

PRE-CONFERENCE WORKSHOP

Legal Issues For Academic Programs In CSD: Tools For Understanding And Proactive Positioning

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The 2003 Annual Conference in Albuquerque, New Mexico, included a Pre-Conference Workshop for Program Directors, Clinic Directors, Clinical Supervisors, and Faculty on Wednesday April 9, 2003. The Workshop moderator was Gary J. Rentschler, Ph.D., Clinic Director and Coordinator of Clinical Education at Duquesne University, Jennifer Horner, Ph.D., JD, Associate Professor and Director of Communication Sciences and Disorders, College of Health Professions at the Medical University of South Carolina, and John F. Burns, JD, Director of Legal Affairs and Professor of Law at The Ohio University.

Dr. Rentschler, Dr. Horner, and Mr. Burns prepared the materials included as part of the proceedings of the Annual Conference, which primarily included Teaching Points (Appendix A) prepared by the moderator, Dr. Rentschler; the Select Cases in Academic Law (Appendix B) dealing with program and clinical operations prepared by Dr. Horner, and three (3) hypothetical cases (Appendix C) and their questions and answers prepared by Dr. Horner and Mr. Burns.

Dr. Rentschler's fifteen (15) Teaching Points are designed to show the many types of legal/practical issues that arise in an academic program and clinical practice setting, and are also designed to initiate discussions on the legal issues facing faculty and academic administrators today. The Teaching Points raise a series of questions, which are dependent in the facts and circumstance for each particular college/university program; but which are generally common to all academic and clinical programs.

Dr. Horner's thirty nine (39) Select Cases on nine (9) general topics in the area of Academic Law focus on both the historical and contemporary landmark and unique cases that guide universities and academic administrators in trying to apply legal principles and precedents to very unique and specific factual settings and problems, with the understanding that there will always be new issues and case decisions that will apply to future issues and problems in academic programs and clinical operations.

The three (3) hypothetical cases prepared by Dr. Horner and Mr. Burns are designed to provide an opportunity for critical thinking, discussion, and debate over the proper legal, as well as practical approaches and alternatives, to dealing with the issues and questions raised in the hypotheticals. The basic point the panel is seeking to make in this portion of the program is that faculty members and academic administrators have to be sure they understand the facts and issues to the greatest extent possible before making decisions and that in the majority of circumstances where legal and practical issues have to be considered in decision making, it is very important to making a thoughtful decision to proceed, rather than wait for another party to make a decision, such as a grievance or lawsuit being filed.

With respect to the questions posed in the three (3) hypothetical cases the basic "answers" as suggested by the presenters are as follows:

A. Clinical Program At State University

- (1) It is generally wise decision making at a college or university, specifically at a public university, whose records are often open to the public, to be open, honest, and specific in responses to the public, media, internal constituencies, legislators, and so forth and to keep the institution's basic core values and goals as a clear part of the communication message, fully understanding that problematic issues and events may cloud the message. However, an institution should always keep its message on

point so it will ultimately be recognized as much as possible to assure public support for the institution.

- (2) In a contemporary college or university clinical programs, the related courses, internships, affiliation agreements, and do forth are all subject to federal and state law and university rules and regulations to a great degree. A faculty member or academic administrator should be familiar with changing or developing legal issues in the discipline, and he or she should seek the most thoughtful and helpful advice from attorneys when appropriate.

B. Aphasia Grant At A Private University

- (1) Development of a copyright policy in an academic setting is an important step because an institution needs to balance precisely its interests in financial gain and public relations, with a faculty member's (author's/creator's) interests in the creative and economic value of owning his or her work and the monetary value to be personally received. These issues can and are usually resolved through specific policies and procedures involving ownership and assignment of copyrights.
- (2) Faculty members should always be cognizant of balancing their caring/concern for a student or a faculty colleague with the ethical and moral responsibility of providing fair and accurate information in a recommendation. It is generally better to error on the side of no response to a recommendation request, if a response would be less than positive. Also, it is very important for faculty members and staff to avoid putting themselves into a position where they may create a perceived, as well as an actual, ethical conflict of interest of giving an inaccurate or an enhanced recommendation.

C. More Problems At Public (State) University

- (1) As noted in Hypothetical #1, a President or his/her spokespersons have to first deal with accurate and updated facts when dealing with the media or interest groups. The president of the institution should be advised to find/appoint someone who can investigate/administer any conflict of interest issues and report whether any action needs to be taken.
- (2) Although the First Amendment of the Bill of Rights to the United States Constitution says no law should be passed restricting freedom of association; there are many federal and state laws and regulations that limit and restrict the above principle. Both faculty and academic administrators need to be aware of First Amendment issues; however, faculty members and their students do not have constitutional right to fraternize; and universities, both public and private, can adopt reasonable policies restricting certain types of relationships.
- (3) The scope of the concept of academic freedom has been the issue of political debates and legal decisions for over one-half of the past century. Although academic freedom today still retains the principle of allowing wide latitude in the teaching of controversial academic subjects and issues; it does not include the freedom to engage in criminal activities, be it felonies or misdemeanors, or violate reasonable university policies dealing with harassment and fraternization issues.
- (4) Under the Health Insurance Portability Access and Accountability Act, generally known as HIPAA, individual employees of so called "Covered Entities" are not going to be held personally responsible for violations of HIPAA or the HIPAA regulations, which are initially in place as of April 14, 2003. However, a "Covered Entity" like a public or private university, can be found "liable" and fined \$25,000/ occurrence for HIPAA

violations. To avoid this somewhat remote possibility the faculty and staff of each public or private university or college should and must plan for their staff to undergo proper training programs regarding HIPAA.

This information and attached documents are designed to provide the Council of Academic Programs Communication Sciences and Disorders Conference attendees a basic outline of the workshop on the legal issues affecting the operations of academic programs and clinical operations of their institutions. The presenters' advice is intended to make the attendees aware of the pertinent federal and state laws and regulations, cases and changes in the implementation and administration of these laws and regulations; and this can continue to be accomplished through the Council's future programs and with the assistance of their individual institutional legal counsel.

