

# ADDRESSING CONFLICTS OF INTEREST IN THE CONTEXT OF CAMPUS SEXUAL VIOLENCE

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## *Abstract*

*Many higher education institutions are re-evaluating how they address allegations of campus sexual violence, which, according to one estimate, affects one in five women. The premise of this article is that many of these efforts are doomed to fail because higher education institutions are not managing or taking into account inherent conflicts of interest. The article examines conflicts of interest inherent in higher education sexual violence policy and practice and explores the results of these conflicts through four case studies from Eastern Michigan University, Elizabeth City State University, Oregon State University, and The Pennsylvania State University. The article then contrasts how the ethical rules governing the legal, accounting, psychology, medical, engineering, and architecture professions address conflicts of interest. Finally, the article recommends methods by which institutions can gain a better appreciation of the ways in which conflicts of interest impact their decision-making and take action to reduce those conflicts when developing, implementing and enforcing sexual violence policies.*

## **I. Introduction**

Sexual violence on college campuses has become a topic of increasing concern and growing frustration. The reported scope the problem and its life-shattering consequences are staggering. According to President Obama:

An estimated one in five women has been sexually assaulted during her college years – one in five. Of those assaults, only 12 percent are reported, and of those reported assaults, only a fraction of the offenders are punished. And while these assaults overwhelmingly happen to women, we know that men are assaulted, too. . . .

For anybody whose once-normal, everyday life was suddenly shattered by an act of sexual violence, the trauma, the terror can shadow you long after one horrible attack. It lingers when you don't know where to go or who to turn to. It's there when you're forced to sit in the same class or stay in the same dorm with the person who raped you; when people are more suspicious of what you were wearing or what you were drinking, as if it's your fault, not the fault of the person who assaulted you. It's a haunting presence when the very people entrusted with your welfare fail to protect you.

Students work hard to get into college. . . . When they finally make it onto campus, only to be assaulted, that's not just a nightmare for them and their families; it's not just an affront to everything they've worked so hard to achieve – it is an affront to our basic humanity. It insults our most basic values as individuals and families, and as a nation. We are a nation that values liberty and equality and justice. And we're a people who believe every child deserves an education that allows them to fulfill their God-given potential, free from fear of intimidation or violence. And we owe it to our children to live up to those values. . . .<sup>1</sup>

President Obama's assessment stands in stark contrast to the values of higher education institutions as articulated in their missions. Most residential learning institutions would likely share the following goal articulated in Bowdoin College's mission:

To enable . . . students to learn from each other, and to make lasting friendships, the College is dedicated to creating a rewarding and congenial residence life, open to all students, which, with communal dining, is at the core of the mission of a residential college.<sup>2</sup>

Most academic institutions would probably also agree with the words of Massachusetts Institute of Technology President Rafael Reif: "I . . . want the family of MIT to be famous for how we treat people: Famous for sympathy, humility, decency, respect and kindness."<sup>3</sup>

Accepting the premise that these higher education institutions mean what they say when they describe the learning environments they hope to create, it seems incomprehensible that a

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<sup>1</sup> President Barack Obama, Remarks by the President at "It's On Us" Campaign Rollout (Sept. 19, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/09/19/remarks-president-its-us-campaign-rollout>.

<sup>2</sup> *Mission of the College, Office of Communications and Public Affairs*, BOWDOIN COLLEGE, <http://www.bowdoin.edu/communications/publications/mission.shtml> (last visited Mar. 2, 2015).

<sup>3</sup> L. Rafael Reif, President, MIT, President L. Rafael Reif's Charge to the Graduates (June 7, 2013), available at <http://newsoffice.mit.edu/2013/president-reif-charge-to-the-graduates-0607>.

respected and respectable higher education institution could blatantly fail to investigate and report rape allegations;<sup>4</sup> fail to warn students that a rapist and murderer may be roaming the campus with a set of dormitory keys;<sup>5</sup> “punish” student-assailants in a brutal seven-hour gang rape with unconscionably light sanctions for making what a school official labeled a “bad choice”;<sup>6</sup> or provide a pedophile with the very currency he used to groom young boys to become his victims.<sup>7</sup> Reviewing such cases, one can conclude only that the schools failed in their statutorily-mandated responsibilities to report campus crimes, warn students of on-going threats, remove sexual predators from the student population, and protect the safety of individuals, including children, invited to campus.

How, one might rightly ask, could this happen? After all, the people making these decisions were often celebrated academics with sterling reputations for integrity and good works. The answer may lie in one of the oldest and most complex influences on human behavior: the conflict of interest. In attempting to address sexual violence on campus, higher education institutions are inherently conflicted. Furthermore, many schools fail to engage in any self-assessment of how such conflicts of interest can seriously impair rational decision-making.

This article argues that higher education institutions historically have given scant attention to the problem of campus sexual violence due to inherent conflicts of interest. To illustrate the point, the article first reviews the potential conflicts of interest inherent in sexual

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<sup>4</sup> See Collin Binkley et al., *Reports on College Crime are Deceptively Inaccurate*, COLUMBUS DISPATCH, Sept. 14, 2014, available at <http://www.dispatch.com/content/stories/local/2014/09/30/campus-insecurity.html>.

<sup>5</sup> See Sara Lipka, Education Dept. Imposes Largest Fine Yet for Campus Crime-Reporting Violation, THE CHRON. OF HIGHER EDUC., Jan. 11, 2008, <http://chronicle.com/article/Education-Dept-Imposes/10648/>.

<sup>6</sup> See John Canzano, *16 Years After Oregon State Football Gang-Rape Allegation, Brenda Tracy Steps from the Shadows*, THE OREGONIAN – OREGON LIVE, Nov. 20, 2014 (updated), [http://www.oregonlive.com/sports/oregonian/john\\_canzano/index.ssf/2014/11/canzano\\_her\\_name\\_is\\_brenda\\_tra.html](http://www.oregonlive.com/sports/oregonian/john_canzano/index.ssf/2014/11/canzano_her_name_is_brenda_tra.html).

<sup>7</sup> See Freeh Sporkin & Sullivan, LLP, *Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky* (July 12, 2012) [hereinafter Freeh Report], available at [http://progress.psu.edu/assets/content/REPORT\\_FINAL\\_071212.pdf](http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf).

violence policies, procedures, and practices. Second, the article reviews how higher education institutions treat conflicts of interest and examines four case studies in which school administrators unquestionably and horrifically failed in their obligations concerning sexual assault and notes the common thread in each case was conflict of interest. Third, the article surveys the ethical rules of other professions – law, accounting, psychology, medicine, engineering, and architecture – and concludes that none of these professions ethically would allow members to perform all the roles colleges and universities endeavor to perform in addressing sexual violence by and against students. Fourth, the article examines the effects conflicts of interest have on decision-making. Finally, the article offers solutions to avoid conflicts of interest, restore integrity, and bring objective decision-making to the difficult issue of campus sexual violence.

## II. Conflicts of Interest Inherent in Sexual Violence Policy and Practice

A conflict of interest is a situation: (1) “that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person’s self interest and professional interest or public interest”; or (2) “in which a party’s responsibility to a second-party limits its ability to discharge its responsibility to a third party.”<sup>8</sup>

“The term’s historical meaning and usage is frequently attributed to the New Testament reference that a person cannot simultaneously ‘serve two masters.’”<sup>9</sup> The “two masters” may be the person’s self-interest and another person’s interest or two opposing parties’ interests.<sup>10</sup> Conflicts of interest can be especially troubling in professional contexts, such as academia,

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<sup>8</sup> “Conflict of Interest”, BUSINESSDICTIONARY.COM, available at <http://www.businessdictionary.com/definition/conflict-of-interest.html>.

<sup>9</sup> Martin A. Cole, *Direct Adversity Conflicts*, BENCH & BAR OF MINN. 1 (Oct. 2010), <http://lprb.mncourts.gov/articles/Articles/Direct%20Adversity%20Conflicts.pdf> (quoting Matthew 6:24).

<sup>10</sup> *Id.*

because

expert and trustworthy judgment in individual situations . . . is what makes members of the profession useful. A conflict of interest makes that judgment unreliable just when reliability is needed. A conflict of interest is therefore always considered a threat to the good that the profession seeks to achieve and is often also a threat to the profession's reputation. That is what makes having a conflict of interest a serious concern in professional ethics.<sup>11</sup>

Higher education institutions, of course, are filled with professionals of various stripes in whom society entrusts one of its most precious resources – its students.

In the context of campus sexual violence, higher education professionals face situations involving numerous actors with competing interests: the accuser, the accused, and associates of both the accuser and the accused; organizations, including athletic teams, fraternities, and sororities, to which the accused and accuser might belong; the school itself; the Board of Trustees or other governing body; law enforcement; and school administrators, faculty, and staff. The accuser often needs medical assistance, psychological help, security, and the ability to seek justice, including legal assistance or assistance in understanding school policies and procedures. The accused often needs legal assistance and assistance understanding school policies and procedures, psychological help, and a means to avoid future confrontation with the accuser (a particularly compelling need when a false allegation is asserted).

The school's interests include complying with its legal obligations, such as the Clery Act<sup>12</sup> and Title IX,<sup>13</sup> and avoiding the reputational damage that a campus sexual assault can

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<sup>11</sup> Michael Davis & Josephine Johnston, *Conflict of Interest in Four Professions: A Comparative Analysis*, in CONFLICTS OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE 304-05 (Bernard Lo and Marilyn J. Field, Eds., 2009).

<sup>12</sup> Pub. L. No. 101-542, 104 Stat. 2381 (1990). The Clery Act has been amended numerous times over the last twenty-five years, most recently in 2013. See Higher Education Technical Amendments of 1991, Pub. L. No. 102-26, 105 Stat.123; Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448; Higher Education Amendments of 1998, Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 105-244, 112 Stat. 1581; Victims of Trafficking and Violence Protection Act of 2000, Campus

bring. Higher education personnel have a strong interest in assuring legal compliance – they could lose their jobs and even their freedom if they fail – but interestingly, a not insubstantial number of these people seem to view avoiding reputational damage to the institution as the most important objective. One researcher has noted that some administrators may also view reporting low crime statistics as enhancing their own career opportunities.<sup>14</sup>

In terms of legal compliance, a higher education institution’s main obligations under the Clery Act are to: (1) warn the campus of a threat to safety;<sup>15</sup> (2) accurately record and report crime statistics;<sup>16</sup> and (3) create policies to reduce crime and its effects on the campus community.<sup>17</sup> An institution’s main obligations under Title IX are to: (1) conduct a prompt, thorough, and impartial investigation if a school knows, or reasonably should know, about possible student on student harassment;<sup>18</sup> and (2) take immediate action, if a school knows or reasonably should know about student on student harassment that creates a hostile environment, to eliminate the harassment, prevent its recurrence, and address its effects.<sup>19</sup>

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Crimes Prevention Act, Pub. L. No. 106-386, 114 Stat. 1464; Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078; Violence Against Women Reauthorization Act, Pub. L. No. 113-4, 127 Stat. 54.

<sup>13</sup> Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

<sup>14</sup> Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUBLIC POL’Y & L. 1, 6 (2015).

<sup>15</sup> 20 U.S.C. § 1092(f)(3).

<sup>16</sup> *Id.* § 1092(f)(4) (daily log); *id.* § 1092(f)(1) (annual report).

<sup>17</sup> *Id.* § 1092(f)(1).

<sup>18</sup> See OFFICE OF CIV. RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS AND THIRD PARTIES: TITLE IX, at 15 (Jan. 2010) (requiring harassment inquiry to be “prompt, thorough, and impartial”).

<sup>19</sup> See OFFICE OF CIV. RIGHTS, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER 4 (Apr. 4, 2011) (“If a school knows or reasonably should know about student-on-student harassment that creates a hostile work environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”)

These laws demonstrate on their face that conflicts of interest exist in addressing campus sexual assaults.<sup>20</sup> If school administrators viewed these obligations as being in the school's best interest, there would have been no need for the Clery Act or Title IX. Schools would already have been doing these things.<sup>21</sup> Furthermore, statistical analysis suggests that compliance with these laws is abysmal.<sup>22</sup>

The conflicts begin when higher education administrators develop sexual violence policies. Administrators' first duty is to craft a policy that protects the institution, not the victim or the rights of the accused. In terms of reporting, the school's interest is to have the campus appear safe. That conflicts with the Clery-mandated duty to warn students of threats to their safety and collect and publish accurate crime statistics. Assuming any sexual assaults are reported, the school now has the obligation to investigate the allegations, with the incentive to find that no sexual assault took place. Here, the school is also attempting to represent the rights of the accused and the rights of the accuser—in other words, to serve two masters. Should a determination be made that a sexual assault took place, the school now must remove the threat of

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<sup>20</sup> See 135 Cong. Rec. E3169 (daily ed. Sept. 26, 1989) (statement of Rep. William F. Goodling) (“Less than 4 percent of our institutions of higher education voluntarily provide campus crime statistics through the FBI's Uniform Crime Report—352 out of roughly 8,000 institutions participating in Federal financial aid programs.”).

<sup>21</sup> See *id.* (“[T]here is evidence that some campuses are still reluctant to provide information regarding incidents of crime on campus, even when this information might prevent repeated occurrences.”). Historically, *in loco parentis* (Latin for “in the place of the parent”) applied to the relationship between American higher education institutions and their students. The demise of the doctrine has forced higher education institutions to redefine their relationships with their students. See Philip Lee, *The Curious Life of In Loco Parentis in American Universities*, 8 HIGHER EDUC. IN REV. 64 (2011).

