

The Ethics of High-Stakes Investigations

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Our Agenda

Foundation

Scenario 1

- Takeaways
- Q&A

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- Takeaways
- Q&A

Scenario 3

- Takeaways
- Q&A

Ethical Foundation & Disclaimer

- Often with the most difficult ethical issues, there are no absolutely right or wrong answers. However, the model rules of professional conduct serve as a framework for analyzing the issues within the context of your specific situation and professional and moral judgment. Today, we'll take you through some of the rules that we find come into play more often in our practices as lawyers for colleges and universities.
- Remember your state's own ethical requirements, opinions, and cases.
- The scenarios, names, characters, and incidents discussed in this webinar are fictitious. No identification with actual persons (living or deceased), places, and institutions, is intended or should be inferred.



Ethical Foundation

From the Preamble to the ABA Model Rules of Professional Conduct:

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, **many difficult issues of professional discretion can arise**. Such issues must be resolved through the **exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules**. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.





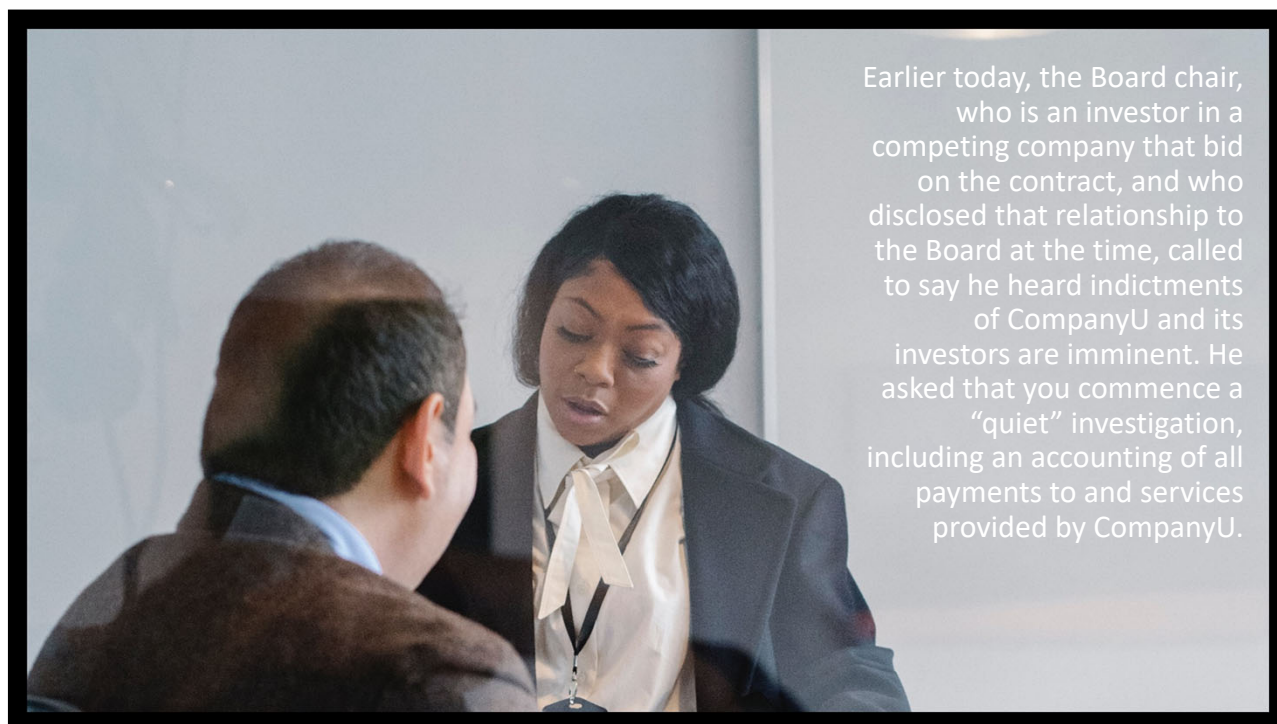
Scenario 1

As general counsel, you are the corporate secretary of the university. Under the university's by-laws, the secretary is an officer of the university corporation and as such, reports to the Board of Trustees; the general counsel is a university administrative officer and as such, reports to the university president.