APPENDIX A
LEGAL ISSUES PRE-CONFERENCE WORKSHOP
Teaching Points

1.	<p>Responsibility to the Patient: Nonmaleficence and holding the patient's welfare in highest regard are fundamental principles of ethics. Some states hold the licensee (not the student) responsible for a patient's treatment. ASHA requires 25% supervision of students doing therapy; which can leave 75% of treatment unattended. Should a patient be harmed, who is responsible for what happens to the patient – the student, faculty, off-site supervisor?</p> <p>* How and where are the lines of responsibility drawn in situations of malpractice or incompetence involving student clinicians?</p>
2.	<p>Student/Faculty Relationships: Students and faculty have sort of a “yin-yang” relationship in the academic environment. Over the years, it seems the “yin” has become a much bigger force, with more and more rights. What is the current legal perspective on the rights of students and of faculty in terms of:</p> <ul style="list-style-type: none"> • Grading • Sexual/racial discrimination • Probation policies • Course descriptions • Other? <p>* Faculty are spending more time “documenting” marginal student performances, leaving less time to work with good students. Course syllabi read more like sections of the penal code than statements to inspire students. How did these changes come about?</p>
3.	<p>Requirements of Off-Campus Placements: Some practicum sites impose requirements which exceed those of the university. For example, some sites require students to undergo a criminal background check or pass a drug test as a prerequisite for the placement. At what point do we consider these an invasion of our privacy?</p> <p>* What do we do if a student refuses to submit to a background check, drug test, or other requirement in order to qualify for a placement?</p>

4.	<p>Educating Students Off-Campus: When a student receives part of their university education at an off campus site, how is responsibility determined for a student when he or she:</p> <ul style="list-style-type: none"> • Fails to meet academic standards (off-site instructors do not always have the same standards as on-site instructors) • Does not receive adequate instruction • Misbehaves • Causes or suffers an accident • Is involved in malpractice? <p>* How much responsibility does an academic program assume sending a student to an off-campus site for part of his/her education? How much authority does the program yield to the site?</p>
5.	<p>Human Subjects in Research: How do I insure that I am following the law when obtaining <i>informed consent</i> when using research subjects who are communicatively-impaired?</p> <p>* When a potential subject has a cognitive or communicative impairment, what precautions should I take to assure that they understand the parameters and implications of the research project in which I would like them to participate?</p>
6.	<p>Intellectual Property: Who owns the work when an employee invents something on work time or the data when a faculty member does research? What about joint research projects, with another faculty member or a student?</p> <p>* Do similar rules apply when an employee creates something on his/her own time, even though it directly relates to a specific project they are working on at their place of employment?</p> <p>Joint authorship; "Work for Hire"</p>
7.	<p>Copyright: How have the standards of the laws governing copyright changed to meet the digital age?</p> <p>* What governs how I can use copyrighted material in my academic and clinical teaching? How should students use copyrighted materials in their assignments?</p>

	(Teach Act; distance learning, concept of Fair Use)
8.	<p>Academic Dishonesty: If a student violates a copyright or plagiarizes material on his/her thesis or dissertation, is the faculty advisor equally liable?</p> <p>* Do students need to be forewarned that their papers will be screened by software programs designed to detect plagiarism?</p> <p>Faculty standards</p>
9.	<p>Specialty Recognition/Credentialing: As a practitioner having been awarded specialty recognition, should your work be held to a higher standard than other practitioners?</p> <p>* As a member of a specialty recognition credentialing board (or other not-for-profit organization), what additional risk or liability to you expose yourself to?</p>
10.	<p>HIPAA: Some of the situations in university clinics covered under HIPAA seem to contradict the intent of greater privacy and security. Were legislators only thinking of the large medical and health care conglomerates when HIPAA was created, or did they envision the impact on educational facilities as well?</p> <p>* HIPAA does not supercede other ethical responsibilities and client protections. How do we decide what is required to best safeguard a client's interests?</p>
11.	<p>Letters of Recommendations and Phone References: Under FERPA (the Buckley Amendment) faculty cannot disclose information about a student's educational experience and performance without their written permission. When a prospective employer calls a faculty member for an employment reference, what should (and shouldn't) we do?</p> <p>* What are you obligated to disclose in a letter of recommendation? For example, if you have knowledge that an action was taken against a student or co-worker because of a drug problem, yet you were personally never directly informed of the problem, what are your ethical and legal obligations?</p>
12.	<p>Conflicts of Interest: Through restructuring, consolidation, reassignment of responsibilities, a push toward entrepreneurialship in the academic setting, and other</p>

	<p>factors in today's workplace, many faculty members are called upon to do many things. How do program managers steer clear of conflicts of interest?</p> <p>* There are many potential sources of conflicting interests in today's workplace. Can you give us some guiding principles that will enable us to objectively assess situations in which there is risk?</p>
13.	<p>Faculty Practice Plans: Many programs have a faculty practice plan in which faculty generate personal income or provide services (without students) outside the educational mission of the university. This often stirs the ire of practitioners in private practice or other agencies, who see this as unfair competition. Is this a "risky" venture given that most universities are state supported and/or have been granted tax exempt status?</p> <p>* What are the legal boundaries of faculty practice plans and how can they be kept from being viewed as unfair competition by other service providers in the community who we rely upon to accept our students for externship placements?</p>
14.	<p>Academic Freedom: A faculty member's right to do or say what they wish is one of the landmark privileges which separate academia from other forms of work life. Certainly there must be limitations. What happens when the freedoms of two faculty member clash?</p> <p>* There are situations where academic freedoms could impinge on public safety or governmental policies. What do you see as the boundaries of academic freedom?</p>