<sup>22</sup> See Yung, *supra* note 14, at 7 (“The study results indicate that the sexual assault data supplied by schools is likely severely undercounting the number of reported incidents on campuses. As a result, policymakers, school administrators, campus police, municipal police, and the public are underestimating the actual severity of campus sexual assault. Further, depending on the stage in the investigation that the sexual assault is dismissed from official counts, universities might actually be short-circuiting investigations of sexual assaults, allowing serial offenders to prey on more victims. . . . The moral implications and utilitarian effects of undercounting sexual assault at colleges and universities are substantial and warrant immediate policy changes.”); Binkley, *supra* note 4 (“Even the U.S. Department of Education official who oversees [Clery Act] compliance . . . admits that they are inaccurate. Jim Moore said that a vast majority of schools comply with the law but some purposely underreport crimes to protect their images; others have made honest mistakes in attempting to comply.”).

recurrence and address its effects, which could include providing medical attention and counseling for the victim, as well as changing a student's class schedule and living arrangements. To the extent the perpetrator's punishment includes counseling as well, both the victim and the perpetrator could be seeing the same university-employed counselor or at least seeing different counselors at the same university counseling center.

### **III. How Higher Education Institutions Treat Conflicts of Interest**

Many higher education institutions view conflicts of interest as acceptable, manageable, and inconsequential. Carnegie Mellon University, for example, maintains that “[c]onflicts of interest are situations that need to be disclosed and sometimes managed. *They are not inherently bad* and do not always lead to biased behavior.”<sup>23</sup> This may be because such institutions often address conflicts in the context of research. While research is critical to the advancement of science, the principles applied to research cannot be applied to addressing a campus sexual assault. A campus sexual assault has a victim and an accused, both of whom often are important institution constituents. In many instances, the consequences of biased research can be discovered before real harm is done. By contrast, the consequences of bias in investigation, procedure, and outcome can be difficult to unwind.

Even when applied to research, however, institutions, such as the University of Alaska at Fairbanks, provide examples of the harmful results of conflicts of interest that are relevant applicable to the context of campus sexual violence:

#### **Conflicts of interest increase the temptation to commit misconduct.**

Conflicts of interest do not necessarily amount to research misconduct. If the potential gain is large, however, then principles that guide responsible conduct in research may be compromised.

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<sup>23</sup> *Conflict of Interest, Office of Research Integrity and Compliance, CARNEGIE MELLON U.*, <http://www.cmu.edu/research-compliance/conflict-of-interest/> (last visited Mar. 22, 2015).



**Conflicts of interest increase the risk of unintentional bias.**

Unintentional bias can be a more serious threat than deliberate misconduct, because even those who are biased would be unaware of the ways in which their actions were [a]ffected.

**Conflicts of interest can lead to harmful misperceptions of scientists and the scientific enterprise.**

When large sums of money are involved, it may be difficult for the public, legislators, the judicial system, and even colleagues to be convinced that results were not biased for personal gain. Perceived impropriety can result in consequences as damaging as if intentional misconduct had been committed. With increased media, governmental, and public scrutiny, a researcher's reputation, research funding, and employment can depend as much on perceptions of integrity as on integrity itself.<sup>24</sup>

Even Carnegie Mellon University agrees that “[w]henever possible, those with potential conflicts should remove themselves from involvement in the decision.”<sup>25</sup>

The four case studies below involve a common theme: In each case, conflicts of interest resulted in terrible decision-making that damaged the victims involved and the institution’s reputation and often destroyed the careers of the administrators making the decisions.

**A. Eastern Michigan University**

Eastern Michigan University (EMU), founded in 1849 as a teachers’ college, has grown into a university of 23,000 students and more than 200 majors.<sup>26</sup> In 2006, EMU President John A. Fallon was named a “distinguished alumni” from Michigan State University.<sup>27</sup> According to Michigan State, Fallon had “emerged as a national leader and eloquent spokesperson for higher

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<sup>24</sup> *Conflict of Interest, Office of Research Integrity*, U. OF ALASKA FAIRBANKS, <http://www.uaf.edu/ori/responsible-conduct/conflict-of-interest/> (last accessed Mar. 22, 2015).

<sup>25</sup> *Carnegie Mellon University Policy on Conflict of Interest/Commitment*, CARNEGIE MELLON U., <http://www.cmu.edu/policies/documents/IntConflict.html> (last accessed Mar. 22, 2015).

<sup>26</sup> *EMU Institutional Profile*, E. MICH. U., <http://www.emich.edu/profile/> (last accessed Mar. 22, 2015).

<sup>27</sup> *John A. Fallon, Distinguished Alumni 2006*, MICH. ST. UNIV., available at <http://education.msu.edu/alumni/awards/john-fallon.asp>.

education.”<sup>28</sup> In 2003, James Vick, EMU’s Vice President of Student Affairs, was “honored by the DTE Energy Foundation and Michigan Nonprofit Association with the 2003 Community Luminary Award.”<sup>29</sup> “The award recognizes outstanding leaders and volunteers for their dedication and efforts in contributing to the development of Michigan communities and for inspiring others around them.”<sup>30</sup> Less than two years later, the reputations of President Fallon, Vice President Vick, and EMU would be in tatters.

On December 15, 2007, an EMU student named Laura “Dickinson was found [dead] lying face up on the [dorm] floor, naked from the waist down, with her legs spread and with a pillow over her face.”<sup>31</sup> The door was locked and “her keys were missing.”<sup>32</sup> The next day EMU released a statement about the death, which included the following language: “At this point, there is no reason to suspect foul play. We are fully confident in the safety and security of our campus environment . . . .”<sup>33</sup> During the week of December 18-22, 2007, an Incident Draft Report (IDR) “was circulated to the Student Affairs office.”<sup>34</sup> The IDR “contained specific and graphic information about Ms. Dickinson’s room and the conditions under which she was found.”<sup>35</sup> Vice President of Student Affairs “Vick directed that the IDR be shredded.”<sup>36</sup>

Two months later, on February 23, 2007, an EMU student . . . was arrested and charged with . . . the rape and murder . . . . [M]any of the key players involved in the dissemination of information concerning Ms. Dickinson’s death went into

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<sup>28</sup> *Id.*

<sup>29</sup> Press Release, EMU’s Vick Receives 2003 Community Luminary Award, E. Mich. U., (Nov. 14, 2003), available at [http://www.emich.edu/univcomm/releases\\_archived/vickaward2003.html](http://www.emich.edu/univcomm/releases_archived/vickaward2003.html).

<sup>30</sup> *Id.*

<sup>31</sup> Butzel Long, P.C., *Executive Summary of the Report of the Independent Investigation into Eastern Michigan University’s Response to the Death of Student Laura Dickinson*, June 8, 2007, at 2, available at [http://www.mlive.com/images/aanews/emu\\_report.pdf](http://www.mlive.com/images/aanews/emu_report.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 3-4.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.*

“damage control mode” and began offering explanations or justifications for not providing accurate information . . . .<sup>37</sup>

According to independent investigative counsel: “None of the[] justifications [offered by university officials] . . . excuse the failure to warn the campus community . . . .”<sup>38</sup> Counsel found that EMU “failed in multiple respects to properly comply with the various policy and reporting requirements under the Clery Act.”<sup>39</sup> The investigation also revealed “a sense of having been misled and a feeling of distrust of the University community by its failure to give a warning or provide accurate information.”<sup>40</sup> Separately from the independent investigative counsel, the *Ann Arbor News* revealed that the suspect (who was ultimately convicted) had prior contact with EMU police, including an incident in which he pulled himself through an open window admittedly looking for “girls and activity on campus.”<sup>41</sup>

Ultimately, the University President, Vice President for Student Affairs, and Campus Police Chief were removed from their positions, their previously impressive legacies forever tarnished by their failures. In the view of one commentator, these individuals “acted unethically by providing inaccurate information not only to the campus community, but . . . [also] to the parents of Ms. Dickinson.”<sup>42</sup> “[I]t appears that finger pointing and defending self were more the actions selected by these leaders.”<sup>43</sup> Perhaps worse yet, the U.S. Department of Education found that “letters sent by the [Michigan State Police (MSP)] to EMU’s president” contradicted EMU’s

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<sup>37</sup> *Id.* at 5.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 6.

<sup>41</sup> Steve Pepple, *Suspect in Killing Previously Caught Breaking into EMU Building*, ANN ARBOR NEWS, Mar. 15, 2007, [http://blog.mlive.com/annarbornews/2007/03/suspect\\_in\\_killing\\_was\\_previou.html](http://blog.mlive.com/annarbornews/2007/03/suspect_in_killing_was_previou.html).

<sup>42</sup> Steven R. Briggs, *Staying out of Court: Leadership Factors for Consideration as Higher Education Administrators*, PARAMETERS OF LAW IN STUDENT AFFAIRS AND HIGHER EDUCATION (CNS 670), at 8-9 (2010), available at [http://digitalcommons.wku.edu/cgi/viewcontent.cgi?article=1008&context=cns\\_law](http://digitalcommons.wku.edu/cgi/viewcontent.cgi?article=1008&context=cns_law).

<sup>43</sup> *Id.* at 16.

explanations as to their failure to warn the campus community about the potential threat to their safety and that “EMU’s claims are in conflict with comments made by MSP detectives.”<sup>44</sup> The

Department of Education added a searing indictment of EMU’s lack of compliance:

EMU’s failure to issue a “timely warning” concerning the death of this student is exacerbated by its issuance of contradictory published statements which publicly claimed that a crime had not occurred. Not only did EMU fail to disclose information that would enable the campus community to make informed decisions and take necessary precautions to protect themselves, but it issued misleading statements from the outset, providing false reassurance that foul play was not suspected, and that it had no knowledge of an ongoing criminal/homicide investigation prior to the arrest of the suspect.<sup>45</sup>

The Department of Education also found that EMU on a prior occasion had suffered the theft of a set of master keys that would have allowed the thief “access to almost any building and room on campus, including dormitory halls.”<sup>46</sup> “[M]ost of the campus community was never notified of the theft.”<sup>47</sup> EMU did notify senior administrators that the keys were reported as “lost,”<sup>48</sup> even though “EMU officials reported the incident to the [campus police] and classified it as a ‘larceny of master keys.’”<sup>49</sup> The Department of Education noted that its “findings . . . indicate numerous and systemic violations by EMU of the Clery Act requirements. EMU misreported statistics, failed to establish and maintain adequate policies, and failed to take action to ensure the safety and well being of the campus community.”<sup>50</sup> As a result of these and other

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<sup>44</sup> U.S. Dep’t of Educ., Final Program Review Determination (EMU, Nov. 14, 2007, at 6-7, *available at* <https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/cleryact/easternmichiganuniversity/EMUFPRD11142007.pdf>.

<sup>45</sup> *Id.* at 7.

<sup>46</sup> *Id.* at 9.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 9-10.

<sup>49</sup> *Id.* at 10.

<sup>50</sup> *Id.* at 9.

violations, the Department of Education fined EMU \$357,500.<sup>51</sup> At that point, it was the largest fine issued by the Department for Clery Act violations.<sup>52</sup> In issuing the fine, the Department of Education warned EMU that:

An on-campus homicide is one of the most egregious of crimes, and all efforts should be made to warn the community of the commission, or possible commission, of such a crime. . . . EMU's response to the student's death was an egregious violation of the regulations and of its responsibility to its students, employees, parents and the public.<sup>53</sup>

## **B. Elizabeth City State University**

Founded as a teacher's college in 1891, Elizabeth City State University (ECSU) is a constituent institution of the University of North Carolina system offering thirty-one baccalaureate degrees and four masters degrees.<sup>54</sup> According to a *Columbus Dispatch* report, ECSU reported under the Clery Act that no student had been sexually assaulted in eleven years.<sup>55</sup> Then a dorm security guard repeatedly attempted to force his way into the room of an ECSU student.<sup>56</sup> At first she was reluctant to report the crime.

After the fourth time—when he pinned her to the bed . . . and tried to spread her legs apart—she went to campus police, who quickly let the matter die, in part because they thought she was lying. So she went to city police. . . . Police found 127 cases of crimes on campus that had not been thoroughly investigated by the college, including eight rapes.<sup>57</sup>

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<sup>51</sup> Letter from Mary E. Gust, Director, Administrative Actions and Appeals Division, U.S. Department of Education, to Dr. Donald Loppnow, Executive Vice President, Eastern Michigan University, Dec. 14, 2007, at 1, *available at* <https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/cleryact/easternmichiganuniversity/AAADFineLetter12142007.pdf>.

<sup>52</sup> Jenna Johnson, *Federal Officials Probe Penn State for Possible Clery Act Violations*, WASH. POST, July 17, 2012, *available at* [http://www.washingtonpost.com/local/education/federal-officials-probe-penn-state-for-possible-clery-act-violations/2012/07/17/gJQA8swirW\\_story.html](http://www.washingtonpost.com/local/education/federal-officials-probe-penn-state-for-possible-clery-act-violations/2012/07/17/gJQA8swirW_story.html).

<sup>53</sup> Letter from Gust to Loppnow, *supra* note 51, at 4.

<sup>54</sup> *Welcome Future Students*, ELIZABETH CITY ST. U., <http://www.ecsu.edu/prospective/index.cfm>.

<sup>55</sup> Binkley, *supra* note 4.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

The fallout was significant. “The campus police chief resigned and . . . pleaded no contest to a charge that he failed to adequately investigate crimes. The college’s chancellor also resigned.”<sup>58</sup> Meanwhile, the victim’s “molester was convicted of sexual battery and breaking and entering.”<sup>59</sup> “I knew the school tried to cover up things,” the victim said. “I just didn’t know to that degree.”<sup>60</sup>

While the ECSU campus police chief did not reveal his motivation, researcher Corey Yung has identified a number of reasons why campus security discourage sexual assault reports and fail to report all sexual assaults under the Clery Act, including a pervasive belief in rape myths and that women are lying, a belief that reporting crimes will make the campus appear less safe and that campus security is failing in its job, and a belief that reporting sexual assaults will damage the reputation of the school and decrease enrollment.<sup>61</sup>

Anecdotal evidence, however, suggests that institutions that provide the greatest sexual violence education, prevention, and support services perversely report the highest percentages of such incidents, which makes them appear to be less safe when they likely are more safe.<sup>62</sup> As Diane Moyer, legal director of the Pennsylvania Coalition Against Rape, explains: “This will

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Yung, *supra* note 14, at 6 (quoting Police Executive Research Forum, *Improving the police response to sexual assault* (2012)). See also Briggs, *supra* note 42, at 4 (“Legislators found that it appeared that colleges and universities were seemingly hiding the violent crimes that occurred on some campuses in order to improve their image in order to avoid decreased enrollment.”).

