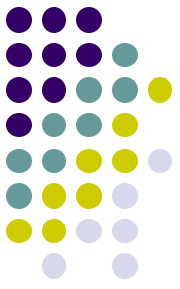
Pepper spray report sharply criticizes UC Davis leaders, police



The New York Times

With Larry Nassar Sentenced, Focus Is on What Michigan State Knew

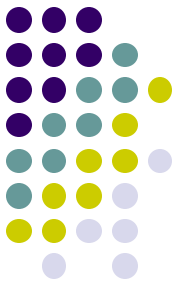




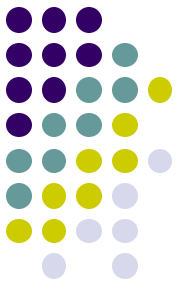
Do you know what duties are “consistent with your job responsibilities”?

- Do you have a detailed **job description**?
- Do you have defined goals each year?
- How does the **position description** calibrate against how you spend a typical workweek?
- Do you know how your performance will be measured?

Managing risk: five more questions to ask yourself:

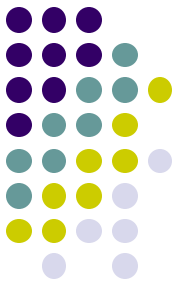


1. Are you engaged with *all* of the programs, policies and risk areas you are assigned to oversee?
2. Are you effectively managing staff and faculty performance?
3. Are you expected to perform duties that have *not* been formally assigned to you?
4. Or prevented from exercising duties that have been?
5. Are you responsible for overseeing a “sacred cow”?



Look for my handouts:

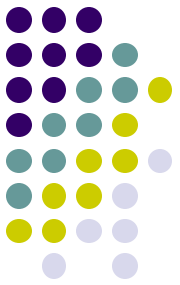
- ❖ Roles and Responsibilities of Department Chairs
- ❖ Writing effective **faculty** evaluations



Tip #2

Be consistent (and careful) in your decision making.

Learning from headlines

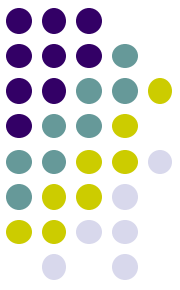


INSIDE
HIGHER ED

In Reversal, Bard College Will Continue to Publish “Conjunctions”

March 14, 2022

Bard College announced Friday that it will continue to publish the literary journal *Conjunctions*. “Having heard the immediate, widespread, and heartfelt reaction from readers, writers, and editors alike, the college is revisiting its decision with the intention of continuing its support for the journal. Bard sincerely regrets both the decision and process that led to it ... [and] for the disruption it has caused.”



Office of the President

Message Regarding Posters Displayed on Campus

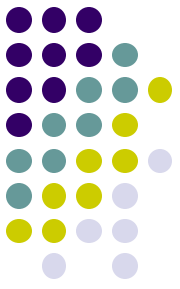
February 7, 2022

Dear Members of the George Washington University Community,

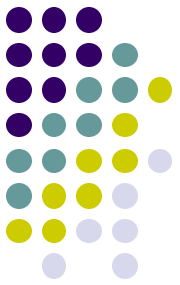
Last week, the university learned of posters on campus depicting images that alarmed some members of our community, and we began to receive a number of concerns through official university reporting channels that cited bias and racism against the Chinese community. I also received an email directly from a student who expressed concerns.

At that time, and without more context on the origin or intent of the posters, I responded hastily to the student, writing that I, too, was concerned. University staff also responded to ensure the posters were removed. **These responses were mistakes.** Every member of the GW community should feel welcome and supported, but **I should have taken more time to understand the entire situation before commenting.**

Steps to good decision- making



1. Clarify the issue(s).
2. Talk with *all* those who have relevant facts.
3. Gather data and facts.
4. Identify applicable policies and then calibrate what you have learned against them.
5. Identify your options.

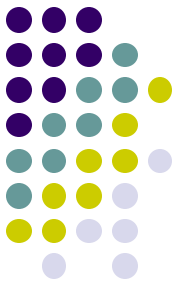


More steps to include ...