APPENDIX B

Academic Law: *Select Cases*

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Academic Misconduct

- 1— **Dixon v. Alabama State Board of Education, 294 F.2d 150 (1961).** “[T]he right to attend a public college or university is not in and of itself a constitutional right.” Nevertheless, students who are dismissed for misconduct (as distinct from failing to meet academic standards) deserve notice, an opportunity to be heard by an impartial panel, and a right to inspect pertinent reports by university officials.
- 2— **Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978).** The U.S. Supreme Court reviewed a case involving dismissal of a student from medical school due to her failure to perform academically and clinically. Where a student violates rules of conduct, and is dismissed for *disciplinary* reasons, a hearing is required. In contrast, when a student is dismissed for *academic* reasons, “far less stringent procedural requirements” are necessary. “Courts are particularly ill-equipped to evaluate academic performance,” and academic dismissals rest on “the academic judgment of school officials.” Therefore, assuming the university’s decision was neither arbitrary nor capricious, the court will not second guess a university’s decision to dismiss a student for academic reasons.
- 3— **Abalkhail v. Claremont University Center, No. B014012 (Cal. Ct. App. Feb. 27, 1986), cert denied, 107 S. Ct. 186 (1986).** Students have a significant legal interest in obtaining a degree and are entitled to procedural fairness. “At a minimum, a fair hearing requires adequate notice of the charges, a reasonable opportunity to respond, and an impartial hearing panel.” In this case, a student was accused of plagiarizing a major portion of his dissertation. His Ph.D. was revoked. After carefully reviewing the facts and the procedures, the court upheld the university’s decision.
- 4— **Crook v. Baker, 813 F.2d 88 (6th Cir. 1987).** Crook received a Master of Science in Geology and Mineralogy, but it was later discovered that he had fabricated data, and his degree was rescinded. The student was afforded procedural process. Furthermore, because the university’s decision was “not arbitrary or capricious, or lacking in a rational basis,” he was afforded substantive due process. The court upheld the university’s decision.
- 5— **Fussell v. Louisiana Business College of Monroe, 519 So. 2d 384 (La. App. 2 Cir. 1988).** Student was dismissed for allegedly engaging in behavior that “disrupted the scholastic program of the college.” The circumstances involved

dissatisfaction by students in a legal secretary program regarding the qualifications of the instructors, the poor job placement record, and the admission of unqualified students. Neither the documentation nor the testimony by students, teachers or administrators could support the decision to dismiss plaintiff. The court held that plaintiff's behavior did not justify her suspension.

- 6— **Ku v. State of Tennessee, 322 F.3d 431 (6th Cir. 2003)**. Student alleged he was not given procedural due process when he was placed on a leave of absence from medical school. First, the court recognized that Ku had a “constitutionally protectable property interest in continuing his medical studies.” Second, the court found that the probation involved an academic (not a disciplinary) decision in light of the student handbook, which stated: “[e]valuation of academic performance may include (but is not necessarily limited to) measuring the student's knowledge, testing how the student applies such knowledge to specific problems, evaluation of the judgement a student employs in solving problems and assessing the quality of the student's psychomotor skills, ethical behavior and interpersonal relationships with medical colleagues, patients and patient's families.” The court held that the university followed procedures that were careful, reasonable, and deliberate and that the procedural due process requirements of the Fourteenth Amendment were satisfied. In response to the substantive due process complaint, the court cited a U.S. Supreme Court precedent: “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation” (*Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). (Powell, J., concurring)).

Academic Freedom and The First Amendment

- 1— **Dong v. Board of Trustees of Stanford University, 236 Cal. Rptr. 912 (Cal. App. 6 Dist. 1987)**. Dong accused Lucas of research fraud; Dong, in turn, accused Lucas of research fraud. Dong insisted that he had a right to access the university's investigative (disciplinary) report regarding Lucas, in order to expose “the existence of fraud in publicly-funded research.” When the university denied him access to the report, he sued the university for infringement of his freedom of speech. In a U.S. Supreme Court case—*Sweezy v. New Hampshire*—Justice Frankfurter defined academic freedom as entailing “four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” Academic freedom is grounded in the First Amendment. However, the freedom of speech does not give a professor the “license” to disrupt or interfere with the operations of the university. Furthermore, according to the court, Dong's right to speak does not impose on the university the obligation to listen. Dong's lawsuit failed.
- 2— **Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 237 (2000)**. Brown, a master's degree candidate challenged his thesis committee's decision to disapprove his thesis because he had written a

scathing and profane “Disacknowledgments” section. The committee said it did not conform to the university’s standards, and the court agreed. Brown alleged a violation of his First Amendment rights. “[E]ducators can, consistent with the First Amendment, restrict student speech provided that the limitation is reasonably related to a legitimate pedagogical purpose.”

- 3— **Salehpour v. University of Tennessee, 159 F.3d 199 (6th Cir. 1998).** Student’s freedom of speech not violated when he was disciplined because his speech disrupted the educational environment.
- 4— **Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000), cert. denied, 121 S. Ct. 759 (2001).** First Amendment not offended by a regulation that restricts faculty from accessing sexually explicit material on computers owned by the state.
- 5— **Hoover v. Morales, 164 F.3d 221 (5th Cir. 1998).** Professors who work as paid consultants or expert witnesses for parties opposing the state in litigation are protected by their right under the First Amendment to speak on matters of public concern.
- 6— **Vanderhurst v. Colorado Mountain College District, 208 F.3d 908 (10th Cir. 2000).** University did not violate a junior college professor’s free speech under the First Amendment when he was disciplined for using inappropriate (vulgar) language in the classroom.