<sup>62</sup> Lipka, *supra* note 5, at A1. Schools that received violence prevention grants from the U.S. Department of Education had higher incidences of violence reporting than did other institutions.

sound counterintuitive, but I actually tell parents to send their kids to the college or university with the highest number of sexual assaults reported through the Clery Act . . . .”<sup>63</sup>

### C. Oregon State University

Founded in 1868, Oregon State University (OSU) is Oregon’s land grant institution and a leading research university with more than 26,000 students and a high sustainability ranking, in part achieved because student exercise machines help power the university.<sup>64</sup> OSU actively markets its location in Corvallis, which it says “consistently ranks among the best and safest cities to live in the U.S.”<sup>65</sup>

Yet Corvallis has not always proven to be a safe place to visit. In 1998, Brenda Tracy visited Corvallis. According to an investigative report by the *Oregonian*, she later made a report to police about that visit.

The police report was graphic and disturbing. Tracy alleged that she was gang raped by the four men, sodomized and robbed over a seven-hour period. She begged them to stop, according to the report. . . . [S]he remembered vomiting, but she said the men just turned her around and continued to assault her. . . . During police interviews, the accused men implicated one another. The physical evidence was staggering. . . . The counselor gave the 38-page [police] report to the university's student conduct department. . . .<sup>66</sup>

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<sup>63</sup> Yung, *supra* note 14, at 2 (quoting Police Executive Research Forum, *Improving the police response to sexual assault* (2012)).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> John Canzano, *The Oregonian's Investigation Uncovers Trail of Betrayal for Alleged Gang Rape Victim Brenda Tracy*, THE OREGONIAN, Dec. 29, 2014, available at [http://www.oregonlive.com/sports/oregonian/john\\_canzano/index.ssf/2014/12/canzano\\_oregonian\\_investigatio\\_1.html#incart\\_story\\_package](http://www.oregonlive.com/sports/oregonian/john_canzano/index.ssf/2014/12/canzano_oregonian_investigatio_1.html#incart_story_package).

The four men involved in the assault were two OSU football players, an OSU recruit who later played football for the University of California, Berkeley, and a community college football player on probation for armed robbery.<sup>67</sup>

After a hearing, OSU punished the two OSU student-athletes for their alleged involvement in this gang rape: Calvin Carlyle and Jason Dandridge were placed on school probation. They had to participate in an educational program and perform 25 hours of community service.<sup>68</sup> Carlyle and Dandridge were also suspended for the season opening football game because, in the coach's words, they made a "bad choice."<sup>69</sup> According to Ms. Tracy, those words broke her heart.<sup>70</sup> Sixteen years later, the coach apologized for his destructive language.<sup>71</sup>

The *Oregonian* assessed OSU's response to the allegation and overwhelming evidence as follows:

The school never responded after she reported the assault. Pervasive conflicts of interest clouded judgment. The betrayal included hasty and questionable decisions made by local police and the district attorney's office. Evidence was destroyed years before the statute of limitations expired – despite the strong urging by a deputy district attorney to preserve it.

OSU insiders acknowledged problems in the way sex assaults were reported and handled back then, but no one seemed to care deeply enough about Tracy to do anything about it. Officials involved portrayed a campus administration consumed with fundraising and with protecting its own image as it tiptoed around the controversy.

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> John Canzano, *Will Nebraska Coach Mike Riley Honor His Promise to Alleged Sex-assault Survivor?*, THE OREGONIAN, Dec. 5, 2014, available at

[http://www.oregonlive.com/sports/oregonian/john\\_canzano/index.ssf/2014/12/canzano\\_will\\_nebraska\\_coach\\_mi.html#incart\\_story\\_package](http://www.oregonlive.com/sports/oregonian/john_canzano/index.ssf/2014/12/canzano_will_nebraska_coach_mi.html#incart_story_package). Riley promised Tracy could address the 2015 OSU football team, but then left OSU to coach at the University of Nebraska—Lincoln. *Id.* Whether Riley or OSU will honor that commitment remains to be seen. *Id.*



Tracy's case, interviews with key participants show, was seen as a potential distraction at a time when budget deficits loomed and enrollment was on the decline. And critical decisions made by people with clout in Corvallis signaled that they wanted the case to just go away.<sup>72</sup>

From the *Oregonian's* perspective, the prosecutor had apparently grown too close to OSU officials, particularly those running the athletics department:

The Benton County District Attorney's office and the blossoming enterprise that was the Beavers' athletic department had a close working relationship, according to [the District Attorney]. The Beavers held an annual meeting designed to foster good will. Over the years, [the District Attorney] said, he and other investigators were summoned to a meeting with Oregon State administrators during the tenures of [four] football coaches. . . . Present for those meetings were upper-level administrators including [two] athletic directors. . . . The meetings were presided over by one of the OSU vice presidents and occasionally by the university president, according to [the District Attorney]. On Oregon State's annual guest list: the district attorney's office, Corvallis Police Department, Benton County Sheriff's Department, Oregon State Police and campus police. "We'd get together and slap backs, laugh and talk about how we were going to try to work better together," [the District Attorney] said. "We had one season where 10 or 11 of the starting 22 football players ended up under investigation for one crime or another." . . . Attendance at the annual meetings with OSU athletic directors and officials would be discontinued in 2000 by [the District Attorney's] successor . . . , who thought the meetings were too cozy.<sup>73</sup>

According to the *Oregonian*, OSU football coaches actively sought to obstruct possible victims from reporting rapes by OSU football players:

Prior to 1998, [the District Attorney] said, he became aware that Oregon State assistant football coaches attempted to talk [rape] survivors out of pursuing cases. The practice happened more than once, according to [the District Attorney], and not just with sex assaults. "It just seemed to be part of the culture that coaches would do what they could to get their athletes out of trouble," he said. . . . Finally, one year [the District Attorney] . . . said, "If I catch your assistant coaches contacting a sex-assault victim involving one of your players again I'll have the coach arrested." The room went silent.<sup>74</sup>

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<sup>72</sup> Canzano, *supra* note 66.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

The new OSU president believes things have changed since 1998.<sup>75</sup> Others, however, disagree: “I think OSU had a problem with violence against women in 1998,” said Larry Roper, former Vice Provost for Student Affairs. “I feel there is still a problem today.”<sup>76</sup>

#### **D. The Pennsylvania State University**

Founded in 1855 and chartered by the Commonwealth of Pennsylvania as one of the nation’s first colleges of agricultural science,<sup>77</sup> the Pennsylvania State University (Penn State) now consists of twenty-four campuses, 17,000 faculty and staff, and 100,000 students. It is a major research university that seeks to “teach students that the real measure of success is what you do to improve the lives of others.”<sup>78</sup>

In 2011, Joe Paterno was a living legend. In his 46 years as head football coach at Penn State, he won more games than any other major-college football coach and “became the face of” Penn State and “a symbol of integrity in collegiate athletics.”<sup>79</sup>

[He] held himself to an exceedingly high standard with what he called his “grand experiment”: fielding outstanding teams with disciplined players whose graduation rates far exceeded that at most football powers. His football program had never been tainted by a recruiting scandal. His statue stood outside Beaver Stadium alongside the legend “Educator, Coach, Humanitarian.” . . .

Many a Pennsylvania home was stocked with Paterno knickknacks: Cup of Joe coffee mugs, Stand-up Joe life-size cutouts, JoePa golf balls bearing his likeness.

Paterno and his wife, Sue, were major benefactors of Penn State. During his nearly half-century as head coach, donors gave hundreds of millions of dollars to the university, helping to shape it into a major research institution, seemingly an

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Our History*, PENN. ST. U., <http://www.psu.edu/this-is-penn-state/our-history> (last visited Mar. 23, 2015).

<sup>78</sup> *This is Penn State*, PENN. ST. U., <http://www.psu.edu/this-is-penn-state> (last visited Mar. 23, 2015).

<sup>79</sup> Richard Goldstein, *Joe Paterno, Longtime Penn State Coach, Dies at 85*, N.Y. TIMES, January 22, 2012, [http://www.nytimes.com/2012/01/23/sports/ncaafootball/joe-paterno-longtime-penn-state-coach-dies-at-85.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2012/01/23/sports/ncaafootball/joe-paterno-longtime-penn-state-coach-dies-at-85.html?pagewanted=1&_r=0) (last visited Mar. 23, 2015).

outgrowth of his having made Penn State a national brand name through its football teams. . . .

Paterno was a five-time national coach of the year. He had five unbeaten and untied teams, and he coached Penn State to the No. 1 ranking in 1982 and 1986. He took his Nittany Lions to 37 bowl games, winning 24 of them, and turned out dozens of first-team all-Americans.<sup>80</sup>

Similarly, if you had asked top academics for the names of the top five university presidents in 2011, Graham Spanier would have been on many lists.

On [November 5, 2011], Graham Spanier was beginning his 17th year as Penn State's president. It was an extraordinary tenure, and one that had seemed most likely to continue for many more years. A man of ceaseless energy and considerable ego, Spanier led the university as it grew from a remote outpost of American higher education into a top-tier public university.

His imprint was everywhere. Some of the world's most-decorated architects designed the dozens of new buildings constructed on his watch, and Spanier had the last word on everything from the shape of the windows to the color of the brick. He performed magic tricks as the opening act at student events, played washboard in a Dixieland band and sometimes climbed into the costume of the school mascot, the Nittany Lion. At various times, he led the boards that governed the N.C.A.A., the Big Ten conference, the Bowl Championship Series, the Association of American Universities and the National Council on Family Relations. His TV show on the Big Ten Network was called "Expert Opinion With Graham Spanier." . . .

Spanier had ruled over an empire: about 45,000 students on a stately, sprawling main campus in State College; another 40,000 at locations around the state; an annual budget exceeding \$4 billion.<sup>81</sup>

Meanwhile, Gary Schultz was near the end of what appeared to be a sterling career managing the business of higher education.<sup>82</sup> Schultz retired in 2009 "as one of the most

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<sup>80</sup> *Id.*

<sup>81</sup> Michael Sokolove, *The Trials of Graham Spanier, Penn State's Ousted President*, N.Y. TIMES MAG., July 16, 2014, available at <http://www.nytimes.com/2014/07/20/magazine/the-trials-of-graham-spanier-penn-states-ousted-president.html>.

<sup>82</sup> See *Senior Vice President Retires, Leaves Legacy of Quality*, PENN ST. NEWS, June 23, 2009, available at <http://news.psu.edu/story/175876/2009/06/23/senior-vice-president-retires-leaves-legacy-quality>.

influential leaders in Penn State history.”<sup>83</sup> He signed back on for a second stint as Penn State tried to find a suitable replacement for his successor, who took a job elsewhere.<sup>84</sup>

As Spanier was building up Penn State’s academic reputation, Schultz was building up its facilities. In his 14 years as the vice president for finance and business, buildings rose and the university budget doubled. Schultz oversaw several departments, including police, human resources and legal services . . . . In September, he and his wife attended the opening of the Gary Schultz Child Care Center, an environmentally friendly building.<sup>85</sup>

In 1993, Timothy Curley became Penn State’s athletic director “and oversaw massive growth of the sports program, millions in donations, 21 NCAA championships and 64 Big Ten titles.”<sup>86</sup> Penn State called him “the architect of the Penn State Intercollegiate Athletics program.”<sup>87</sup> In June 2011, “the National Football Foundation named Curley the country’s top athletic director.”<sup>88</sup> The Foundation’s president said, “Tim Curley is a great leader with unparalleled vision.”<sup>89</sup>

Despite outward appearances, all was not well at Penn State. For example, Penn State had failed to implement the Clery Act.<sup>90</sup> As of November 2011, “Penn State’s Clery Act implementation plan was still in draft form.”<sup>91</sup> On November 5, 2011, the sterling reputations of all four men and the university they served began to unravel. The fall from grace would be hard and fast and take them and the institution to depths that no one could have imagined. On that

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<sup>83</sup> *Id.*

<sup>84</sup> Jenna Johnson, *Penn State’s Lesser-Known Fallen Icons: Spanier, Curley and Schultz*, WASH. POST, Nov. 21, 2011, available at [http://www.washingtonpost.com/blogs/campus-overload/post/penn-states-lesser-known-fallen-icons-spanier-curley-and-schultz/2011/11/21/gIQA6ZhniN\\_blog.html](http://www.washingtonpost.com/blogs/campus-overload/post/penn-states-lesser-known-fallen-icons-spanier-curley-and-schultz/2011/11/21/gIQA6ZhniN_blog.html).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Louis Freeh, *Remarks of Louis Freeh in Conjunction with Announcement of Publication of Report Regarding The Pennsylvania State University*, July 12, 2012, at 3, available at <http://i2.cdn.turner.com/cnn/2012/images/07/12/freeh.statement.pdf>.

