

WHAT WOULD YOU

A senior professor insists that the institution's no smoking policy is a violation of her academic freedom. When a grand champion pig is declared ineligible for the 4-H competition it won, a lawsuit is filed asserting that the pig's due process rights were ignored in revoking its award. An instructor fired for sexually molesting several students files suit under the Americans with

Do?

Disabilities Act alleging that

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the institution should not have terminated him. A group of farm workers sues a university for wasting public funds, alleging that the institution was wrong to sponsor research that led to the development of machines that put them out of work. A nurse claims that she has a learning disability that makes it impossible for her to get along with other people. She sues to get a job that would not require her to deal with people anymore.

Welcome to the world of higher education lawyers, the men and women who serve the nation's colleges and universities by responding when legal issues arise and trying to avoid lawsuits. They address an exceedingly broad range of legal issues from athletics to taxation, from employment law to intellectual property, from student affairs to technology transfer. Their day-to-day work ranges from mundane contracts to high-profile and very emotional cases involving student behavior. So what does it take to be a successful university counsel in an increasingly complex environment? A few cases might help to illustrate the answers. (For the outcome of the cases, see page 47)

Case 1. You have been asked to draft an "inurnment agreement" to cover placing the cremated remains of a trustee under an artwork on campus that will be donated by the trustee's family. What in the world is an inurnment agreement, you may ask? Although your campus doesn't have such a structure, perhaps you can refer to policies and procedures developed at a college that happens to have a columbarium, an above-ground structure in which certain members of the campus community may purchase a niche to house their cremated remains in perpetuity? Or maybe you should turn to the various state statutes and regulations concerning the disposition of human remains?

There can be some very tricky and sticky rules for this kind of activity. Also, in the case of selling a spot for the inurnment of remains, you might check whether the institution needs to register with the state's Office of Consumer Protection, which issues rules governing the licensing of those who sell grave spaces. Besides reaching for *Webster's Dictionary*, what do you do?

What does this case require? The university counsel needs a sense of humor, the ability to understand arcane issues, and a command of the various legal and regulatory resources necessary to get the answers. Then, counsel must be able to communicate the results of the research in plain English.

Case 2. One Friday afternoon, you are working through a stack of papers in your in-box in the general counsel's office, with hopes of clearing some of them out before the weekend. The telephone rings. It is the outside counsel you hired on behalf of the university to represent the institution in what has turned out to be the largest potential liability case in the university's history. You have worked closely, daily, with this lawyer on behalf of the institution to manage a

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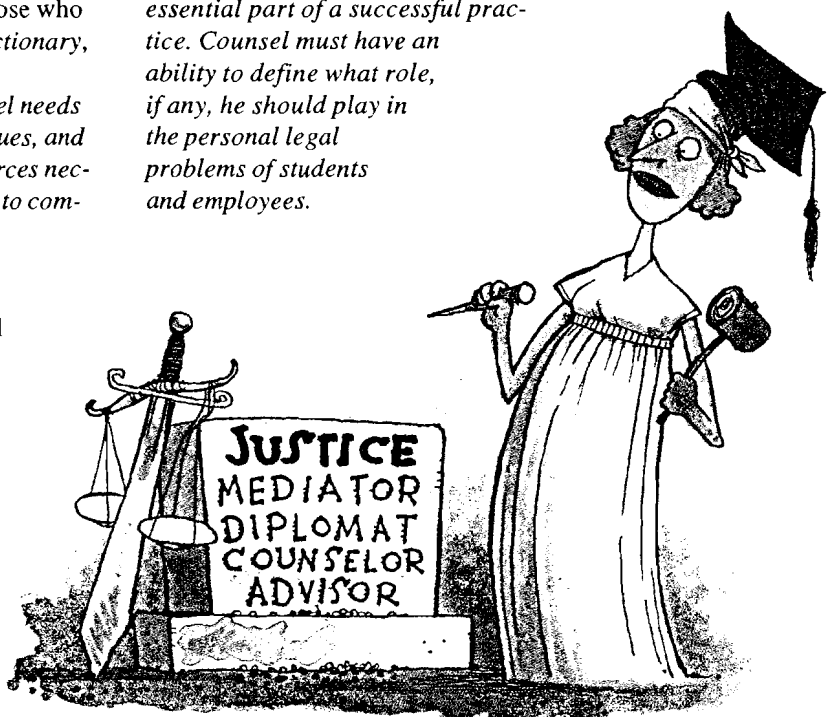
fraud case in which university faculty members were accused of overcharging the federal government.