Academic Malpractice

Miller v. Loyola University of New Orleans, 829 So.2d 1057 (La. App. 4 Cir. 2002) (rejecting a student’s complaint regarding the quality of a course). Most states do not recognize “educational malpractice” claims. Montana is an exception. *B.M. v. State*, 649 P.2d 425, 427-28 (Mont. 1982) (placing a duty of care on educators). Eleven other states have considered, and rejected such claims under either tort or contract principles: Alabama, Alaska, California, Florida, Idaho, Iowa, Kentucky, Maryland, New Jersey, New York, and Wisconsin. In *Miller*, the Louisiana Appellate Court rejected an educational malpractice claim under tort principles because there is not a uniform “standard of care” by which to judge teaching methods, because there is “inherent uncertainty” regarding cause and damages, and the court recognized the importance of academic freedom. Unless there is a breach of a specific contractual promise, there is no claim. Other theories considered and rejected by this court were: unjust enrichment, and detrimental reliance. The dissenting opinion lamented the lack of accountability in higher education, and opined that universities should be held, at least, to principles of “good faith and fair dealing” under contract law. See also *Alligood v. County of Erie*, 749 N.Y.S.2d 349 (N.Y. App. Div. 4, 2002) (no cause of action for educational malpractice in the State of New York.)

Conflict of Interest

- 1— **Moore v. Regents, 793 P.2d 479 (Cal. 1990).** When Moore underwent blood tests and a splenectomy for hairy-cell leukemia, his physicians

harvested unique blood cells from Moore without telling him. The clinical researchers patented the cell-line, which was highly profitable. Moore sued them and lost on his property claim. However, the court held that the physicians breached their fiduciary duty to Moore by “fail[ing] to disclose the extent of their research and economic interests in Moore’s cells before obtaining consent to the medical procedures.”

- 2— **Gross v. University of Tennessee, 448 F. supp. 245 (W.D. Tenn. 1978).** When two professors at the Center for the Health Sciences refused to sign a Medical Practice Income Agreement, their positions were terminated. The court rejected their due process and equal protection claims, holding that plaintiffs had “no constitutional right to engage in the unlimited private practice of medicine while holding a public position of employment.”
- 3— **Odrich v. Trustees of Columbia University in City of New York, 747 N.Y.S.2d 342 (N.Y. Sup. 2002).** Fee-splitting of professional services is permitted in New York if those persons are “partners, employees, associate in a profession firm or corporation, professional subcontractor or consultant...” (Education Law s 6530(19)). Thus, fee-splitting between two ophthalmologists and Columbia Ophthalmology Consultants [COC], the duly incorporated faculty practice corporation, was legal. (“[T]he entities which are permitted to share fees...are those who in return share a correlative responsibility to the patients.”) However, after the doctors had severed ties with COC, they were told they could engage in practice at the medical school on condition that they paid “a 10% share of ‘all practice income,’ wherever generated.” The court held that this demand was illegal. “The ban on fee-splitting was...created to protect patients from inflated billings and clandestine partnerships which have the potential to compromise health care decisions.”
- 4— **Truong v. Regents of University of California, (Cal. App. 4 Dist. 2002).** Truong alleged that the university’s failure to reappointment him was due to discrimination based on his race and national origin, whereas the university said the dismissal was for financial reasons. In turn, Truong claimed that they were forcing him to participate in an illegal compensation plan. Throughout the State of California, faculty are required to share a portion of their clinical fees with the university. The court held that such contractual arrangements within a “faculty medical practice plan” did not violate the statute against referral fees or inducements, or fee-splitting.
- 5— **Institutional Conflicts of Interest**
 - **Association of American Medical Colleges (AAMC). Protecting Subjects, Preserving Trust, Promoting Progress II: Principles and Recommendations for Oversight of an Institution’s Financial Interests in Human Subjects Research (October 2002)** (acknowledging that public trust and accountability are at stake in situations where an institution has ownership or investment interests in a research sponsor; emphasizing that patient safety and welfare could be compromised; recommending that administrative oversight for finances and for human research should be “full and reliably” separate).

- **Association of American Universities (AAU) Task Force on Research Accountability. Report on Individual and Institutional Conflict of Interest (October 2001)** (defining *individual financial conflict of interest* as “situations in which financial considerations may compromise, or have the appearance of compromising, an investigator’s professional judgement in conduct or reporting research”; and an *institutional financial conflict of interest* as when the institution or its agents “has an external relationship or financial interest in a company that itself has a financial interest in a faculty research project”).
- **Emanuel E. & Steiner D. Institutional Conflict of Interest (Sounding Board). New Engl J Med 1995;332(4):262-267** (proposing an analytic framework and safeguards when an institution has a financial interest in the outcome of clinical research).

Faculty Affairs; Employment Disputes

- 1— **Maron v. United States, No. 96-1492 (4th Cir. 1997)**. Maron, a renowned cardiologist at N.I.H. sued his former colleagues for intentional infliction of emotional distress, civil conspiracy, and invasion of privacy. The court held that the colleagues had acted within the scope of their federal employment at the time of the alleged acts. As such their employer, the United States, was substituted as the defendant and was immune from liability under the Federal Tort Claims Act 28 U.S.C. 1346(b), 2679(b)(1) (*Feres v. U.S.*, 340 U.S. 135 (1950)).
- 2— **University of Baltimore v. Iz, 716 A.2d 1107 (Md. App. 1998)**. A university enjoys wide discretion in the tenure review process. Collegiality may be considered in tenure and promotion decisions, as long as it is not used as a pretext for discrimination. Held, for the university.
- 3— **Katzberg v. Regents of University of California, 29 Cal.4th 300 (Cal. 2002)**. The position of chair is an “at-will” position (terminable without cause). A United States Supreme Court case has found that “an at-will [public] employee’s liberty interests are deprived when his discharge is accompanied by charges ‘that might serious damage his standing and associations in his community’ or ‘impose on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities’; as such, the injured party has a right to a “name-clearing hearing.” *Board of Regents v. Roth*, 408 U.S. 564 (1972). When Katzberg was removed as chair during an investigation about misallocation of funds, he rejected an opportunity for a name-clearing hearing; instead, he sued for money damages for the violation of his liberty interest. The court held that a “constitutional tort” for damages is not available when meaningful alternative remedies are available.
- 4— **Flaskamp v. Dearborn Public Schools (E.D. Mich. 2002)**. Where a teacher engaged in a sexual relationship with a student, he defended his right to do so under the constitutional right to “freedom of association.” The

court rejected his defense, because nonfamilial associations are not protected by the First Amendment.

