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# Higher Education Discrimination Law

**Blurred Lines: Ethical Challenges in Counsel's Role  
During Investigations**

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# Agenda



The Role of Counsel in Investigations



Ethical Framework and Best Practices



Scenario



# The Role of Counsel in Investigations

# The Relationship Between General Counsel and the Independent Investigator

- The GC and the independent investigator must work in parallel to ensure a fair, legally sound, and ethical investigative process.
- The GC is responsible for institutional legal risk and compliance.
- The investigator is responsible for impartial fact-finding.

# The Relationship Between General Counsel and the Independent Investigator

- As the investigation unfolds, communication between the GC and the investigator must be transparent but limited to avoid inappropriate influence.
- GC's Role:
  - Acts as a resource, answering legal questions and clarifying policies.
  - Ensures investigator has unobstructed access to evidence.
- Legal privilege issues

# The Relationship Between General Counsel and the Independent Investigator

Once the investigator issues their findings, the GC must navigate the legal and ethical implications without undermining the investigation's integrity.

- GC's Role:
  - In some cases: reviews the report for privilege or other legal concerns but does not alter factual findings.
  - Advises institutional leadership on next steps while respecting the investigator's independence.
  - Ensures the organization responds appropriately, including corrective actions (if applicable).



# Ethical Framework and Best Practices



# Ethical Duties and Professional Responsibility Considerations



## ABA Model Rules of Professional Conduct (Relevant Rules)

- **Rule 1.13:** Duty to the organization as a client.
- **Rule 1.6:** Confidentiality and privilege concerns.
- **Rule 3.4:** Fairness to opposing parties and counsel (prohibits suppressing evidence).
- **Rule 8.4:** Prohibits conduct involving dishonesty, fraud, or misrepresentation.



# Common Ethical Pitfalls in Investigations

## Counsel's Involvement in Directing the Investigation

- Instructing an investigator **who to interview or what conclusions to draw**.
- Limiting the scope of the investigation based on **litigation risk**, not factual relevance.

## Review of Investigative Reports

- Requesting **changes to factual findings** to minimize liability.
- Asking an investigator to **soften language or remove key evidence**.

## Influence on Hearing Panels or Decision-Makers

- Coaching hearing panelists on **how to interpret evidence**.
- Providing **off-the-record guidance** to decision-makers.

# Best Practices

- Clear, written expectations upfront prevent ethical dilemmas later.
- GC should support the process, not direct fact-finding or shape conclusions.
- Communication should avoid undue influence.
- GC review should focus on legal privilege and policy adherence, not factual determinations.
- Institutions must act on findings ethically, without suppression or spin.



# Scenario

A university is conducting an independent investigation into a high-profile complaint alleging discrimination and retaliation against a senior administrator. The General Counsel (GC) is overseeing the process but has hired an external investigator to maintain independence.

- The complainant is a well-respected faculty member alleging gender-based pay disparities and retaliation after raising concerns.
- The respondent, a senior administrator, is a key decision-maker at the university.
- The university is concerned about legal exposure, reputational harm, and the potential for a lawsuit.

The external investigator submits a draft report with preliminary findings:

- Key Findings: There is evidence supporting pay disparities, but retaliation is inconclusive.
- The GC requests to review the draft before it is finalized, citing concerns over accuracy and institutional liability.
- The GC suggests removing certain findings about systemic pay disparities, arguing that they are "speculative" and could be used against the university in litigation.

After the final report is issued, the case moves to a hearing panel, which will determine whether the university's policies were violated.

- The GC privately meets with panel members before the hearing.
- In the meeting, the GC frames certain pieces of evidence, stating that "some findings shouldn't be given too much weight."
- A panelist later expresses discomfort, feeling they were subtly influenced.

After the panel finds that discrimination did occur, the GC, concerned about potential lawsuits, advises university leadership to:

- Delay implementation of corrective actions pending further legal review.
- Issue a public statement downplaying the findings to protect institutional reputation.
- Offer a confidential settlement to the complainant with a non-disparagement clause.



The background of the slide features a series of overlapping, stylized silhouettes of people's heads and shoulders in profile, facing right. The silhouettes are rendered in various shades of green, brown, and red, creating a sense of a diverse group of individuals. The word "Questions?" is superimposed in the center of this background.

# Questions?

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