The outside counsel calls to tell you that the federal criminal prosecutors conducting the investigation have decided that, in your capacity as university counsel, you committed a crime. Your "crime" is having assisted your institution in incorporating and establishing relationships for a legal off-shore corporation created for legitimate insurance purposes. You are unable to represent the university further. This means you may no longer manage more than a dozen lawyers who have been retained to represent various university faculty members, a dean, and a vice president, who all were personal subjects of the criminal investigation. After you recover from your astonishment, what do you do next?

What attributes are needed here? The university lawyer must be nimble, able to adapt quickly to changing circumstances, shifting gears at a moment's notice. She cannot allow herself to be shocked or rattled by unexpected setbacks because the client—her university—is relying on her to provide the best and most reasoned options for a course of action when a case takes a surprising turn.

Case 3. A student from Africa entered the country and the institution on a tourist visa. After enrolling, he applied for a student visa. Unbeknownst to the college, his tourist visa expired and his student visa had not yet been issued. He joined the basketball team and, while traveling to a game in Canada, was detained at the Canadian border because he did not have a current visa. The college's van went on and he walked back to the U.S. border, where not only was he not allowed entry because he did not have a current visa, but also he was arrested. What is your role as counsel?

What skill is most needed here? The college lawyer must always remember that the institution's interests are paramount in his legal representation but that fairness and sensitivity to human situations are also an essential part of a successful practice. Counsel must have an ability to define what role, if any, he should play in the personal legal problems of students and employees.



He must be able to tell a client when the problem is not really a legal one or when the problem is not one in which institutional counsel can be involved.

Case 4. A full-time student was arrested off campus for flashing at a playground. There were two requirements for bail: that he complete his studies and that he not be within 500 feet of children. The building in which his program of studies is located also houses the college's child-care center, but the District Attorney refuses to change the requirements of bail, leaving the student to violate one or the other of the requirements. What do you do?

What talents are needed to resolve this mess? University counsel must be smart and creative, always ready to craft a solution to a brand new problem.

Case 5. A few years ago, a coach decided to have a live bull penned on a golf course during a golf tournament he was hosting as a fund-raiser. The bull was to be raffled off later. The bull wasn't supervised, golfers who had been drinking taunted the bull, and it broke out of the pen. It ran rampant on the golf course causing hundreds of dollars of damage to the course. The bull fell into a ravine and was badly injured. The coach had to bring someone in to shoot the bull and then had to contract with someone else to take the carcass out of the ravine. The following year, the coach asks you if he can use a different animal.

What's key here? The lawyer must have a sense of humor (still); great capacity to work in a risk-laden environment in

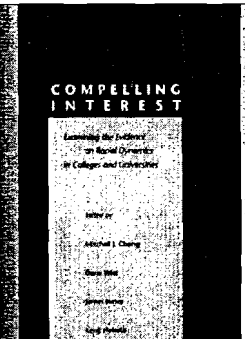
which any number of individuals need your help and are not prepared to be calm or reasonable; and an ability to strike the right balance between caution and fearlessness.

Case 6. A veterinary college finds itself treating a lot of ostriches and emus. One day you are sitting in your office and take a "cold call." The person on the other end wants to know when you are going to send him a check for \$20,000. He explains that he would accept that in settlement of his claim since the institution's vets had killed his breeding ostrich named "Mae West."

When you reach them, the story from the university officials involved is that the ostrich had been brought in with a nonspecific digestive ailment. It was decided that she needed an X-ray. Several high-ranking faculty members decided that a really good idea would be to use the portable X-ray machine for the 8-foot-tall animal, although it would require confining Mae in a very small space in order to limit her movements.

Ostriches do not like very small spaces. Mae protested vigorously, becoming so enraged that she flailed her long neck up and down while continuing to kick. At some point she lowered her neck to the point where one of her flying feet made hard contact with the back of her head and broke her neck. The owner was notified, was furious, and was uninsured. What do you do when the owner says he wants his money?

The characteristics needed here? The university attorney must have a sense of humor (did we mention that before?), and the ability to remain calm and dispassionate even in the most



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trying of circumstances. Knowing that she must always be accessible, she must understand that the "cold calls" are often the most "interesting" ones.