- 5— **Karle v. Board of Trustees/Marshall University, 575 S.E.2d 267 (W.Va. 2002)**. Karle appealed the denial of her tenure, alleging that the process was unfair and the result was wrong. The court reviewed the findings of an administrative law judge and found: “The record demonstrates that the decision to deny appellant tenure was based upon the exercise of professional judgment and on the basis of factors bearing upon the appropriateness of conferring academic tenure.” The court will not overturn a tenure committee’s decision to deny tenure “unless shown to be arbitrary and capricious or clearly wrong.”
- 6— **Peterson v. State of North Dakota ex rel. North Dakota University System, 240 F.Supp.2d 1055 (D.N.D. 2003)**. Faculty member’s dismissal followed two events. First, she shared confidential information about a student to a classroom of students. Second, she criticized administration policy. Following her dismissal, she sued on the grounds of violation of substantive due process (under the Fourteenth Amendment), which the court rejected, because a contractual employment contract with the state does not trigger *substantive* due process protection. On the other hand, she does have a protected property interest that triggers *procedural* due process protection—namely “notice and an opportunity to be heard”—which she was given. She also argued that her dismissal was in retaliation for the exercise of her First Amendment rights. The court disagreed, because the speech at issue, while job-related, was not of “public concern”—that is, was not about matters “of political, social, or other concern to the community,” as “determined by the content, form, and context” of the speech. Peterson’s dismissal was upheld.

Intellectual Property

- 1— **Speck v. North Carolina Dairy Foundation, 319 S.E.2d 139 (N.C. 1984)**. Speck, a professor of food science and microbiology discovered a secret process that led to the production of “Sweet Acidophilus” while working at NC State University. The Dairy Foundation arranged for the licensing and marketing of the milk using the trademark “Sweet Acidophilus.” NCSU received royalties from these licensing agreements but Dr. Speck received none. He sued, alleging the NCSU had “breached their fiduciary duties by using the secret process to their own advantage.” The court rejected this claim, because the “rights of employer and employee in an invention or discovery by the latter arise from the contract of employment. The fruit of the labor of one who is hired to invent, accomplish a prescribed result, or aid in the development of products belongs to the employer absent a written

contract to assign [the rights in the product to the employer].” Therefore, Dr. Speck never possessed any *legal* interest in the process that he discovered.

- 2— **Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987).** J.D. Salinger challenged the publisher’s intent to publish a biography that included portions of letters he had written and had no intention of publishing. The letters were in the libraries of Harvard, Princeton, and the University of Texas. The biographer had both paraphrased and quoted from Salinger’s letters under the “fair use” provisions of the Copyright Act. First, the court noted that “unpublished [literary works] normally enjoy insulation from fair use copying”; in other words, the author has, under the Copyright Act, “the right of first publication.” Second, the court found that the biographer had both directly quoted or closely paraphrased from Salinger’s letters. Third, the court emphasized that it was permissible for the biographer to cite *facts* from the letters, but not Salinger’s *creative expression*. In summary, the court found in Salinger’s favor, because the biographer appropriated Salinger’s creative expression and because Salinger, as the author and holder of copyright in these original works, had the right to control first publication (including the right not to publish). The biographer’s use was not “fair use” under the Copyright Act.
- 3— **Chavez v. Arte Publico Press, 204 F.3d 601 (5th Cir. 2000).** Chavez asserted that the University of Houston breached a contract when it continued to publish her book after she left the university, and misappropriated her name without compensation. There were several strikes against her: first, contract law is governed by state, not federal law; second, the fact that statutorily created rights in property [Trademark Remedy Clarification Act, Copyright Remedy Clarification Act] do not trigger Fourteenth Amendment due process rights; and, third, a statute written by Congress cannot abrogate a state’s Eleventh Amendment immunity from lawsuits by private citizens (in other words, “states are subject to federal law when they undertake activities regulated by it...the Eleventh Amendment only shields them from being sued in federal court” by private citizens). (The U.S. Supreme Court has addressed the validity of 15 U.S.C. § 1122; 17 U.S.C. §§ 501, 511.) For all of these reasons, Chavez cannot sue the state university.
- 4— **Madey v. Duke University, 307 F.3d 1351 (C.A. Fed. 2002).** Madey sued Duke for infringement of his patents. In its defense, Duke used the “experimental use” doctrine to defend its position, saying it had a right to use the equipment “solely for experimental or other non-profit purposes.” The Court of Appeals for the Federal Circuit rejected this assertion because “experimental use” is limited to actions performed “for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry.” Therefore, if the use has the “slightest commercial implication”—whether or not the user has a non-profit status—there is infringement. Furthermore, just because a federal grant was involved (thereby giving the government a license to use the patented equipment), the government’s right did not encompass Duke’s use.

- 5— **Regents Of University Of New Mexico v. Knight, 321 F.3d 1111 (Ct. App. Fed. 2003)**. Knight alleged that the university did not own his inventions (and patents) because he had not assigned them to the university. Under the UMN Patent Policy, the university claimed that Knight had a contractual obligation to assign the patents. Even though 35 U.S.C. § 261 stipulates that the inventor is the owner, when Knight signed the Co-Inventor Agreement, he effectively assigned (transferred) ownership rights to the university.

Specialty Recognition/Credentialing

Parrish D. The Scientific Misconduct Definition and Falsification of Credentials. PROFESSIONAL ETHICS REPORT (AAAS) 1996; 9(4). Both the Office of Research Integrity and the National Science Foundation consider falsification of one's credentials to be "scientific misconduct." According to Parrish, the ramifications are very serious:

"Federal funds have been recovered from the institution that employed the researcher who presented false credentials and a researcher falsifying his credentials may be prosecuted under other federal and state laws. The researcher can be sued for fraud and misrepresentation and may be prosecuted criminally for embezzlement, theft by deception, false pretenses or impersonation. Some states have statutes making it a misdemeanor to claim to have a degree that one does not possess. Further, if the falsified credentials resulted in the funding of a grant application that would not otherwise have been funded, the researcher may be prosecuted under 18 U.S.C. § 1001 or the False Claims Act, 18 U.S.C. § 287, which prohibit falsification in documents or claims submitted to the United States government. Companies and institutions who discover an employee has falsified a credential have taken a variety of actions against the individual, from issuing a reprimand to terminating the employee."