<sup>91</sup> *Id.*

November day, former Penn State football defensive coordinator Jerry Sandusky was arrested and released on \$100,000 bail after being arraigned on forty criminal counts related to sexually abusing eight boys.<sup>92</sup> That same day, Curley and Schultz were each “charged with perjury and failing to report what they knew about the allegations.”<sup>93</sup>

Four days after Sandusky’s arrest, “Penn State’s board of trustees either dismissed Spanier or, as he contends, he resigned first.”<sup>94</sup> Within fourteen days of Sandusky’s arrest, the Gary Schultz Child Care Center no longer had a name, the National Football Foundation rescinded Curley’s award as top athletic director, the Big Ten “decided to remove Paterno’s name from its Stagg-Paterno Championship Trophy,” and Spanier’s high school “removed a plaque honoring him as a distinguished alumnus.”<sup>95</sup> The high school also erased Spanier’s name “from a roster of distinguished alumni on the school’s website. The school superintendent . . . implied that even just the vestiges of Spanier posed a danger. The measures to expunge them, he said, were ‘an attempt to protect our students.’”<sup>96</sup>

On January 22, 2012, Joe Paterno died.<sup>97</sup> Of “the episode that ended his career and left

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<sup>92</sup> Darren Everson, *Ex-Penn State Coach Sandusky Arrested on Sex Charges*, WALL ST. J., Nov. 6, 2011, available at <http://www.wsj.com/articles/SB10001424052970203716204577020001842475304>. The Judge’s decision as to \$100,000 unsecured bail was criticized. Andrew Scott, *Ex-Monroe Prosecutor, Now Judge, Criticized for Sandusky Bail*, POCONO REC., Nov. 16, 2011, available at <http://www.pocorecord.com/article/20111116/News/111160314?template=printart>. It was later revealed that she had donated to and volunteered for the Second Mile, an at risk children’s camp Sandusky founded in 1977. *Id.*; Jenny DeHuff, *Vereb: Sandusky’s Ally on Bench Gave Him Low Bail, Access to Kids*, TIMES HERALD, Nov. 14, 2011, available at <http://www.timesherald.com/article/JR/20111114/NEWS01/111119862>. Amid serious questions as to whether the Judge had a conflict of interest, the Judge recused herself from further proceedings. T. Rees Shapiro, Jenna Johnson & Joel Achenbach, *Penn State Pride Erodes into Agony as Sandusky Scandal Drapes Pall over Community*, WASH. POST, Nov. 19, 2011, available at [http://www.washingtonpost.com/national/health-science/penn-state-pride-erodes-into-agony-as-sandusky-scandal-drapes-pall-over-community/2011/11/18/gIQAqTPucN\\_story.html](http://www.washingtonpost.com/national/health-science/penn-state-pride-erodes-into-agony-as-sandusky-scandal-drapes-pall-over-community/2011/11/18/gIQAqTPucN_story.html).

<sup>93</sup> Everson, *supra* note 92.

<sup>94</sup> Sokolove, *supra* note 81.

<sup>95</sup> Shapiro et al., *supra* note 92.

<sup>96</sup> Sokolove, *supra* note 82.

<sup>97</sup> Goldstein, *supra* note 79.

his reputation in tatters,” he said: “This is a tragedy. It is one of the great sorrows of my life. With the benefit of hindsight, I wish I had done more.”<sup>98</sup> In June 2012, Paterno’s former assistant coach and one-time heir apparent Sandusky went to trial.<sup>99</sup>

Eight men testified . . . , offering graphic accounts of repeated assaults by Sandusky — on the Penn State campus, in hotel rooms and in the basement of Sandusky’s home. It was painful testimony, the men telling their horrifying stories in public for the first time. Some wept. Others said, with anger and relief both, that they wanted to move on at last.<sup>100</sup>

On June 22, 2012, “Sandusky stood stoically as the jury foreman read off the verdicts on the 48 counts against him. The foreman said guilty 45 times. . . . Sandusky was taken into custody after the verdicts were read.”<sup>101</sup> The 45 counts of child sex abuse ranged “from corruption of minors to involuntary deviate sexual intercourse.”<sup>102</sup>

On July 12, 2012, Special Investigative Counsel released a blistering report lambasting Penn State, its Board of Trustees, and in particular Spanier, Curley, Schultz, and Paterno.<sup>103</sup>

Conclusions from the report included the following:

The most saddening finding by the Special Investigative Counsel is the total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky’s child victims.<sup>104</sup>

Four of the most powerful people at The Pennsylvania State University — President Graham B. Spanier, Senior Vice President-Finance and Business Gary

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<sup>98</sup> *Id.*

<sup>99</sup> Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES, June 22, 2012, available at <http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?pagewanted=all>; Ann O’Neill, *‘Because of You, I Trust No One’*, CNN, Oct. 13, 2012, available at <http://www.cnn.com/2012/10/10/justice/jerry-sandusky-victim-impact/index.html> (“It’s official: Sandusky, the 68-year-old retired football coach once considered Joe Paterno’s heir apparent at Penn State, has been formally labeled a ‘sexually violent pedophile.’”).

<sup>100</sup> Drape, *supra* note 99.

<sup>101</sup> *Id.*

<sup>102</sup> Josh Levs & Laura Dolan, *Sandusky Gets At Least 30 Years for Child Sex Abuse*, CNN, Oct. 9, 2012, available at <http://www.cnn.com/2012/10/09/justice/pennsylvania-sandusky-sentencing/>.

<sup>103</sup> Freeh Report, *supra* note 7, at 16.

<sup>104</sup> *Id.* at 14.

C. Schultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno – failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky’s activities from the Board of Trustees, the University community and authorities. They exhibited a striking lack of empathy for Sandusky’s victims by failing to inquire as to their safety and well-being. . . .<sup>105</sup>

These individuals, unchecked by the Board of Trustees that did not perform its oversight duties, empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University’s facilities and affiliation with the University’s prominent football program. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims. Some coaches, administrators and football program staff members ignored the red flags of Sandusky’s behaviors and no one warned the public about him.<sup>106</sup>

A decision by Spanier, Schultz, Paterno and Curley to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy, with future “visibility” at Penn State and ways “to continue to work with young people through Penn State,” essentially granting him license to bring boys to campus facilities for “grooming” as targets for his assaults. Sandusky retained unlimited access to University facilities until November 2011.<sup>107</sup>

Special Investigative Counsel rejected these leaders’ claims and justifications for their actions:

Taking into account the available witness statements and evidence, the Special Investigative Counsel finds that it is more reasonable to conclude that, *in order to avoid the consequences of bad publicity*, the most powerful leaders at the University—Spanier, Schultz, Paterno and Curley – *repeatedly concealed critical facts relating to Sandusky’s child abuse* from the authorities, the University’s Board of Trustees, the Penn State community, and the public at large.<sup>108</sup>

Special Investigative Counsel also identified a culture in which employees failed to report Sandusky’s crimes because they feared retaliation. Special Investigative Counsel pointed in particular to a group of janitors who witnessed “the most horrific rape that’s described” in the

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 15.

<sup>107</sup> *Id.* at 17.

<sup>108</sup> *Id.* at 16 (emphasis added).

report<sup>109</sup> and failed to tell authorities because they feared losing their jobs.<sup>110</sup> The Board of Trustees was “‘deeply ashamed’ of its lack of oversight identified in the report.”<sup>111</sup>

On July 22, 2012, Penn State removed the famed statue of Joe Paterno located outside Beaver Stadium.<sup>112</sup> On the same day, “the NCAA imposed sanctions against Penn State, including a \$60 million fine, scholarship reductions, the vacating of 112 wins of the football team, five years’ probation and a bowl ban for four years.”<sup>113</sup> In October 2012, Sandusky was sentenced to a 30 to 60 year prison term.<sup>114</sup> At sentencing, some of Sandusky’s victims emotionally and often angrily relayed the impact his abuse had on their lives.<sup>115</sup>

“You were the person in my life who was supposed to be a role model,” [Victim No. 4, now 29 years old] seethed angrily at the man convicted of sexually violating him and nine other boys. “I can’t begin to express how this has screwed up my life. Because of you, I trust no one and I will not allow my own child out of my sight for fear of what might happen to him.”<sup>116</sup>

Victim No. 4 then provided gut wrenching details about how Sandusky used the currency Penn State had provided him—the Penn State football program—to manipulate his victims, and described his molestation by Sandusky in places like the Penn State football locker room

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<sup>109</sup> Susan Candiotti, Josh Levs & David Ariosto, *Penn State Leaders Disregarded Victims, ‘Empowered’ Sandusky, Review Finds*, CNN, July 12, 2012, available at <http://www.cnn.com/2012/07/12/us/pennsylvania-penn-state-investigation/> (“One janitor, a Korean War veteran, said it was ‘the worst thing he’s ever seen.’”).

<sup>110</sup> Freeh Report, *supra* note 7, at 22.

<sup>111</sup> Candiotti, Levs & Ariosto, *supra* note 109.

<sup>112</sup> Jennifer Preston, *Penn State Removes Paterno Statue*, N.Y. TIMES, July 22, 2012, available at [http://thelede.blogs.nytimes.com/2012/07/22/penn-state-will-remove-paterno-statue/?\\_r=0](http://thelede.blogs.nytimes.com/2012/07/22/penn-state-will-remove-paterno-statue/?_r=0).

<sup>113</sup> Levs & Dolan, *supra* note 102. The NCAA ultimately reduced the sanctions and restored the football wins. Erik Brady, Rachel Axon & Steve Berkowitz, *With Penn State Wins Restored, Joe Paterno the Winningest Coach Again*, USA TODAY, Jan. 16, 2015, available at <http://www.usatoday.com/story/sports/ncaaf/bigten/2015/01/16/ncaa-joe-paterno-wins-restored-penn-state-settlement/21867685/>.

<sup>114</sup> Levs & Dolan, *supra* note 102.

<sup>115</sup> *Id.*

<sup>116</sup> O’Neill, *supra* note 109.



showers.<sup>117</sup> The sentencing judge summarized the long-term damage Sandusky inflicted on victims: “This crime is not only what you did to their bodies but their psyche and souls.”<sup>118</sup>

On November 1, 2012, former President Graham Spanier “was charged with eight criminal counts, including child endangerment, perjury and conspiring to cover up Sandusky’s crimes.”<sup>119</sup> As of this writing, Spanier, Curley, and Shultz await trial with their reputations “in tatters and [as] their life’s work threatens to crumble before their eyes.”<sup>120</sup> Michael Bérubé, who holds the title of Paterno Family professor of literature at Penn State, said this is “the most repugnant thing we’ve ever seen, so beyond anything we could ever imagine. This has totally ruined our legitimacy.”<sup>121</sup> Certainly to many, Penn State has become “a target of scorn and ridicule.”<sup>122</sup>

Some have argued that Penn State is making strides to ensure that similar incidents never again tarnish its campus.<sup>123</sup> However, concerns remain that Penn State employees still fear retaliation for reporting crimes.<sup>124</sup> On May 1, 2014, the U.S. Department of Education’s Office for Civil Rights released “a list of the higher education institutions under investigation for

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<sup>117</sup> *Id.*

<sup>118</sup> Levs & Dolan, *supra* note 102.

<sup>119</sup> Sokolove, *supra* note 81.

<sup>120</sup> Shapiro, Johnson & Achenbach, *supra* note 92.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Charles Thompson, *Senator George Mitchell Says Penn State Remains on Track with Post-Sandusky Athletics Integrity Agreement*, PENN LIVE, Dec. 8, 2014, available at [http://www.pennlive.com/midstate/index.ssf/2014/12/senator\\_mitchell\\_says\\_penn\\_sta.html](http://www.pennlive.com/midstate/index.ssf/2014/12/senator_mitchell_says_penn_sta.html) (“The monitor tracking Penn State’s compliance with the NCAA consent decree and related agreements issued another glowing report about the university’s post-Sandusky progress Monday.”).

<sup>124</sup> Eric J. Barron, *Upholding the Promise of Confidentiality: Why It’s the Right Thing to Do*, PENN. ST. U., Dec. 19, 2014, available at <http://progress.psu.edu/resource-library/story/upholding-the-promise-of-confidentiality-why-its-the-right-thing-to-do> (“Yet, in a recent ethics and values survey, many staff and faculty still indicate concern about retaliation even with the implementation of multiple avenues of reporting and much higher visibility of its importance. We still have work to do. We need to foster trust and encourage employees to speak up when they encounter something concerning them.”).

possible violations of federal law over the handling of sexual violence and harassment complaints.”<sup>125</sup> Penn State was among the institutions listed.<sup>126</sup>

#### IV. How Other Professions Treat Conflicts of Interest

Other professions would never tolerate the conflicts of interest prevalent in addressing sexual assault at higher education institutions; indeed, in those professions, such conflicts are either expressly or implicitly recognized and banned.

##### A. Law

“The main legal professions—lawyers and judges—have traditionally taken conflict of interest very seriously.”<sup>127</sup> The legal profession generally defines a conflict of interest as “a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.”<sup>128</sup>

The legal profession argues that a conflicting interest can arise in three situations:

- a lawyer’s self-interest conflicts with the performance of a client retainer (a conflict of duty and interest),
- a lawyer’s duty to another client conflicts with the performance of a client retainer (a conflict of duty and duty),
- a lawyer’s duty to another client impairs the lawyer’s relationship with a client and thereby impairs client representation (a conflict of duty with relationship).<sup>129</sup>

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<sup>125</sup> U.S. Dep’t of Educ., *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, May 1, 2014, available at <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

<sup>126</sup> *Id.*

<sup>127</sup> Davis & Johnston, *supra* note 11, at 305.

<sup>128</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 8. *Cf. Canadian Bar Ass’n, Task Force on Conflicts of Interest – Toolkit*, CAN. BAR ASS’N (2008), <http://www.cba.org/cba/groups/conflicts/toolkit.aspx> (defining legal conflict of interest as “an interest that gives rise to a substantial risk of material and adverse effect on the representation”).

<sup>129</sup> CAN. BAR ASS’N, *supra* note 128.

The Canadian Bar Association answers the question “what is it about a conflict of interest that is so bad?” as follows:

The answer is quite simple. Conflicts can impair effective representation of a client. It is fundamental to the lawyer-client relationship that a lawyer be free of conflicts other than those willingly accepted by the client. And if a client has reason to question the representation provided by his or her lawyer, the very functioning of our legal system is called into question.<sup>130</sup>

The legal profession divides conflicts of interest into various categories, with “[r]epresentation of clients whose interests are directly adverse in the same litigation constitut[ing] ‘the most egregious conflict of interest.’”<sup>131</sup>

As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.<sup>132</sup>

Comment 6 to Model Rule of Professional Conduct 1.7 provides further rationale:

The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.<sup>133</sup>

Indeed, representing one client against another in the same tribunal “is one of few situations where a conflict cannot be waived.”<sup>134</sup> So fundamental is this principle that the Director of the

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<sup>130</sup> *Id.*

<sup>131</sup> *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 509 (Mo. Ct. App. 2010), quoting *Nunez v. Lovell*, Civil No. 2005-7, 2008 WL 4525835, at \*3 (D.V.I. Oct. 3, 2008).