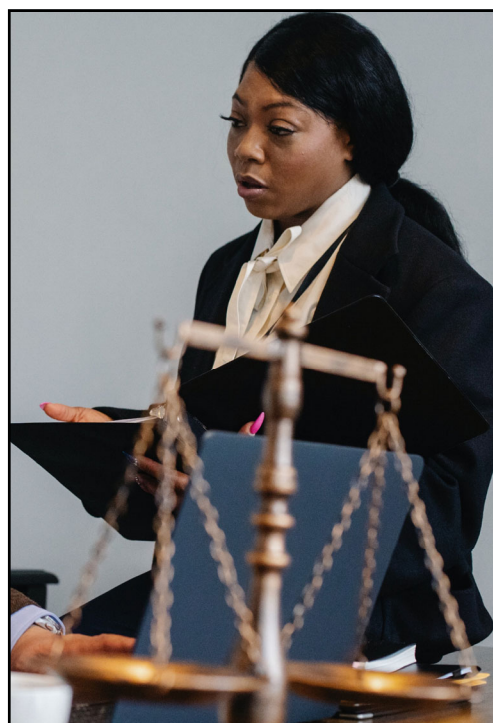
Two years ago, an attorney in your office reviewed and recommended approval of a very lucrative management services contract between the university and a company – CompanyU – owned and operated by a third party. The university Board subsequently approved the contract.

The university president's husband is an investor/part owner of another company that became the majority owner of CompanyU three weeks after the contract was signed. Yesterday, you received news that CompanyU is under investigation for tax fraud, and its investors are targets for conspiracy to commit tax fraud. You wonder if the university, and even the president, may become subjects in the investigation.

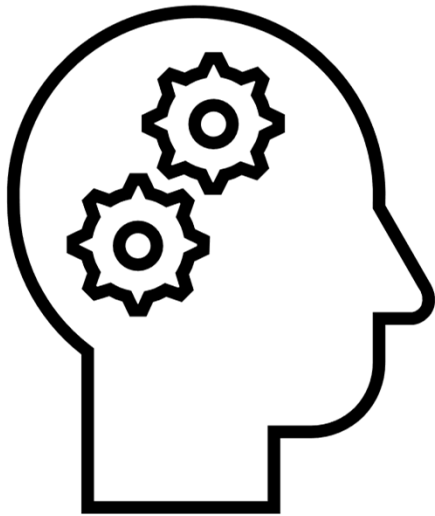




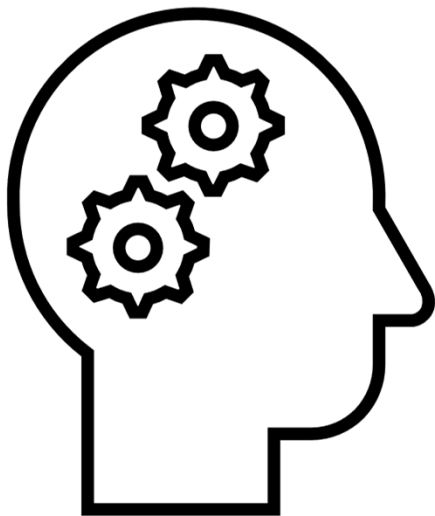
Earlier today, the Board chair, who is an investor in a competing company that bid on the contract, and who disclosed that relationship to the Board at the time, called to say he heard indictments of CompanyU and its investors are imminent. He asked that you commence a “quiet” investigation, including an accounting of all payments to and services provided by CompanyU.



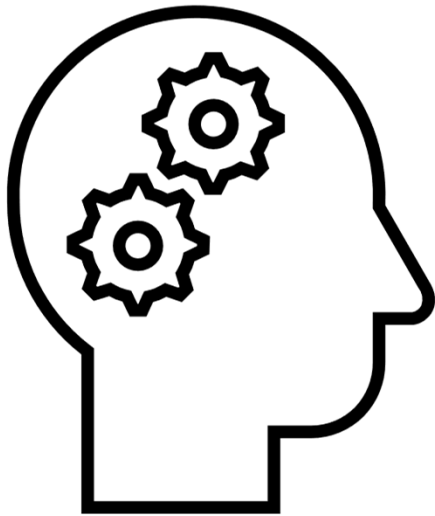
The Board chair has scheduled a legal matters review with the Board’s risk committee next week. After reminding you of your status as a corporate officer, he requests that for now, the president be kept out of the investigation until more about the matter is understood. He also requests that you oversee and manage the investigation and reveal it only to those on a need-to-know basis due to its sensitivity. Finally, he requests that information gathered in the investigation not be disclosed without Board authorization, especially if there is evidence that implicates the university or its employees.



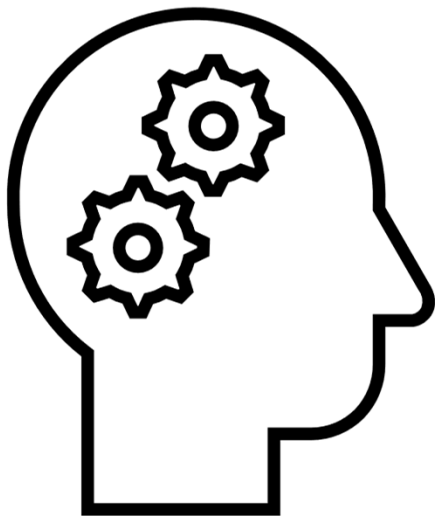
Can you personally conduct the investigation as requested by the Board chair – and *should you*, at least for now? What are your ethical obligations and considerations?