Case 7. A lawsuit was filed by an employee who was disciplined after being criticized by her new supervisor. She boldly claims that the supervisor had no right to ask that she do her job. After all, for many years, no one had required her to do her job. Thus, she believed she now had a vested right in non-performance. How do you handle this situation?

What kind of skills does this call into play? Unfortunately, the university's prerogatives are not usually this clear-cut! Still, the college lawyer must be a problem solver and must be knowledgeable about a wide range of areas of practice and approaches to solving a problem, with employment law being one of the most common areas of practice on a college campus.

It is obvious from the above cases that higher education lawyers are called upon to handle not just a broad spectrum of legal matters but also a wide variety of other issues. In fact, one college lawyer has summed up the job this way: "First, lawyers tend to be good problem solvers, and higher education has lots of problems, so we're a good match. Second, everything has some connection to some law somewhere, so (it is widely assumed) the lawyers must be the source of knowledge. Third, lawyers know how to handle litigation, litigation is confrontation, and confrontation is unpleasant; therefore, lawyers know how to handle unpleasant things; therefore, all unpleasant things should be handled by lawyers." This is a useful perspective when you are asked to address the complex, curious, and sometimes seemingly intractable issues you are presented with as counsel.

While some of the cases we cite are amusing and perhaps surprising to those outside higher education law, *every one of them is real*. College and university lawyers must have all of the attributes described above and then some. They must use all of their diplomatic and managerial skills, since everyone assumes they are experts in every field of the law.

They are often, and increasingly, called upon to act as mediators. Sometimes, this is in an effort to avoid legal claims, but often the problems involved are only tangentially or remotely related to a legal issue. Frequently, college lawyers are called in because they are perceived as being experts in "dispute resolution" in its broadest sense. So counsel is asked to serve as mediator, diplomat, counselor, and advisor to a multitude of members of the university community. Combining these various duties with the attributes necessary to be successful in higher education law is a balance capably—and sometimes even happily—struck by those who wind up making their careers as college and university counsels.

At some point in his or her career, nearly every college or university administrator, faculty member, or staff member at an institution will be in a bind, whether it be with a disgruntled colleague or employee, with a student in trouble, with an unhappy alumnus, or perhaps even with an angry animal or a pig who did not get due process. It should be comforting to know there is a higher education lawyer ready and willing to take that cold call. ☐

HOW DO YOU THINK THE LEGAL CASES WERE RESOLVED?

Case 1. A balance was struck between demanding extensive legal protections for the institution and accepting the family's wishes, allowing a delicate compromise of the situation. A fairly simple "Memorial Site Agreement"—as opposed to the rather cold "Inurement Agreement"—was drawn up and a campus policy was established to address issues such as acceptance or rejection of requests for a memorial site, compliance with health and inurement laws, and standards for acceptance and evaluation of artwork according to the campus master plan. The policy also required that an endowment be established to maintain the artwork and created working rules on issues such as decorations, campus maintenance services, access, markers, and processes for removal of remains by heirs.

Case 2. Rather than wallowing in indignity, university counsel asked for a hearing before the federal judge supervising the investigation, which resulted in the federal prosecutors dropping their objections to her continued representation of the institution.

Case 3. The college found an immigration lawyer to represent the student. The college's student senate offered to use its funds to defray the cost of counsel. The Immigration and Naturalization Service determined that the student could not stay but that if he agreed to be voluntarily deported, he could complete the proper paperwork and documentation in his home country and return to the United States. The college refunded his tuition money so that he could afford the plane fare to return home.

Case 4. Because the college was not the entity in charge of enforcing the bail requirements, it came up with a practical solution that seemed to satisfy everyone. To ensure that children were not threatened, the student was not allowed to use any of the building entrances anywhere near the child-care center, and all personnel and security guards had a picture of the student and information about the restrictions. The student signed the agreement with the college, honored its terms, and completed his education.

Case 5. We do not know, but we imagine counsel approved the use of a butterfly.

Case 6. The owner filed suit in the home county of the university, but ultimately got nothing. Perhaps he should have shopped for a venue that was more "ostrich-friendly," because most of the agriculture in the part of the state involved was dedicated either to raising cattle or growing feed for cattle.

Case 7. After a lengthy hearing, the discipline was sustained. But not without an enormous fight.