<sup>132</sup> *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 898 (1977).

<sup>133</sup> MODEL RULES OF PROF. CONDUCT R. 1.7 cmt. 8.

<sup>134</sup> *Cole*, *supra* note 9, at 2. See also MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer

Minnesota State Bar Association Office of Lawyers Professional Responsibility called it “a principle of the ‘Duh!’ variety”.<sup>135</sup> Furthermore, the legal profession extends this prohibition to an entire law firm,<sup>136</sup> so that even “another lawyer in the firm—and if the firm is large enough, that other lawyer may not be physically in the same office or the same state”<sup>137</sup> may not represent one client against another client before a tribunal.

The prohibition against representing two adverse parties in the same litigation applies even when the two parties claim to be aligned. In *State ex rel. Horn v. Ray*,<sup>138</sup> an attorney sought to represent both the defendant and the alleged victim in a criminal prosecution for domestic violence. The Missouri Court of Appeals refused to allow the joint representation:

Counsel’s duty of loyalty to the defendant . . . prevents counsel from fairly presenting to the victim all possible courses of action because some of those options—most notably testifying against the defendant—would be detrimental to the defendant. Counsel’s duty of loyalty to the defendant thus plainly forecloses alternatives that otherwise might be recommended to the victim. . . . Likewise, counsel’s duty of loyalty to the victim prevents counsel from fairly presenting to the defendant all possible courses of action because some of those options—such as testifying that the victim lied about events leading to the instant charges or claiming self defense—would be detrimental to the victim. Thus, counsel’s duty of loyalty to the victim forecloses alternatives that would otherwise be available to the defendant. . . . In our circumstances, counsel’s duty of loyalty to one client naturally compromises his duty of loyalty to the other.<sup>139</sup>

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reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) *the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal*; and (4) each affected client gives informed consent, confirmed in writing.” (Emphasis added)).

<sup>135</sup> Cole, *supra* note 9, at 2.

<sup>136</sup> MODEL RULES OF PROF. CONDUCT R. 1.10.

<sup>137</sup> Cole, *supra* note 9, at 2. The legal profession typically defines a tribunal broadly to include not only a court, but also “an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” See PENN. RULES OF PROF. CONDUCT R. 1.0(m).

<sup>138</sup> 325 S.W.3d 500 (Mo. Ct. App. 2010).

<sup>139</sup> *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 508 (Mo. Ct. App. 2010).

But even in cases not involving two adverse litigants, where consent to joint representation is allowed, any consent obtained must be “knowing, intelligent, and voluntary.”<sup>140</sup>

The client must be of sufficiently sound mind to assent to the conflict, to understand the consequences of consent, and to exercise judgment in the matter. The client must [also] not be unduly influenced by another person. Consent purportedly given by a client whom the lawyer should reasonably know lacks capacity to give consent is ineffective.<sup>141</sup>

The prohibition against conflicts of interests also extends to those who serve as neutrals attempting to resolve disputes. “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>142</sup> “Judicial impartiality is a significant element of justice. Judges should decide legal disputes free of any personal bias or prejudice. As a result of a conflict of interest, a judge may be unable to maintain impartiality in a case and thus should be disqualified.”<sup>143</sup>

A similar prohibition against judges’ conflicts of interest is also applied to those serving as neutrals in alternative dispute resolution models such as arbitration<sup>144</sup> and mediation,<sup>145</sup> even when the parties would otherwise consent to the conflict.

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<sup>140</sup> *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 739 (Mo. 2004), quoting *In re Schaeffer*, 824 S.W.2d 1, 3 (Mo. 1992).

<sup>141</sup> *In re Schaeffer*, 824 S.W.2d 1, 3 (Mo. 1992).

<sup>142</sup> 28 U.S.C. § 455(a); Davis & Johnston, *supra* note 11, at 305 (“Because justice is to be fairly meted out, interests that might cause a judge to be or appear to be partial are also generally prohibited.”).

<sup>143</sup> Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 543 (1994).

<sup>144</sup> See JAMS, ARBITRATORS ETHICS GUIDELINES Guideline V(C) (“An Arbitrator should not proceed with the process unless all Parties have acknowledged and waived any actual or potential conflict of interest. If the conflict of interest casts serious doubt on the integrity of the process, an Arbitrator should withdraw, notwithstanding receipt of a full waiver.”), available at <http://www.jamsadr.com/arbitrators-ethics/>; N.Y. SUP. CT., COMMERCIAL DIV., N.Y. CNTY, ETHICAL STANDARDS FOR ARBITRATORS AND NEUTRAL EVALUATORS Standard II (“An arbitrator or neutral evaluator should decline any appointment if acceptance would create a conflict of interest. An arbitrator or neutral evaluator who determines to accept an appointment should disclose all potential conflicts of interest. After such disclosure, the neutral may accept the appointment if all parties so request. . . . If, however, the conflict of interest would cast serious doubt on the integrity of the process or the Programs, the neutral should decline the appointment.”), available at [http://www.nycourts.gov/courts/comdiv/ADR\\_ethicsforarbitrators.shtml](http://www.nycourts.gov/courts/comdiv/ADR_ethicsforarbitrators.shtml).

<sup>145</sup> AM. ARB. ASS’N, AMERICAN BAR ASS’N & ASS’N FOR CONFLICT RESOLUTION, THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2005) Standard III(E) (“If a mediator’s conflict of interest might reasonably be

An arbitrator or neutral evaluator should conduct the ADR proceeding in an impartial manner. An arbitrator or neutral evaluator should act at all times with the utmost impartiality and evenhandedness. An arbitrator or neutral evaluator should handle only those matters in which the neutral can remain impartial and evenhanded. The arbitrator or neutral evaluator should withdraw if unable to do so at any time.<sup>146</sup>

Under some schools' sexual assault policies, a single individual attempts to represent the rights of the accused and the victim, while also serving as judge and jury. This would never be permissible under the ethics rules governing attorneys. Moreover, involvement of different school personnel representing both the victim and the accused, with another administrator serving as "judge," would also be prohibited by the rule restricting different lawyers in a single firm representing adverse parties. This would be true even if the victim and the accused consented to the joint representation: the conflict cannot be waived.

But even if informed consent could resolve these conflicts, recall that such consent must be "knowing, intelligent, and voluntary" and obtained from a person competent to make the decision. In the case of campus sexual assault, both parties have typically barely reached majority, and each party is suffering from the severe psychological trauma of either being sexually assaulted with the terror of it happening again or being accused of sexual assault with the terror of going to prison. In many cases, the institution's inherent conflict of interest is neither explained nor disclosed, and neither side ordinarily is represented by counsel. So one might ask whether a terrified and psychologically traumatized person barely the age of majority who likely does not understand the concept of conflicts of interest has sufficient capacity to give

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viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary."), *available at* [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007.aut\\_hcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.aut_hcheckdam.pdf)

<sup>146</sup> N.Y. SUP. COURT, *supra* note 144, at Standard I.

consent to an undisclosed, multi-layered conflict of interest and whether such consent could ever be “knowing, intelligent, and voluntary.”

But what about the case in which the victim and the accused have separate “counsel” who are independent of the school? Could the school serve as “judge” or even “mediator” in that case? A good argument exists that the ethical rules would prohibit this because the “judge” here has an interest in the outcome of the case.

## **B. Accounting**

“Accountants and auditors prepare and examine financial records. They ensure that financial records are accurate and that taxes are paid properly and on time.”<sup>147</sup> One significant function of an accountant is auditing public companies’ financial statements.<sup>148</sup> The United States Supreme Court described the background of this function as follows:

Corporate financial statements are one of the primary sources of information available to guide the decisions of the investing public. In an effort to control the accuracy of the financial data available to investors in the securities markets, various provisions of the federal securities laws require publicly held corporations to file their financial statements with the Securities and Exchange Commission. Commission regulations stipulate that these financial reports must be audited by an independent certified public accountant in accordance with generally accepted auditing standards. By examining the corporation’s books and records, the independent auditor determines whether the financial reports of the corporation have been prepared in accordance with generally accepted accounting principles. The auditor then issues an opinion as to whether the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for

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<sup>147</sup> BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK – ACCOUNTANTS AND AUDITORS, <http://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm> (last visited Mar. 21, 2015).

<sup>148</sup> CTR. FOR AUDIT QUALITY, IN-DEPTH GUIDE TO PUBLIC COMPANY AUDITING: THE FINANCIAL STATEMENT AUDIT, May 2011, at 3, *available at* [https://www.pwc.com/en\\_US/us/audit-assurance-services/assets/in-depth-guide-to-public-company-auditing.pdf](https://www.pwc.com/en_US/us/audit-assurance-services/assets/in-depth-guide-to-public-company-auditing.pdf) (“An independent financial statement audit is conducted by a registered public accounting firm. It includes examining, on a test basis, evidence supporting the amounts and disclosures in the company’s financial statements, an assessment of the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation to form an opinion on whether the financial statements taken as a whole are free of material misstatement.”).

the relevant period.<sup>149</sup>

The Supreme Court goes on to describe the accountant’s need for total independence in fulfilling this function as follows:

By certifying the public reports that collectively depict a corporation’s financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation’s creditors and stockholders, as well as to the investing public. This “public watchdog” function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.<sup>150</sup>

This “remains the *raison d’être* of the legal requirement that public companies be audited. If the auditors are not willing to maintain total independence from the client at all times, . . . there is no reason to have the audit at all.”<sup>151</sup>

For more than a century, accountants were largely, though not entirely, self-regulated.<sup>152</sup>

Following major scandals that rocked financial markets at the turn of the twenty-first century, that began to change, culminating in enactment of the Sarbanes-Oxley Act of 2002 (SOX).<sup>153</sup>

SOX was designed to enhance the reliability of financial reporting and to improve audit quality. . . . SOX forged a new era for the US audit profession by ending over 100 years of self-regulation and establishing independent oversight of public company audits by the Public Company Accounting Oversight Board (PCAOB). SOX strengthened corporate governance, shifting responsibility for the external auditor relationship away from corporate management to independent audit

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<sup>149</sup> *United States v. Arthur Young & Co.*, 465 U.S. 805, 810-11 (1984).

<sup>150</sup> *Id.* at 817-18 (emphasis in original).

<sup>151</sup> Richard L. Kaplan, *The Mother of All Conflicts: Auditors and Their Clients*, ILL. PUB. L. AND LEGAL THEORY RES. PAPERS SERIES 363, 367 (2004).

<sup>152</sup> John R. Evans, *The SEC, the Accounting Profession, and Self-Regulation*, Distinguished Speaker Series Address at the University of Kentucky (Feb. 28, 1979) (transcript available at <https://www.sec.gov/news/speech/1979/022879evans.pdf>) (“The Commission has authority, among other things, to establish accounting requirements, to deal with evolving accounting issues, and to ensure that those who audit financial statements of public companies are independent. During its early years the Commission considered undertaking the establishment of a uniform system of accounting standards, but determined in 1938 that the primary responsibility for accounting principles should remain in the private sector with those who practice the accounting profession.”).

<sup>153</sup> Pub. L. 107-204, 116 Stat. 745. SOX is also known as the Public Company Accounting Reform and Investor Protection Act of 2002.



committees. It instituted whistleblower programs, CEO and CFO certification requirements and stricter criminal penalties for wrongdoing, including lying to the auditor. These measures and others were geared toward improving the reliability of corporate financial reporting.<sup>154</sup>

The implementation of Sarbanes-Oxley, ironically, suffered a severe setback due to an undisclosed conflict of interest. Specifically, William Webster, selected to head the newly created PCAOB, resigned after reports surfaced that Webster had been the head of the audit committee of U.S. Technologies, a company whose accounting had come under question.<sup>155</sup> Harvey Pitt, head of the Securities Exchange Commission, also resigned because he had failed to tell fellow Commissioners and the Bush Administration about Webster's role on U.S. Technologies' audit committee.<sup>156</sup> As one commentator noted respecting the resignations, "[t]here is a new climate in Washington. Even the appearance of impropriety can do in a career."<sup>157</sup>

SOX amends Section 10A of the Securities Exchange Act of 1934 to prohibit auditors from providing non-auditing services to an issuer contemporaneously with the audit, subject to certain exceptions,<sup>158</sup> and to address conflicts of interest resulting from certain cross-employment relationships.<sup>159</sup> SOX also creates and charges the PCAOB<sup>160</sup> to "establish or adopt, or both, by

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<sup>154</sup> Ernst & Young LLP, *The Sarbanes-Oxley Act at 10: Enhancing the Reliability of Financial Reporting and Audit Quality at Preface* (2012), [http://www.ey.com/Publication/vwLUAssets/The\\_Sarbanes-Oxley\\_Act\\_at\\_10\\_-\\_Enhancing\\_the\\_reliability\\_of\\_financial\\_reporting\\_and\\_audit\\_quality/\\$FILE/JJ0003.pdf](http://www.ey.com/Publication/vwLUAssets/The_Sarbanes-Oxley_Act_at_10_-_Enhancing_the_reliability_of_financial_reporting_and_audit_quality/$FILE/JJ0003.pdf).

<sup>155</sup> Jane Ulick, *Webster Calls it Quits*, CNN Money, Nov. 13, 2002, available at [http://money.cnn.com/2002/11/12/news/webster\\_resigns\\_a/](http://money.cnn.com/2002/11/12/news/webster_resigns_a/).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (quoting Greg Valliere).

<sup>158</sup> 15 U.S.C. § 78j-1(g). Among the restricted non-audit services are: "(1) bookkeeping or other services related to the accounting records or financial statements of the audit client; (2) financial information systems design and implementation; (3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports; (4) actuarial services; (5) internal audit outsourcing services; (6) management functions or human resources; (7) broker or dealer, investment adviser, or investment banking services; (8) legal services and expert services unrelated to the audit; and (9) any other service that the Board determines, by regulation, is impermissible." *Id.*

<sup>159</sup> 15 U.S.C. § 78j-1(l) (making it "unlawful for a registered public accounting firm to perform for an issuer any audit service required by this title, if a chief executive officer, controller, chief financial officer, chief

rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers.”<sup>161</sup> Under PCAOB Rule 3520: “A registered public accounting firm and its associated persons must be independent of the firm’s audit client throughout the audit and professional engagement period.”<sup>162</sup> Subsequent rules state that a registered public accounting firm is not independent of its audit client if the firm or an affiliate provides contingency fee-compensated services to an audit client<sup>163</sup> or certain tax services<sup>164</sup> to the audit client or its financial oversight employees or their family members during the audit and professional engagement period.<sup>165</sup>

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accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and participated in any capacity in the audit of that issuer during the 1-year period preceding the date of the initiation of the audit”).