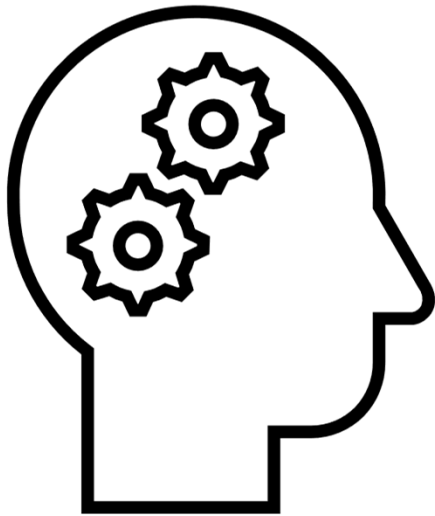
If you do not personally conduct the investigation, *can you/should you* retain the investigation in-house, given you must “oversee and manage” it, based on the Board chair’s request?



If asked, *can you/must* you honor the Board chair's confidentiality instructions? What are your obligations and considerations if the president asks about any recent communications regarding the CompanyU contract?



If you are subsequently successful in convincing the Board chair to refer the investigation to outside counsel, what role, if any, *can you/should* you play in the oversight and management of the investigation? What are your ethical obligations and considerations as you extricate you/your office from the investigation at that time?



For the last 10 years, you've enjoyed a close friendship with the former controller of the university. She left her position nine months ago to become controller at CompanyU. She calls to ask if you have time this week to discuss an "important personal matter." What do you do?

Key Takeaways

The Client

- Know who your client is, and make certain everyone who "needs to/should know", knows who your client is.
- If your client is an organization, know who speaks for the organization (and on what matters), especially in high stakes matters. As a general rule, this person(s) sets direction for your work.

Independent Professional Judgment/Conflicts

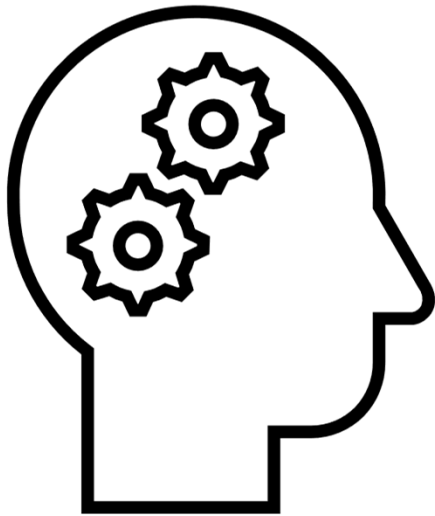
- Attorneys must exercise independent professional judgment, free of one's own competing interests or those of others, including other clients. If, based on the circumstances, you cannot effectively exercise such judgment, do not undertake/continue the work. You likely have a conflict.
- The "harsh reality" test is a good tool to analyze conflicts: If, with the benefit of hindsight, a disinterested attorney would look back and doubt the wisdom of your decision to undertake (or continue) representation based on what you knew at that time (including what might reasonably go wrong based on that knowledge), you should strongly question whether to undertake (or continue) representation.
- Employ the test each time there is a material change in the facts and circumstances of your matter.
- Friendships/close relationships can place you in awkward positions that may implicate the rules of professional conduct.

We Welcome Your Questions!