Student Affairs; Discrimination and Breach of Contract

- 1— **Litman v. George Mason University, No. 98-1742 (4th Cir. 1999)**. Litman reported sexual harassment by a former professor, which ultimately led to *her* expulsion from the university. She then alleged sexual discrimination in violation of Title IX of the Education Amendments of 1972 (20 U.S.C. s. 1681 et seq.), and the university countered that it was immune for liability under the Eleventh Amendment (42 USC s 2000d-7(a)(1)). The court held that when the University accepted federal education funding, it waived immunity voluntarily and the lawsuit could go forward. Cf. Gupta v. Florida Board of Regents, 212 F.3d 571 (11th Cir. 2000).
- 3— **Grutter v. Bollinger, 282 F.3d 732 (4th Cir. 2002)**. Students challenged the University of Michigan's policy of using race as a factor in law school admissions decisions, asserting it violated the Equal Protection Clause of the

U.S. Constitution. The Sixth Circuit Court of Appeals held that it is permissible as long as the public university's interest is "compelling" and the procedure is "narrowly tailored" to serve that interest. (This is the "strict scrutiny" analysis used in constitutional *equal protection* cases.) (The U.S. Supreme Court heard oral arguments for this and a companion case, *Gratz v. Bollinger*, on April 1, 2003. Cf. *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (holding that race could be one of a number of factors).)

- 4— **Bender v. Alderson Broaddus College, 575 S.E.2d 112 (W.Va. 2002).** When Bender started nursing school, a grade of 70% was required to earn a "C." While still enrolled, the grading scale was changed, such that at 75% was required to earn a "C" and applied retroactively. Bender was unable to meet these standards and was expelled, because she was unable to complete the program within the requisite five years. Bender sued under breach of contract principles. The court acknowledged that the student-college relationship was "clearly contractual in nature," but, "implicit in that contract is a right to change the college's academic degree requirements if such changes are not arbitrary and capricious." The court will consider the decisions of the educational institutional to be "valid as long as the decision is supported by substantial evidence or by a rational basis." In short, Bender lost.
- 5— **Bird v. Lewis & Clark College, 303 F.3d 1015 (9th Cir. 2002).** A paraplegic student alleged discrimination under Title III of the Americans with Disabilities Act because, she alleged, the university did not accommodate her disabilities during an overseas program. The court found in favor of the university and the appellate court affirmed. The student was disabled and the university was required to make reasonable accommodations; that is, provide "meaningful access," and "when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." However, the ADA does not require the public entity to make "fundamental or substantial[,] modifications to its programs."

Research Misconduct

- 1— **Berge v. Board of Trustees of the University of Alabama No. 95-2811 (4th Cir. 1997).** Berge, a doctoral student at Cornell University, visited UAB to access a large database on cytomegalovirus (CMV) at UAB, funded in part by an NIH grant. She received her Ph.D., but had difficulty publishing her dissertation. Berge later accused a subsequent UAB doctoral student of plagiarizing her work, and accused UAB of making false statements in its annual report to NIH/NICHHD. She brought suit under the False Claims Act (31 U.S.C. 3729-3733) and a state law claim of conversion of intellectual property. The federal district court found in favor of Berge, but the federal court of appeals found in favor of UAB on all counts. First, the False Claims Act requires that false statements must be "material;" that is, "has a natural tendency to influence agency action or is capable of influencing agency action." So, even if Berge's allegations regarding UAB's false statements

were true (which they were not), they were not material to NICHD's funding decision. Second, Berge's charge that the grant application plagiarized her work does not stand because UAB's professor was co-author and therefore co-owner of the copyright in the work. (The court noted that the Office of Research Integrity, ORI, does not consider credit disputes to be instances of plagiarism.) Third, Berge's charge that another doctoral student plagiarized her work was belied by the fact that the latter work had different hypotheses and conclusions. Finally, Berge's state law conversion claim was preempted by the Copyright Act (17 USC 102, 103, 301(a)).

- 2— **Phinney v. Alderman & Verbrugge & Perlmutter, 564 N.W.2d 532 (Mich. Ct. App. 1997)**. In return for using Phinney's work in a grant application, Perlmutter promised her first authorship and a job in the Institute of Gerontology. Phinney relied on these promises. Later, Perlmutter used Phinney's creative work without acknowledgment, stole data and a test instrument library, and failed to hire her. When Phinney complained to the Institute's director Alderman, she was suspended, denied housing, and later fired. Phinney sued Perlmutter for fraud and misrepresentation, and Alderman, for retaliatory discharge under the state's Whistleblower Protection Act (WPA). She won on all counts. Among other important legal analyses, the court of appeals held that Phinney was allowed to sue under the WPA, because her report of suspected violations of law by "an agency receiving public money is in the public interest," and she had made her report to a "public body" (here, the University of Michigan) as required by the law.
- 3— **Angelides v. Baylor, Fed. Reg. 64 (48): 12341 (March 12, 1999)**. Former professor, Department of Molecular Physiology and Biophysics at Baylor College of Medicine was found by the HHS Office of Research Integrity (ORI) to have intentionally falsified data and misrepresented research results in five grant applications and in five publications. Dr. Angelides was barred from receiving federal grants for 5 years, barred from serving in any advisory capacity to PHS, and required to retract falsified figures and text. Later, Dr. Angelides sued Baylor for defamation and wrongful termination.
- 4— **Berman v. Fred Hutchinson Cancer Research Center, No. C01-0727L (BJR) (W.D. Wash.)**. A chemotherapy protocol involving two drugs, pentoxifylline (PTX) and ciprofloxacin. The patient was not informed, among other things, that seven prior protocol participants had died and that there were less risky and more effective treatments available. Furthermore PTX was referred to in the informed consent document as an agent that would inhibit tumor necrosis (Anti-TNF) resulting from the toxic effects of chemotherapy, when there were no medical data to support that assertion. The plaintiff was unable to tolerate the oral form of PTX and the intravenous form was not available, because, as the researchers knew, the manufacturer was no longer supplying it. The patient died as a result of her participation in the protocol. The court held that the defendant violated Washington's informed consent statute on the PTX claim. However, whether a similarly situated reasonable and prudent patient would have consented if she had had accurate information was a question left for a jury to decide.