<sup>160</sup> 15 U.S.C. § 7211(a) (“There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports.”).

<sup>161</sup> 15 U.S.C. § 7211(c)(2).

<sup>162</sup> PCAOB R. 3520 (2014).

<sup>163</sup> *Id.* R. 3521 (“A registered public accounting firm is not independent of its audit client if the firm, or any affiliate of the firm, during the audit and professional engagement period, provides any service or product to the audit client for a contingent fee or a commission, or receives from the audit client, directly or indirectly, a contingent fee or commission.”).

<sup>164</sup> *Id.* R. 3522 (“A registered public accounting firm is not independent of its audit client if the firm, or any affiliate of the firm, during the audit and professional engagement period, provides any non-audit service to the audit client related to marketing, planning, or opining in favor of the tax treatment of, a transaction (a) Confidential Transactions - that is a confidential transaction; or (b) Aggressive Tax Position Transactions - that was initially recommended, directly or indirectly, by the registered public accounting firm and a significant purpose of which is tax avoidance, unless the proposed tax treatment is at least more likely than not to be allowable under applicable tax laws.”).

<sup>165</sup> *Id.* R. 3523 (“A registered public accounting firm is not independent of an issuer audit client if the firm, or any affiliate of the firm, during the professional engagement period provides any tax service to a person in a financial reporting oversight role at the issuer audit client, or an immediate family member of such person, unless - (a) the person is in a financial reporting oversight role at the issuer audit client only because he or she serves as a member of the board of directors or similar management or governing body of the audit client; (b) the person is in a financial reporting oversight role at the issuer audit client only because of the person's relationship to an affiliate of the entity being audited - (1) whose financial statements are not material to the consolidated financial statements of the entity being audited; or (2) whose financial statements are audited by an auditor other than the firm or an associated person of the firm; or (c) the person was not in a financial reporting oversight role at the issuer audit client before a hiring, promotion, or other change in employment event and the tax services are - (1) provided pursuant to an engagement in process before the hiring, promotion, or other change in employment event; and (2) completed on or before 180 days after the hiring or promotion event.”).

Similarly, the American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct, adopted by many state accounting organizations, provides: "A member should maintain objectivity and be *free of conflicts of interest* in discharging professional responsibilities. A member in public practice should be *independent in fact and appearance when providing auditing* and other attestation services."<sup>166</sup> The AICPA Code, moreover, defines "public practice" as "the performance of professional services for a client by a member or member's firm."<sup>167</sup>

So how would the accounting rules treat a school's reporting of its crime statistics under the Clery Act? Clearly, these statistics are made available to guide students and their parents in college selection.<sup>168</sup> As such, Clery Act statistics are analogous to corporate financial statements, which are "one of the primary sources of information available to guide the decisions of the investing public."<sup>169</sup> If that is the case, then under the accounting rules, the accountant must "maintain total independence from the client at all times" and have "complete fidelity to the public trust."<sup>170</sup> Moreover, given that this function would likely constitute auditing as part of "public practice," the accountant would have to be "independent in fact and appearance" under accounting ethics rules.<sup>171</sup>

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<sup>166</sup> AICPA Code of Professional Responsibility Preface 0.300.050.01 (effective through Dec. 15, 2014) (emphasis added).

<sup>167</sup> *Id.* 0.0400.42.

<sup>168</sup> See Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 71 (2002) (stating that one purpose behind Clery Act reporting is "for prospective students, their parents, and employees to be informed as to campus safety and security issues when making enrollment or employment decisions").

<sup>169</sup> *United States v. Arthur Young & Co.*, 465 U.S. 805, 810-11 (1984).

<sup>170</sup> *Id.* at 818.

<sup>171</sup> AICPA CODE OF PROF'L CONDUCT Preface 0.300.050.01 (effective through Dec. 15, 2014) (emphasis added).

### C. Psychology

“Psychologists study cognitive, emotional, and social processes and human behavior by observing, interpreting, and recording how people relate to one another and their environments.”<sup>172</sup> Perhaps most relevant here is the work of counseling psychologists, who “advise people on how to deal with problems.”<sup>173</sup>

The American Psychological Association’s ethics rules prohibit conflicts of interest in several circumstances:

Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation.<sup>174</sup>

The American Association for Marriage and Family Therapy imposes similar restrictions:

“Marriage and family therapists do not provide services that create a conflict of interest that may impair work performance or clinical judgment.”<sup>175</sup>

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<sup>172</sup> BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK – PSYCHOLOGISTS, <http://www.bls.gov/ooh/life-physical-and-social-science/psychologists.htm> (last visited Mar. 21, 2015).

<sup>173</sup> BUREAU OF LABOR STAT., UNITED STATES DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK – WHAT PSYCHOLOGISTS DO, <http://www.bls.gov/ooh/life-physical-and-social-science/psychologists.htm#tab-2> (last visited Mar. 21, 2015).

<sup>174</sup> AM. PSYCH. ASS’N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Rule 3.06 (2010), *available at* <http://www.apa.org/ethics/code/principles.pdf>; *see also* Rule 3.05(a) (“A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person. A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist’s objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.”).

<sup>175</sup> AM. ASS’N FOR MARRIAGE AND FAMILY THERAPY (AAMFT), REVISED AAMFT CODE OF ETHICS, Standard 3.4 (rev. 2015), *available at* [https://www.aamft.org/iMIS15/AAMFT/Content/legal\\_ethics/code\\_of\\_ethics.aspx](https://www.aamft.org/iMIS15/AAMFT/Content/legal_ethics/code_of_ethics.aspx).

These ethics rules would likely prohibit a therapist from counseling both a rapist and his or her victim. The rules probably also would extend to two different therapists at the same practice, not only because objectivity, competence, or effectiveness might be compromised, but also because the victim might run into the perpetrator while coming to the office for counseling, thus exposing the victim “to harm or exploitation.”<sup>176</sup>

Another potential conflict of interest under the psychological ethical rules arises because higher education institutions employ people who function as therapists. As such, the employer may attempt to influence psychiatric care in a manner detrimental to the patient and thus violate psychological ethical standards. A University of Oregon (“UO”) therapist reported an example of this conflict of interest in a Letter of Concern:

In my role as a Senior Staff Therapist . . . , I have normally been supported to practice standard care for my clients (our students) with the freedom to follow all ethical guidelines; my constitutional rights as a clinician/employee who works for a State entity; and all State regulatory laws. However, things shifted when working with a student for whom litigation against the University was anticipated. I was told to provide non-standard care for this student which went against my ethical and professional standards. When I tried to seek appropriate and unbiased information as of how to best respond clinically for the student, I was scolded and my job was threatened. . . . Needless to say, I was disappointed with this reaction, especially by specific individuals in Senior Leadership capacities, along with UO Legal Counsel, who began to look out for the “the system” and their loyalty to that system . . . and neglected the very client/student we were supposed to be supporting.<sup>177</sup>

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<sup>176</sup> See text accompanying *supra* note 174.

<sup>177</sup> Letter of Concern from Jennifer Morlok and Karen Stokes to All, at 1 (undated), *available at* <http://www.scribd.com/doc/255145466/Letter-of-Concern-University-of-Oregon>. Providing non-standard care to a patient when the therapist believes standard care is appropriate violates Ethical Standard 3.04. See AM. PSYCH. ASS’N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT [APA ETHICAL PRINCIPLES], Standard 3.04 (2010), *available at* <http://www.apa.org/ethics/code/> (“Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.”). The therapist appears to have written the Letter of Concern under Ethical Standards 1.03 and 1.05. Standard 1.03 provides: “If the demands of an organization with which psychologists are affiliated or for whom they are working are in conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code.” Standard 1.05 provides: “If an apparent ethical violation has substantially harmed or is likely to substantially harm a person or organization . . . , psychologists take further action appropriate to the situation. Such action might include referral to

The Letter of Concern also revealed that “the client’s clinical records were accessed without the client’s permission or consent and without proper authorization prior to any litigation occurring,”<sup>178</sup> which appears to constitute another ethical violation under the rules governing psychologists.<sup>179</sup> Additionally, the Letter of Concern noted that UO “relies on the UO Legal Counsel and . . . Senior Leadership to fulfill ethical and professional requirements,”<sup>180</sup> which is a questionable practice given the attorney’s duty was to protect UO against liability from the student UO was counseling.<sup>181</sup>

While the student’s lawsuit has not been resolved in the courts, UO eventually did expel all three of the accused for sexual misconduct.<sup>182</sup> After that, UO filed a counterclaim in the student’s lawsuit seeking attorneys’ fees and accusing the plaintiff’s attorneys of filing “a lawsuit with unfounded allegations in an attempt to damage a good man’s reputation, curry favor and gain traction in the media.”<sup>183</sup> UO subsequently withdrew the counterclaim under pressure

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state or national committees on professional ethics, to state licensing boards or to the appropriate institutional authorities.”)

<sup>178</sup> Letter of Concern, *supra* note 177, at 1.

<sup>179</sup> APA ETHICAL PRINCIPLES, *supra* note 177, at Standard 4.05(b) (“Psychologists disclose confidential information without the consent of the individual *only as mandated by law*, or where permitted by law *for a valid purpose such as to* (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.” (emphasis added).)

<sup>180</sup> Letter of Concern, *supra* note 177, at 2.

<sup>181</sup> Here, the lawyers were charged with ensuring counseling and testing center compliance with the ethical rules governing it while simultaneously representing UO in potential litigation where the center’s strict compliance with those ethical rules would damage UO’s ability to defend the case. To compound matters, the Letter of Concern states that the therapist was informed “under no uncertain terms” was she to seek “outside legal counsel” “even though [she] was clear of [her] concern regarding the bias/conflict of interest present toward this client.” *Id.* at 1.

<sup>182</sup> Tyler Kingkade, *Oregon Finds 3 Basketball Players Guilty of Sexual Assault, Will Remove Them from Campus*, HUFFINGTON POST, June 23, 2014, available at [http://www.huffingtonpost.com/2014/06/23/oregon-sexual-assault-basketball-players\\_n\\_5522915.html](http://www.huffingtonpost.com/2014/06/23/oregon-sexual-assault-basketball-players_n_5522915.html) (“The University of Oregon found three former basketball players responsible for sexual misconduct and will remove them from campus for up to 10 years.”).

<sup>183</sup> Defendants’ Answer, Affirmative Defenses, and Counterclaim ¶ 104, *Jane Doe v. Univ. of Ore.*, No. 6:15-cv-00042-MC (D. Ore. Feb. 9, 2015). Attached to the Defendants’ Answer, Affirmative Defenses, and Counterclaim was a declaration from the mother of one of the students expelled for sexual misconduct. *Id.* at Exhibit A.

resulting from a petition from students, alumni, and faculty to “stop suing rape survivors,” with the President hoping to “get away from this distraction” and claiming that he was “told it’s typical when you respond” to file such a counterclaim.<sup>184</sup> The Letter of Concern may have been prescient in noting that had UO followed “the proper professional and ethical practices . . . , it actually would have reduced the university’s liability as a whole and everyone involved would have been better served.”<sup>185</sup>

#### **D. Medicine**

“Physicians and surgeons diagnose and treat injuries or illnesses.”<sup>186</sup> In this role, physicians and surgeons may face conflicts of interest. American Medical Association (AMA) Code of Medical Ethics Opinion 10.015 makes clear, however, that the treatment of a patient is “fundamentally a moral activity that arises from the imperative to care for patients and alleviate suffering” with the patient’s best interests being “paramount.”<sup>187</sup> AMA Code of Medical Ethics Opinion 8.03 addresses financial conflicts of interest as follows:

Under no circumstances may physicians place their own financial interests above the welfare of their patients. The primary objective of the medical profession is to render service to humanity; reward or financial gain is a subordinate consideration. For a physician to unnecessarily hospitalize a patient, prescribe a drug, or conduct diagnostic tests for the physician’s financial benefit is unethical. If a conflict develops between the physician’s financial interest and the physician’s responsibilities to the patient, the conflict must be resolved to the patient’s benefit.<sup>188</sup>

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<sup>184</sup> Charles Huckabee, *U. of Oregon Amends Its Response to Sexual-Assault Lawsuit*, CHRON. OF HIGHER EDUC., Feb. 27, 2015, available at <http://chronicle.com/blogs/ticker/u-of-oregon-amends-its-response-to-sexual-assault-lawsuit/94749>.

<sup>185</sup> Letter of Concern, *supra* note 177, at 2.

<sup>186</sup> BUREAU OF LABOR STAT., U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK – PHYSICIANS AND SURGEONS, <http://www.bls.gov/ooh/healthcare/physicians-and-surgeons.htm> (last visited Mar. 21, 2015).

<sup>187</sup> AM. MED. ASS’N, CODE OF MED. ETHICS Opinion 10.015 (2001), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion10015.page?>.

<sup>188</sup> *Id.* Opinion 8.03 (rev. 1994), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion803.page?>; see also *id.* Principle of Medical Ethics VIII (“A physician shall, while caring for a patient, regard responsibility to the patient as paramount.”).