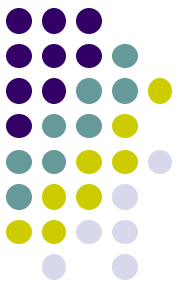
6. Consider the consequences of your options.
7. Share you inclinations with a trusted peer.
8. Make your decision and reduce it to writing.
9. Communicate your decision and own it.
10. Debrief and identify the learnings. How will you avoid a similar problem in the future?

Tip #3

Be vigilant when encountering
these issues:



1. Sexual misconduct **of any kind**
2. Claims of unlawful discrimination or retaliation
3. Failures to provide ADA accommodations
4. Academic misconduct
5. Fraud in sponsored research, misuse of federal funding, or misappropriation of donations



When duties are not fulfilled...

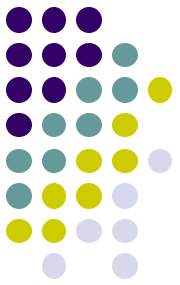
Los Angeles Times



Baylor Removes Ken Starr As President Over University's Response To Sex Assault Cases

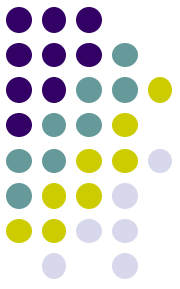


UCLA knew of doctor sex abuse allegation in 2014 but didn't fire him for four years



Tip #4

Report and respond to
misconduct however it arises



The Philadelphia Inquirer



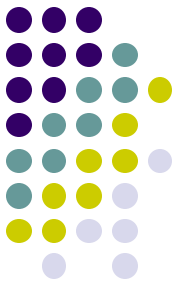
Pa. attorney general settles with Temple over phony MBA rankings, falsified student data

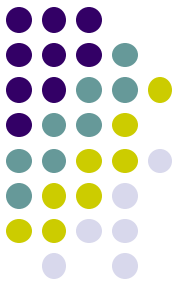
Audit: University of California hid \$175M in budget reserves from state



Another investigation into misuse of funds adds to University of Louisville's recent turmoil

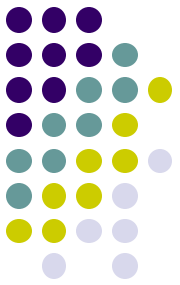
Northern Illinois University president to resign after report alleges mismanagement





Look for my handout:

- ❖ Learning from the mistakes of others: a reading list of investigative reports addressing serious failures in university administration



Tip #5

Know what **Academic Freedom** is (and isn't) and the contours of **Free Speech**

March 23, 2022

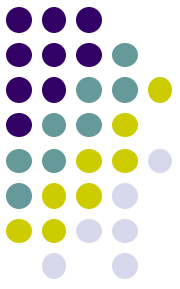
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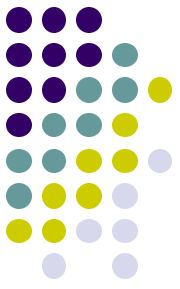
Law Students Shout Down Controversial Speakers

“Two protests, two law schools, two controversial speakers. The difference? One event went ahead, despite repeated disruptions, at Yale Law School. The other, at the University of California Hastings College of the Law, descended into chaos: the speaker was unable to eke out more than a few words before students shut him down, chanting, clapping and banging on desks in protest.”

Free Speech and Academic Freedom

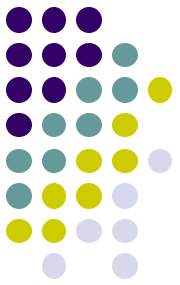


- U.S. Supreme Court has not defined the precise nature and scope of academic freedom.
- But speech on *internal operational matters* is entitled to considerably less protection.
- Courts recognize schools' legitimate need to maintain orderly operations and regulate their own internal operations.
- *"Teachers are entitled to freedom in the classroom...but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject."* AAUP
- Academic freedom does NOT protect behavior by faculty that could be reasonably described as attacking, intimidating, or harassing.



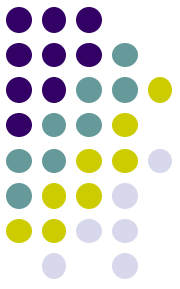
Things to consider ...