5— Stewart v. Cleveland Clinic Foundation, 736 N.E.2d 491 (Ohio App. Dist. 8, 1999). Klais was diagnosed with Stage IV squamous cell carcinoma of the tongue. Dr. Adelstein, an oncology researcher, advised Klais of an experimental preoperative chemotherapy trial involving random assignment to chemotherapy + radiation therapy + surgery, or radiation therapy + surgery. He was assigned to the latter condition. No one told him that past studies had shown that the combination of chemotherapy and radiation would improve his chances of survival. Several years later, the cancer metastasized and Klais died. The tort of informed consent requires: " '(a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any; '(b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy." The appellate court reversed the trial court's ruling and remanded it for trial. The teaching point of this case is that researchers must tell a potential research participant what treatment is available outside the clinical trial.

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NOTICE

Panel presentation to the Council of Academic Programs in Communication Sciences and Disorders, Albuquerque, NM, April, 2003.

All cases abstracted for educational purposes only. The law varies by jurisdiction.

Reader advised: This information is not legal advice.

APPENDIX C

CASE STUDIES

1—Aphasia Grant at Private University

Private University is in a large city and has a medical school with a large teaching hospital which carries out \$\$\$ Research for NIH, Big Pharma, and other sponsored research. Both undergraduate and graduate programs in the School of Speech and Hearing have cooperative relations with the medical school for faculty and students to participate in clinical research projects. Although the medical school administration and medical school physician faculty sometimes take themselves much more SERIOUSly than the academic faculty, they do cooperate on research projects.

Dr. MICHAEL MAKEMONEY, a Professor of Neurology at the medical school, has received a Big Pharma sponsored research grant to investigate aphasia and he asked **NELLIE NERVOUS**, Ph.D. to help with the design, application and assist in the research project. **Dr. NERVOUS** is a tenure-track faculty member whose penultimate year tenure decision is next year. **NERVOUS** has an excellent undergraduate student, **SAM SERIOUS**, who she thinks would be a good “worker bee” to interview, analyze and collect data on **MAKEMONEY’s** project. **MAKEMONEY** and **NERVOUS** hire **SERIOUS** at \$7.50/hr. to help with the project. In addition to being very responsible on the job and an excellent student, **SERIOUS** is also “smart” as he keeps copy of the data he has collected and writes a paper about the project using the data he has seen and collected for another class and received an “A” for his effort.

MAKEMONEY and **NERVOUS** decide to prepare an article for publication in the *Journal of Speech and Hearing Research* about their research findings, assigning a copyrighted co-authorship submission to the publisher; and the journal starts the peer review process before publication.

In the meantime, **SERIOUS** decides he wants to go to graduate school in speech pathology; and finds out about **MAKEMONEY’S** and **NERVOUS’** planned article. **SERIOUS** tells **NERVOUS** he really did much of the work and should be named as a co-author, or at least be given significant credit; and be a part of any press release about the article and future presentation at conferences and meetings. **MAKEMONEY** and **NERVOUS** consider this and tell **SERIOUS** “no.”

SERIOUS brings the matter to the attention of the new School director **WILLIAM WAFFLE**, and the Dean, **ROGER REPHRASE**. **REPHRASE** appoints a committee to investigate **SERIOUS’** complaint. The investigation of **SERIOUS’** complaint leads to the finding **SERIOUS** was an actual co-worker on **MONEY’S** and **NERVOUS’** project and should be given appropriate credit. Also, during the review of **SERIOUS’** complaint, **NERVOUS** reviews **SERIOUS’** paper he submitted in the other class, and finds many errors and plagiarism from **NERVOUS’** other work. She makes a complaint to Private U’s student disciplinary office. Further, **SERIOUS** has contacted **NERVOUS** before **NERVOUS** contacted the disciplinary office, and asks **NERVOUS** to write a letter of recommendation for his admission to graduate school based on their academic and working relationship; **SERIOUS** uses Private U’s recommendation form from its Placement Office; in accordance with the Family Educational Rights and Privacy Act (FERPA), the form has the option of the recommendation being “open” so **SERIOUS** can read the recommendation.

Questions and Discussion:

- (1) What advice and counsel would you provide to **NERVOUS** about what she should do to avoid issues of who is an author in a program and who owns the copyright to an academic work product?
- (2) What should **NERVOUS** do about **SERIOUS’** request to provide the recommendation for admission to graduate school?
- (3) What would you advise school Director **WAFFLE** and Dean **REPHRASE** to do to inform their

faculty of rules of copyright ownership and academic publications?

2—Clinical Program at State University

State University is a large public university with a college of Allied Health Programs and a School of Speech and Hearing. The School requires its majors to have clinical internship experiences and they have contacted the local community hospital, **ALL-IS-WELL MEMORIAL**, about placing the students in clinical internships in the hospital's speech pathology program. **ALL-IS-WELL** sends the Dean of the College, **DANIEL DETAIL**, a five-page Affiliation Agreement with provisions requiring State U to be responsible for all the actions of its student, provide the student with a series of immunizations including Hepatitis B and Meningitis Virus, provide \$1,000,000.00 of insurance coverage naming the hospital, holding harmless the hospital for the actions of the students, and provide proof of insurance for both State U and the student interns. They have also sent a Business Associate Agreement to comply with HIPAA.