The AMA Code of Medical Ethics also address conflicts of interest related to biomedical research,<sup>189</sup> clinical trials,<sup>190</sup> and industry gifts to physicians.<sup>191</sup> Code of Medical Ethics Opinion 8.031 does not prohibit conflicts of interest in biomedical research, but acknowledges that “[a]voidance of real or perceived conflicts of interest in clinical research is imperative if the

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<sup>189</sup> See *id.* Opinion 8.031 (rev. 1999), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8031.page> (“Avoidance of real or perceived conflicts of interest in clinical research is imperative if the medical community is to ensure objectivity and maintain individual and institutional integrity. All medical centers should develop specific guidelines for their clinical staff on conflicts of interest. These guidelines should include the following rules: . . . (3) Clinical investigators should disclose any material ties to companies whose products they are investigating, including financial ties, participation in educational activities supported by the companies, participation in other research projects funded by the companies, consulting arrangements, and any other ties. The disclosures should be made in writing to the medical center where the research is conducted, organizations that are funding the research, and journals that publish the results of the research. An explanatory statement that discloses conflicts of interest should accompany all published research.”).

<sup>190</sup> See *id.* Opinion 8.0315 (2001), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion80315.page> (“Physicians should be mindful of the conflicting roles of investigator and clinician and of the financial conflicts of interest that arise from incentives to conduct trials and to recruit subjects. In particular, physicians involved in clinical research should heed the following guidelines: . . . (2) Physicians should be familiar with the ethics of research and should agree to participate in trials only if they are satisfied . . . that the research does not impose undue risks upon research subjects, and that the research conforms to government regulations. (3) When a physician has treated or continues to treat a patient who is eligible to enroll as a subject in a clinical trial that the physician is conducting, the informed consent process must differentiate between the physician’s roles as clinician and investigator. This is best achieved when someone other than the treating physician obtains the participant’s informed consent to participate in the trial. This individual should be protected from the pressures of financial incentives, as described in the following section. . . . (6) The nature and source of funding and financial incentives offered to the investigators must be disclosed to a potential participant as part of the informed consent process. Disclosure to participants also should include information on uncertainties that may exist regarding funding of treatment for possible complications that may arise during the course of the trial. Physicians should ensure that such disclosure is included in any written informed consent. . . .”).

<sup>191</sup> See *id.* Opinion 8.061 (2014), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8061.page> (“Gifts to physicians from industry create conditions that carry the risk of subtly biasing—or being perceived to bias—professional judgment in the care of patients. To preserve the trust that is fundamental to the patient-physician relationship and public confidence in the profession, physicians should: (a) Decline cash gifts in any amount from an entity that has a direct interest in physicians’ treatment recommendations. (b) Decline any gifts for which reciprocity is expected or implied. (c) Accept an in-kind gift for the physician’s practice only when the gift: (i) will directly benefit patients, including patient education; and (ii) is of minimal value. (d) Academic institutions and residency and fellowship programs may accept special funding on behalf of trainees to support medical students’, residents’, and fellows’ participation in professional meetings, including educational meetings, provided: (i) the program identifies recipients based on independent institutional criteria; and (ii) funds are distributed to recipients without specific attribution to sponsors.”).



medical community is to ensure objectivity and maintain individual and institutional integrity.”<sup>192</sup>

The AMA’s Code of Medical Ethics, furthermore, places an affirmative duty on physicians to act to prevent, identify, and treat violence and abuse, including “treat[ing] the immediate symptoms and sequelae of violence and abuse” and “reporting suspicion of violence and abuse” when legally mandated.<sup>193</sup> Therefore, treatment of a rape victim and administration of a rape test by a campus medical facility, as well as reporting an alleged rape to law enforcement officials, clearly would be allowable, and indeed encouraged, under AMA rules. However, where the physician has a stake in the outcome of the treatment, such treatment would be prohibited. An extreme example would involve a surgeon operating on a patient who knew information that, if revealed, would damage the surgeon’s reputation. Likewise, a physician examining an alleged victim for evidence of a rape the physician does not wish to see reported would likewise be prohibited.

## **E. Engineering**

Engineering, which involves the design, building, and use of engines, machines, and structures, has numerous disciplines and five major societies.<sup>194</sup> One of the five, the National Society of Professional Engineers (NSPE), cuts across all disciplines<sup>195</sup> and helps establish

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<sup>192</sup> *Id.* Opinion 8.031, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8031.page>.

<sup>193</sup> *Id.* Opinion 2.02 (2008).

<sup>194</sup> Davis & Johnston, *supra* note 11, at 337-38 (American Society of Civil Engineers, American Society of Mechanical Engineers, Institute of Electrical and Electronic Engineers, American Institute of Chemical Engineers, and National Society of Professional Engineers).

<sup>195</sup> NSPE, <http://www.nspe.org/> (last visited Mar. 21, 2015).

standards for licensing Professional Engineers.<sup>196</sup> Additionally, ABET, Inc., which focuses on engineering-related education program accreditation, sets professional ethical principles and canons.<sup>197</sup>

According to the NSPE, “the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare.”<sup>198</sup> The NSPE Code of Ethics for Engineers addresses conflicts of interest as follows:

- Engineers shall act for each employer or client as faithful agents or trustees.
- a. Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.
  - b. Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.
  - c. Engineers shall not solicit or accept financial or other valuable consideration, directly or indirectly, from outside agents in connection with the work for which they are responsible.
  - d. Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.
  - e. Engineers shall not solicit or accept a contract from a governmental body on which a principal or officer of their organization serves as a member.<sup>199</sup>

The focus of the NSPE rule is on disclosure with one exception: soliciting or accepting consideration from outside agents in connection with the work for which they are responsible, which is simply prohibited.

ABET’s Fundamental Canon 4 states: “Engineers shall act in professional matters for

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<sup>196</sup> *NSPE Strategic Plan*, NSPE, <http://www.nspe.org/membership/nspe-who-we-are-what-we-do/nspe-strategic-plan> (last visited Mar. 21, 2015).

<sup>197</sup> ABET, Inc., <http://www.abet.org/> (last visited Mar. 21, 2015).

<sup>198</sup> NSPE, CODE OF ETHICS FOR ENGINEERS, Preamble, available at <http://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/Code-2007-July.pdf>.

<sup>199</sup> *Id.* R. 4.

each employer or client as faithful agents or trustees, and shall avoid conflicts of interest.”<sup>200</sup> In contrast to four of the NSPE sub-rules, the ABET Suggested Guidelines associated with Canon 4 do not allow disclosure to cure a conflict of interest:

4. Engineers shall act in professional matters for each employer or client as faithful agents or trustees, and shall avoid conflicts of interest.
  - a. Engineers shall avoid all known conflicts of interest with their employers or clients and shall promptly inform their employers or clients of any business association, interests, or circumstances which could influence their judgment or the quality of their services.
  - b. Engineers shall not knowingly undertake any assignments which would knowingly create a potential conflict of interest between themselves and their clients or their employers.
  - c. Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, nor for services pertaining to the same project, unless the circumstances are fully disclosed to, and agreed to, by all interested parties.
  - d. Engineers shall not solicit nor accept financial or other valuable considerations, including free engineering designs, from material or equipment suppliers for specifying their products.
  - e. Engineers shall not solicit nor accept gratuities, directly or indirectly, from contractors, their agents, or other parties dealing with their clients or employers in connection with work for which they are responsible.<sup>201</sup>

Finally, the Code of Ethics of the Institute of Electrical and Electronics Engineers (IEEE), which serves the electrical, electronic, and computing fields,<sup>202</sup> requires members “to avoid real *or perceived* conflicts of interest whenever possible, and to disclose them to affected parties when they do exist.”<sup>203</sup>

As one set of commentators has explained, for engineering, “conflict of interest is a threat to the profession’s usefulness (the reliability of its judgment) as well as to its honor and reputation. For most purposes, the best response to an actual or potential conflict of interest is to

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<sup>200</sup> ABET, CODE OF ETHICS OF ENGINEERS, Canon 4 (1977).

<sup>201</sup> ABET, SUGGESTED GUIDELINES FOR USE WITH THE FUNDAMENTAL CANONS OF ETHICS, Guideline 4, available at <https://engineering.purdue.edu/MSE/Academics/Undergrad/ethics.pdf>.

<sup>202</sup> IEEE, <http://www.ieee.org/> (last visited Mar. 22, 2015).

<sup>203</sup> IEEE, CODE OF ETHICS, R. 2, <http://www.ieee.org/about/corporate/governance/p7-8.html> (emphasis added).

avoid it as soon as one learns of it.”<sup>204</sup> To the extent analogous situations exist, it appears unlikely that an engineering firm could ethically take on two clients with diametrically opposed goals, such as the victim and accused in a sexual assault case. An engineering firm would also be ethically required to decline to report information that the public relied upon for its safety if that firm had an interest in minimizing the statistics. To the extent the engineering firm was required to report the information, disclosure of the conflict would be required.

## F. Architecture

The National Council of Architectural Registration Boards (NCARB) develops standards for the licensure and credentialing of architects by its member boards in each of the states and various U.S. territories.<sup>205</sup> Its rules of conduct are recommended for member boards with the authority to promulgate and enforce rules of conduct applicable to registered architects.<sup>206</sup> The NCARB Rules of Conduct 2014-2015 devote the entirety of Section 2 and the first sub-rule of Section 3 to conflicts of interest.<sup>207</sup> Each rule is followed by a commentary.<sup>208</sup> The rules address accepting compensation from more than one party on a project without disclosure,<sup>209</sup> disclosing financial interests that influence judgment,<sup>210</sup> not soliciting or accepting compensation from

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<sup>204</sup> Davis & Johnston, *supra* note 11, at 350.

<sup>205</sup> NCARB, RULES OF CONDUCT 2014-2015, [http://www.ncarb.org/Getting-an-Initial-License/~media/Files/PDF/Special-Paper/Rules\\_of\\_Conduct.pdf](http://www.ncarb.org/Getting-an-Initial-License/~media/Files/PDF/Special-Paper/Rules_of_Conduct.pdf).

<sup>206</sup> *See id.* Introduction (“These rules of conduct are published by NCARB as a recommended set of rules for Member Boards having the authority to promulgate and enforce rules of conduct applicable to their registrants.”).

<sup>207</sup> *Id.* R. 2.1-3.1.

<sup>208</sup> *See generally id.*

<sup>209</sup> *See id.* R. 2.1 (“An architect shall not accept compensation in connection with services from more than one party on a project (and never in connection with specifying or endorsing materials or equipment) unless the circumstances are fully disclosed to and agreed to (such disclosure and agreement to be in writing) by all interested parties.”).

<sup>210</sup> *See id.* R. 2.2 (“If an architect has any business association or direct or indirect financial interest which is substantial enough to influence his/her judgment in connection with the performance of professional services, the architect shall fully disclose in writing to his/her client or employer the nature of the business association or

suppliers,<sup>211</sup> impartiality in judging contract performance in a dispute,<sup>212</sup> and disclosing compensation or economic interests when making public statements.<sup>213</sup> Disclosure is the common remedy for conflicts of interest, except as to impartiality in judging contract disputes. This “rule recognizes that . . . the architect may appropriately decline to act in those two roles.”<sup>214</sup> The rule exists to govern “the customary construction industry relationship where the architect, though paid by the owner and owing the owner his/her loyalty, is nonetheless required” to decide if the builder has performed to the architect’s specifications.<sup>215</sup> In other words, the rule exists to promote expediency in construction, and all parties arguably consent to this rule in order to complete the project. However, some commentators view the rule as unforgiving:

[T]he rule is not satisfied if the architect merely believes himself or herself to be impartial; the architect must actually render an impartial decision. If the decision is obviously biased, the architect would be subject to discipline under the rule, even though the architect believed himself or herself to be impartial.<sup>216</sup>

The American Institute of Architects (AIA) also imposes a code of ethics, which is enforced against its members.<sup>217</sup> The AIA Code requires that “[m]embers should serve their clients competently and in a professional manner, and should exercise unprejudiced and unbiased judgment when performing all professional services.”<sup>218</sup> The AIA Code further requires that:

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financial interest, and if the client or employer objects to such association or financial interest, the architect will either terminate such association or interest or offer to give up the commission or employment.”).

<sup>211</sup> See *id.* R. 2.3 (“An architect shall not solicit or accept compensation from material or equipment suppliers in connection with specifying or endorsing their products. As used herein, ‘compensation’ shall not mean customary and reasonable business hospitality, entertainment, or product education.”).

<sup>212</sup> See *id.* R. 2.4 (“When acting as the interpreter of building contract documents and the judge of contract performance, an architect shall render decisions impartially, favoring neither party to the contract.”).

<sup>213</sup> See *id.* R. 3.1 (“An architect, making public statements on architectural questions, shall disclose when he/she is being compensated for making such statement or when he/she has an economic interest in the issue.”).

<sup>214</sup> *Id.* R. 2.4 Commentary.

<sup>215</sup> *Id.*

<sup>216</sup> Davis & Johnston, *supra* note 11, at 333.

<sup>217</sup> AIA, 2012 CODE OF ETHICS & PROF. CONDUCT, available at <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiap074122.pdf>.

<sup>218</sup> *Id.* Canon III.

A Member shall not render professional services if the Member's professional judgment could be affected by responsibilities to another project or person, or by the Member's own interests, unless all those who rely on the Member's judgment consent after full disclosure.<sup>219</sup>

The commentary to this rule states that the rule "is intended to embrace the full range of situations that may present a Member with a conflict" of interest.<sup>220</sup> The Ethical Standard immediately preceding this rule simplifies the requirement: "Members should avoid conflicts of interest in their professional practices and fully disclose all unavoidable conflicts as they arise."<sup>221</sup>

To the extent the situation is analogous, architecture ethical rules would probably not permit the architect to act as a judge in case where the architect had a stake in the outcome. Absent this situation, the ethical rules might permit the architect to act as judge in a case involving a victim and an accused, but any biased decision would subject the architect to discipline. The architecture rules would likely treat the reporting of statistics in a manner similar to the engineering rules.

## **V. Effect of Conflicts of Interest**

One problem with a conflict of interest is that it can prevent the decision-maker from recognizing the severity or even existence of the conflict. As former Evangelical Counsel for Financial Accountability President Dan Busby has observed:

We are not the best judges of our own conflicts of interest. . . . The principles embodied in Matthew 7 seem to apply to the difficulty with which we recognize

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<sup>219</sup> *Id.* R. 3.201.