- Does your school have updated free speech policies?
- Do your policies protect UNPOPULAR speech and speakers and those who invite them to campus?
- Does your school have processes to address student protesters when violence erupts?
- Does your school regulate who may speak on behalf of the university or use official letterhead?
- How will you respond when one student group complains about another group's speaker or program plans?



Tip #6

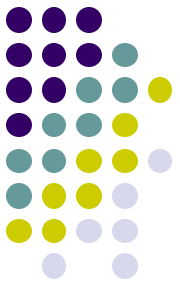
Protect your community members – students, faculty and staff



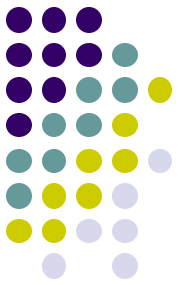
More questions for you:

- Do you know what to do when a faculty member reports being threatened by a student?
- Do you know what to do when you learn indirectly that a student in your program was recently sexually assaulted?
- Do you know how to contact your campus threat and/or behavioral assessment team?

A few words about FERPA ...



❖ Look for my sample handout
for faculty on FERPA

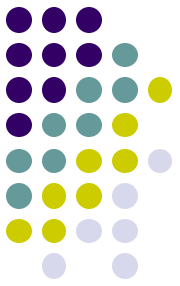


Tip #7

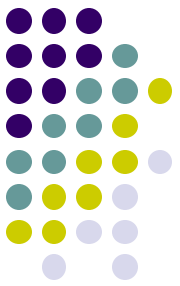
Advocate for comprehensive, well-written policies to guide your college, school or program

The Boston Globe

‘Significant errors...serious damage’: New report details MIT relationship with Jeffrey Epstein



Jeffrey Epstein scandal: MIT professor put on leave, he ‘failed to inform’ college that sex offender made donations

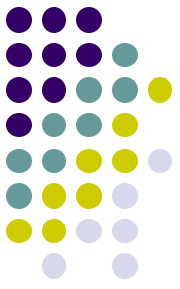


What's the difference?

Practice: Typically not written; a **tradition** followed; “This is always how we’ve done this...”

Protocol/Procedure: Identifies steps to be followed. Usually written, but not typically informative about purpose, context, rationale, or consequences if not observed.

Policy: Typically written rules to assist with decision-making. They are comprehensive and communicated widely. If written effectively, a policy should answer key questions.



Policies *can* preserve flexibility

Consider using these words when drafting:

Except in rare circumstances,

Typically,

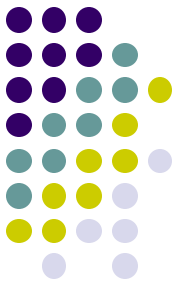
Usually,

Normally,

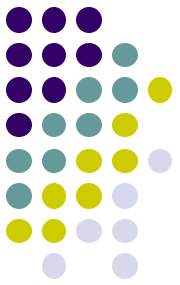
In most instances,

Almost always,

An effective policy:

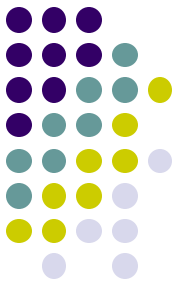


1. Supports the university's mission and goals.
2. Explains how the university conducts its academic operations.
3. Provides clear, concise steps to follow and identifies where to go for additional information or advice.
4. Promotes accountability by identifying the colleagues and offices responsible for the policy's administration.
5. Is not stale, but updated.



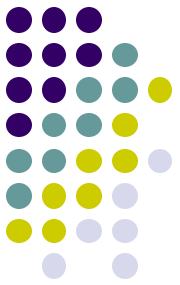
Tips for working effectively with legal counsel

1. Stay calm and steady for yourself and colleagues.
2. Share bad facts and bad news early.
3. Minimize defensiveness.
4. Be prepared to “show your work.”



More tips...

5. Retain emails and documents
6. Demonstrate your knowledge of relevant policies
7. Maintain confidentiality and be discrete.
8. Be mindful of retaliation claims.



Thank you!

I invite your questions

Kathleen Rogers, Esq.

kathyrogers726@gmail.com