The Affiliation Agreement arrives at **DEAN DETAIL's** office a couple of days before the student is to start the internship. The student begins the placement after Dean **DETAIL** has the School's clinical program director request **ALL-IS-WELL** to let the student start the internship, as this is a very busy time in the Dean's office and he will review and take care of the matter soon.

ALL-IS-WELL indicates that is okay and will wait for the **DEAN DETAIL** to sign the Affiliation Agreement.

After about a week, a student, **BOBBY BONG**, starts not showing up for his scheduled work times. **BONG's** SLP supervisor at **ALL-IS-WELL**, **KATHY KIND**, asks **BONG** why he has not been to work. **BONG** tells her he has not been feeling well but will be on-time for now on. **BONG** says he appreciates her concern and, as a "thank you," **BONG** gives **KIND** some of his favorite marijuana joints for her and her friend. **KIND** does not know what to do and goes to see **CARL CAREFUL**, the administrator of **ALL-IS-WELL** Memorial Hospital.

CAREFUL tells **KIND** that the best thing to do is to call State U and the **DEAN DETAIL'S** office. He also indicates that **BONG** should leave the internship, as **ALL-IS-WELL** does not need any bad publicity about having **BONG** being assigned there; and administrator **CARL CAREFUL** says he will call the local police later to tell them what happened.

SLP supervisor **KIND** calls **DEAN DETAIL** at State U to tell him what happened. Dean **DETAIL** calls **BONG** in to tell him he is being removed from his academic program and that **BONG** will get an "F" in the internship course; as a result of **KIND's** report, and he is going to send the information to State U student disciplinary office for their action.

Hospital administrator **CAREFUL** calls the local D.A., **PAUL PICKY**, and tells **PICKY** what happened. **PICKY** tells **CAREFUL** that this is a clear case of obstruction of justice in not calling the local police earlier, and **CAREFUL** and **KIND** will be called before the grand jury for not reporting the drug use to the police before they reported it to State U and **DEAN DETAIL**.

Questions for discussion:

- (1) What advice would you give the President of State U, **SAM SMOOTH**, about how to handle the incident involving **BONG** and **ALL-IS-WELL** Hospital?
- (2) What advice and counsel would you provide to the Provost of State U **CHARLIE CLUELESS** about how to structure and operate courses involving clinical internships, review of Affiliation Agreements, and administration and monitoring off-campus academic programs?

3—More Problems at Public University

GERRY GIRAFFE is the new HIPAA Privacy Director at State U. Despite the fact that he is the *least* favorite person on campus right now, he is getting more phone calls and emails than anyone else (go figure?! **WILLIE WATCHDOG** calls with a concern about a fellow practicum student. According to him, **SALLIE SNOOPIE** finds medical records so fascinating, that she is reading as many as she can between her regular patients. **LAURA LAZY**, her clinical education coordinator for speech-language pathology, is usually having coffee, so she isn't supervising **SALLIE SNOOPIE** most of the time. **WILLIE WATCHDOG**, on the other hand, has his "nose" to the ground.

Much to his surprise (and delight), **WILLIE WATCHDOG** learns that **SALLIE SNOOPIE** is actually screening medical records for a neurologist, **ALICE ANYTHING-GOES** (who thinks the rules are not for her), and is recruiting patients faster than anyone on record. After **ALICE ANYTHING-GOES** got a waiver of informed consent from the IRB, she recruited **SALLIE SNOOPIE**, promising **SNOOPIE** \$50 for each successful recruitment; and as usual, money talks! Besides the publications and reputational interests at stake, **ALICE ANYTHING-GOES** and **RANDY RISKY**, the head of the IRB, already have one patent—and, if their latest research project proves their "hypothesis," they can retire early (*together*, if you get our drift).

So, back at the HIPAA ranch, **GERRY GIRAFFE** is up to his neck in patient privacy notices, business associate agreements, and phone/email queries. (Rules, rules, and more rules!) A big-time researcher at the university, **FRANKIE FRANTIC** calls and asserts that this new HIPAA rule about Protected Patient Information (PHI) is infringing his freedom of speech / academic freedom. **FRANKIE FRANTIC** has just learned from his *girlfriend* **SALLIE SNOOPIE** that **ALICE ANYTHING-GOES** (in collusion with **RANDY RISKY**) has by-passed both IRB *and* HIPAA rules, and is racing ahead of *him* in patient recruitment that he desperately needs for in order to compete for the next *really-big* Big Pharma contract.

When **GERRY GIRAFFE** advises **FRANKIE FRANTIC** that he shouldn't be having a relationship with a student, and he has no inherent *right* to "do research," **FRANKIE FRANTIC** asserts: under the First Amendment, I have not only a right to *speak* about my personal concerns, and a right to *associate* with whomever I want, but also a right to *do my research* without the government's—or your—interference....and furthermore, I demand that you *listen* to my complaints! After 30 minutes of insults, **GERRY GIRAFFE** tells **FRANKIE FRANTIC** he is "stupid," and hangs up on him. The very next day, **FRANKIE FRANTIC** files a lawsuit against State U, alleging infringement of his constitutional right to academic freedom, as well as defamation.

Questions for Discussion:

- (1) What advice would you give the President of State U, **SAM SMOOTH**, if he asked you to enforce the policy on *individual* and *institutional* conflicts of interest?
- (2) What advice would you offer the **RANDY RISKY** and **ALICE ANYTHING-GOES**, and, **FRANKIE FRANTIC** and **SALLIE SNOOPIE** about their respective right to *freedom of association* in the university context?
- (3) What advice would you offer **FRANKIE FRANTIC** about the scope of academic freedom?
- (4) If HIPAA privacy violations were to be investigated by the authorities, *who* would be held responsible? President **SAM SMOOTH**? Privacy Director **GERRY GIRAFFE**? IRB head **RANDY RISKY**? researcher **ALICE ANYTHING-GOES**? practicum supervisor **LAURA LAZY**? Or, SLP student (unofficial research assistant) **SALLIE SNOOPIE**?