<sup>220</sup> *Id.* R. 3.201 commentary.

<sup>221</sup> *Id.*, E.S. 3.2. The Preamble to the Code of Ethics describes the canons, ethical standards, and rules as follows: "Canons are broad principles of conduct. Ethical Standards (E.S.) are more specific goals toward which Members should aspire in professional performance and behavior. Rules of Conduct (Rule) are mandatory; violation of a Rule is grounds for disciplinary action by the Institute. Rules of Conduct, in some instances, implement more than one Canon or Ethical Standard." *Id.* Preamble.

our own conflict of interest. It's much easier to see the "speck" of conflict in the eye of another ... when all the time there is a "plank" in our own eye.<sup>222</sup>

In the view of some ethical systems designers:

There are no cure-alls for conflicts of interest, and people often underestimate the severity of bias caused by such conflicts. Professionals often insist that they can properly navigate their conflicts, but objectivity is sometimes just not humanly possible.<sup>223</sup>

Indeed, studies show that professionals view restrictions based on conflicts of interest for other professions as reasonable, but see those same restrictions as unreasonable when applied to their own profession.<sup>224</sup>

In some situations, education may play a role in reducing the negative effects of conflicts of interest.<sup>225</sup> However, some ethical systems designers still argue that they "should be ruthless in identifying conflicts of interest and finding ways to create or restructure rules, procedures, other controls, and incentives to minimize them."<sup>226</sup>

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<sup>222</sup> Dan Busby, *Handling Conflicts of Interest: Practical Approaches for Boards*, FOCUS ON ACCOUNTABILITY, available at <http://www.ecfa.org/Documents/HandlingConflictsOfInterest-Busby.pdf>.

<sup>223</sup> Daylian Cain & Jeffrey Kaplan, Conflicts of Interest, EthicalSystems.org, <http://ethicalsystems.org/content/conflicts-interest>.

<sup>224</sup> Zachariah Sharek, Robert E. Schoen & George Loewenstein, *Bias in the Evaluation of Conflict of Interest Policies*, 40 J.L. MED. & ETHICS 368 (2012); see also Christopher Shea, *Doctors, Conflict-of-Interest Rules and 'Motivational Bias'*, WALL ST. J., June 27, 2012, available at <http://blogs.wsj.com/ideas-market/2012/06/27/doctors-conflict-of-interest-rules-and-motivational-bias/> ("Doctors participating in clinical care at the University of Pittsburgh Medical Center tended to think those strictures [on financial planners] sounded pretty reasonable. However, when 'financial planners' was replaced by 'doctors,' and 'investment companies' by 'pharmaceutical companies,' the doctors started to raise objections — that the supposed conflicts were hypothetical, for example, and that no one's views about which drugs to prescribe could ever be swayed by a coffee mug. And investment managers surveyed by the researchers reacted similarly: The rules for doctors sounded fine to them, but the ones for investment professionals seemed petty and unnecessary.").

<sup>225</sup> See Elizabeth H. Gorman, *Professional Self-regulation in North America: The Cases of Law and Accounting*, 8 SOC. COMPASS 491, 498 (2014) ("In accounting, researchers have investigated whether ethics education raises students' objective scores on psychological scales of moral development. The limited evidence suggests that ethics modules in auditing courses do not improve students' moral reasoning abilities, but dedicated courses on ethics and professionalism do have positive effects on moral development" (internal citations omitted).); see also Marissa King et al., *Medical School Gift Restriction Policies and Physician Prescribing of Newly Marketed Psychotropic Medications: Difference-in-Differences Analysis*, 346 BRIT. MED. J. 1, 1 (2013), available at <http://www.bmj.com/content/346/bmj.f264> ("Exposure to a gift restriction policy during medical school was associated with reduced prescribing of two out of three newly introduced psychotropic medications.").

<sup>226</sup> Cain & Kaplan, *supra* note 223.

Even if a conflict of interest does not produce bias, it renders suspect the actor's motives or decisions: "There may be degrees of conflict, from a very serious offense . . . to one of less significance. . . . But, the effect is the same—others have ammunition to question your motives or decisions."<sup>227</sup> After surveying the conflict of interest rules of lawyers, certified public accountants, architects, and engineers, one set of commentators rendered the following conclusions:

The obvious point is that all four professions take conflict of interest in professional practice very seriously. . . .

All four professions treat conflict of interest situations as risk situations; bias, breach of confidentiality, fraud, and malpractice are dealt with separately. Conflicts of interest are understood to threaten the quality of the individual professional's judgment and, as a consequence, the well-being of the client or employer in question, the profession's usefulness to the public (depending on the specific circumstance), and the reputation of the profession as a whole. . . .

Each profession understands that conflict of interest is in part a threat to the trustworthiness (or reliability) of the profession as well as to judgments in specific cases. This is clear from the way in which the professions, each in a somewhat different way, address appearances. In general, members of these professions are supposed to avoid giving clients, employers, and the public even a plausible reason to suppose that they have an interest, relationship, or the like that might impair their objectivity (the reliability of their judgment). . . .

Because so many conflicts of interest are either prohibited outright, require disclosure and consent, or are hard to manage, avoidance is, all else being equal, the preferred technique for dealing with conflict of interest.<sup>228</sup>

## **VI. Lessons to Learn**

As the preceding case studies illustrate, some of America's best colleges and universities have mishandled sexual violence investigation and reporting, sometimes horribly, resulting in unnecessary harm to students and to their institutions' and institution employees' reputations.

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<sup>227</sup> Busby, *supra* note 222.

<sup>228</sup> Davis & Johnston, *supra* note 11, at 350-53.



We believe that this is due in large part to the lack of appreciation of a conflict of interest's impact on decision making, which is commonly recognized in virtually every other profession. We also believe that higher education institutions will continue to fail in their handling of sexual violence if they do not directly address these inherent conflicts. At a minimum, failing to address these conflicts of interest will support the beliefs of many that the decision-making process in a sexual violence case was biased and unfair. This concern provides the basis for the mandate from many professions to rid their members' actions of "the appearance of impropriety."

#### **A. Institutions Overestimate Their Ability to Respond**

Higher education institutions seek to present their administrators, faculty, and staff as caring and compassionate mentors and their programs and activities as student-focused. Berea College, for instance, promotes its student focus as follows:

Our faculty are well known for the interest they take in their students. From your adviser to your classroom professors, you'll find our faculty to be just as concerned about you and your success as they are about their own. . . . This is because at Berea professors are more than teachers. They are friends, mentors, and leaders—and they are committed to the success of students, in college as well as in life.<sup>229</sup>

Some higher education institutions even package their student focus in ethical terms. Indiana University's Office of Mentoring Services & Leadership Development describes itself as "serv[ing] students and the campus community through mentoring services and initiatives reflective of the highest ethical, professional, and best practice standards of the field."<sup>230</sup>

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<sup>229</sup> *Office of Admissions, Caring Faculty*, BERA C., <https://www.berea.edu/admissions/why-berea/caring-faculty/> (last visited Mar. 25, 2015).

<sup>230</sup> *Office of Mentoring Services & Leadership Development, Vision, Mission and Goals*, IND. U., <http://www.indiana.edu/~omslld/#vision> (last visited Mar. 24, 2015). *See also* University College, Faculty Mentoring, UNIV 1210, U. OF OKLA., [http://www.ou.edu/univcoll/courses\\_for\\_freshmen/faculty\\_mentoring.html](http://www.ou.edu/univcoll/courses_for_freshmen/faculty_mentoring.html) (last visited Mar. 24, 2015) ("Faculty mentors create nurturing and personalized university experiences for new students, thus easing the transition from high school to college and assisting in the retention and graduation of

Unfortunately, faculty and staff often have little to no direct experience and at best minimal training in working with victims of sexual violence. Their responses to a student report of sexual assault are unlikely to address the student's needs and expectations, particularly when the student is confused, hurting, scared, embarrassed, and/or traumatized. Thus, assuming an institution's administrator, faculty, or staff can actually manage these conflicts of interest, even the most caring administrator or faculty member's response may give rise to an allegation of misconduct.

### **B. Institutions Need to Reduce Conflicts in Sexual Violence Policies**

Given that conflicts of interest have produced such disastrous results, it would be wise for higher education institutions to minimize conflicts of interest when drafting, implementing, and enforcing sexual violence policies. Avoiding a conflict of interest begins with policy creation. To minimize conflicts of interest, sexual violence policies should be created with broad input from diverse sources, including, most importantly, the student population whose lives will be governed by the policy. A critical component of this process is achieving student buy-in concerning the policy itself – each student at the institution should view the policy as fair and agree to abide by its terms. Indeed, institutions should view the creation of a sexual assault policy as part of their educational mission; the practical lessons learned will serve students well in the workplace, a participatory democracy, and life. This would have additional substantial benefits for both students, who would have a clear understanding of the policy, and the institution, which would receive greater protection from liability. Each student should also have a clear understanding that he or she could be either an accuser or an accused under the policy and be encouraged to think about the policy from both perspectives.

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college students. . . . It gives the student a chance to become acquainted with someone who is personally interested in the student's well-being and who can assist with the complexities of university life.”).

Independent professionals should also review the policy from the students' perspective. The institution's law firm does not count as an independent professional: the law firm should review the policy, but that firm's job under the legal ethics rules is to protect the institution, not its students. Institution employees also should not be considered independent professionals. In the context of Clery Act reporting, an independent third party could handle the gathering of statistics and certify the results before the institution submits its report each October. In the event that is not possible, an independent audit of the report would be a good practice.

Someone other than an institution employee should investigate allegations of sexual assault for purposes of Clery Act and Title IX determinations. That could be accomplished through a student-run program, the hiring of an outside investigator, or use of an administrator from another school as part of a resource-sharing program. The same or similar approach could be used to ensure conflict-free adjudications of sexual assault allegations. In terms of addressing the effects of a sexual assault under Title IX, some third party advocacy service or organization working with the victim would help minimize conflicts of interest. Here, the advocate could help the victim obtain medical treatment and counseling, advise concerning school and legal options, and serve as a helper and sounding board to help the victim cope with the long-term trauma of sexual abuse.

Providing a similar advocate for the accused, by contrast, would be doing the accused a terrible disservice: it is almost universal advice among legal professionals that anyone accused of a crime should shut up, stay away from the accuser, and get a lawyer.<sup>231</sup> Inserting a non-attorney

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<sup>231</sup> Lauren Baldwin, *Falsely Accused of a Crime*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/resources/criminal-defense/defendants-rights/falsely-accused-a-crime.htm> (last visited Mar. 24, 2015); Abby Rogers, *Here's Everything You Should Do if You're Falsely Accused of a Crime*, BUSINESS INSIDER, Dec. 14, 2012, available at <http://www.businessinsider.com/how-to-handle-being-falsely-accused-2012-12>.

advocate for the accused into the process would potentially result in the accused compromising his or her Fifth Amendment and perhaps other rights without first obtaining the benefit of legal counsel.<sup>232</sup>

This is not to say that every school disciplinary hearing involving sexual violence requires the accused to have an attorney present: that is simply not the law and reasonably could be viewed as thwarting effective fact-finding. The determination concerning whether a person committed sexual assault is not a criminal determination, and treating it as such would have numerous disadvantages. First, the standard of proof involved would contradict the Department of Education's stance on adjudicating Title IX violations,<sup>233</sup> and thus put the institution's federal funding at risk. Second, the accused would be ill served by a school tribunal's finding that the student committed sexual violence "beyond a reasonable doubt," particularly if the accused chose to testify and possibly waive his or her privilege against self-incrimination. Third, such a policy would elevate the school sexual harassment burden of proof beyond that currently required for employment dismissals based on workplace sexual harassment claims and therefore subject the institution to potential liability based on the burden of proof and process alone. Certainly institutions are free to insert these requirements into their policies should they desire to do so, but these are not necessary components of a sexual assault policy seeking to avoid and minimize conflicts of interest. Indeed, one might argue that a heightened burden of proof and subjecting the victim to intense cross-examination by trained attorneys is a product of a conflict of interest bred by a desire to chill sexual violence allegations and artificially decrease the sexual violence incidents that the institution must ultimately report.

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<sup>232</sup> There is no legal requirement under Title IX to assist the accused; there, however, is a clear requirement under Title IX to assist the alleged victim.

<sup>233</sup> See Dear Colleague Letter, *supra* note 19, at 11 ("[P]reponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.")

Finally, the institution must assess blame and punishment should a student be found to violate the policy. But in this instance, if the institution simply follows the policies and procedures it set up and imposes any punishment recommended by a neutral decision-maker after conflict-free information-gathering and hearing processes, its risk of liability would be greatly minimized. This, therefore, is a simple conflict to manage.

## **VII. Conclusion**

Higher education institutions stand at a critical crossroads in addressing sexual assault on campus. If campus sexual assault is as pervasive as the U.S. Department of Justice claims, widespread policy failures exist on college campuses. Widespread failures often lead to widespread liability, and widespread liability for this failure could well bankrupt many institutions.

The case studies demonstrate that college administrators should view Clery Act and Title IX compliance as in their own best interest, and ultimately, the best interest of the institutions they serve. Certainly, Clery Act and Title IX compliance would serve the humanitarian and educational mission of their institutions. Moreover, the administrators in the case studies were exceptionally talented, capable, and accomplished, and in many cases their legacies and sterling reputations have been utterly destroyed. Many of them deeply regret the decisions they made, not only because of the consequences to themselves, but also because of the sexual assault victims they betrayed. In the words of one retired administrator from the case studies reported here: “I look back now and think, ‘[Damn], we could have really done something.’”<sup>234</sup>

Higher education institutions currently have a great deal of flexibility in how they comply

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<sup>234</sup> Canzano, Dec. 29, 2014, *supra* note 66.

with the Clery Act and Title IX, but policymakers now view that flexibility as being abused. Like the accounting profession, higher education institutions may lose the privilege of self-regulation. That would be unfortunate because, when freed from conflicts of interest, higher education institutions have the ability to create effective and fair policies suitable for their individual institutional needs and the needs of their students.