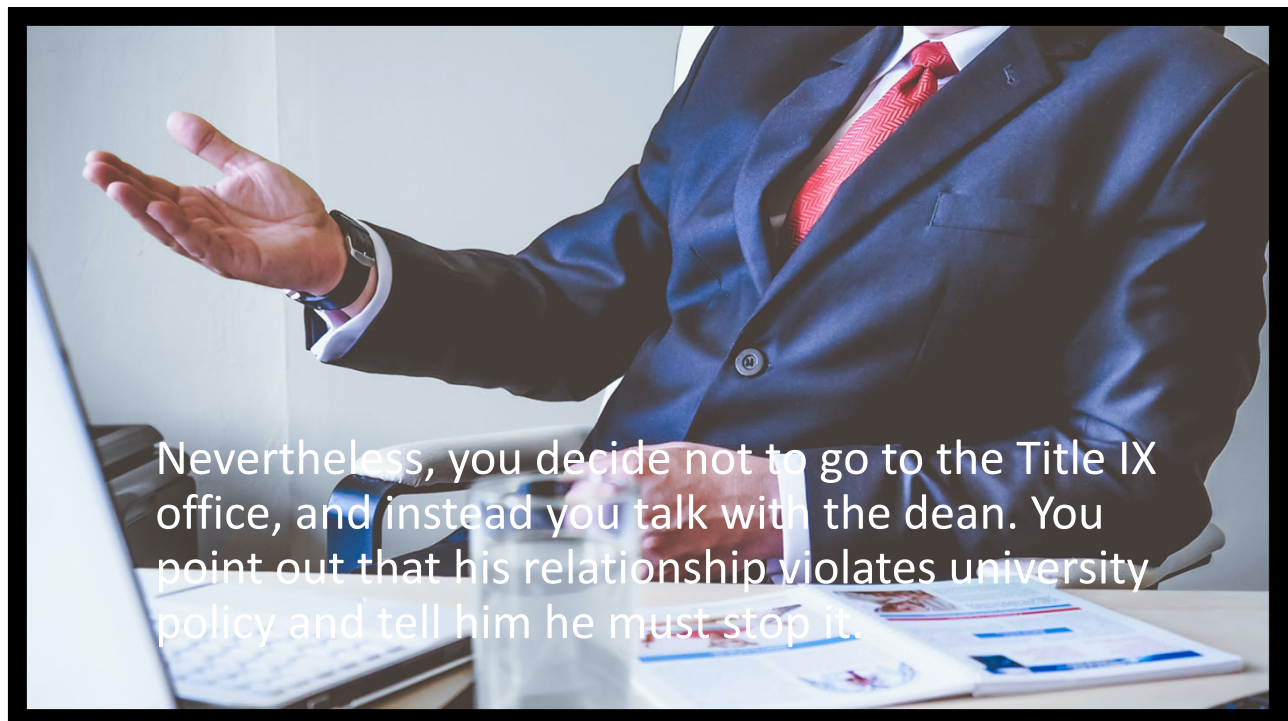


Scenario 2

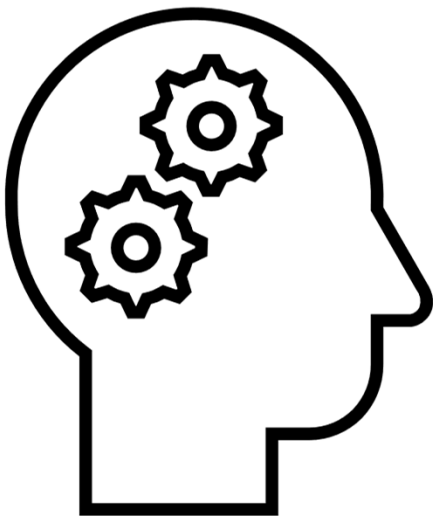
Just when you thought you could get to the backlog of contracts and policy revisions to review, the phone rings. It is the president telling you that she has received a report that one of the deans is having an intimate relationship with his student employee, which is prohibited under the school's policies. The president indicates that she does not want to send this to the TIX office, because it will "blow up" and the dean and his wife are close personal friends. She is concerned that it will ruin the marriage if an investigation is started. The president wants you to talk to the dean about the problems his improper relationship is causing.



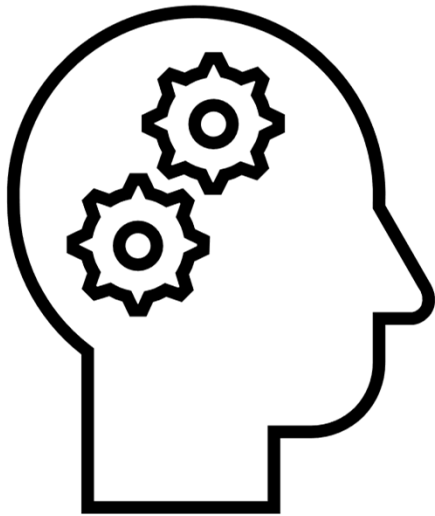
Is there a problem with your not going to the Title IX office and instead talking with the dean?



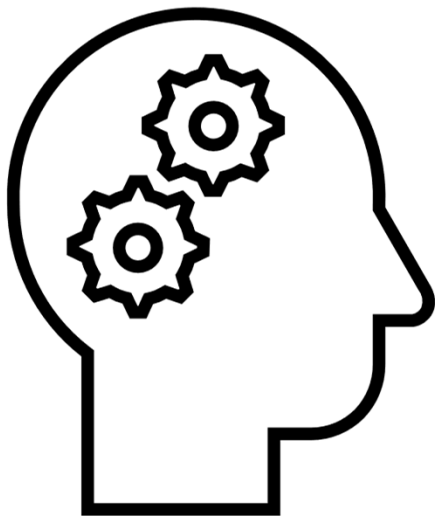
A week later, you learn through the grapevine that the relationship is still going on. Other employees are complaining that it is disruptive. You have also heard that it is coercive and the student employee is not looking well.



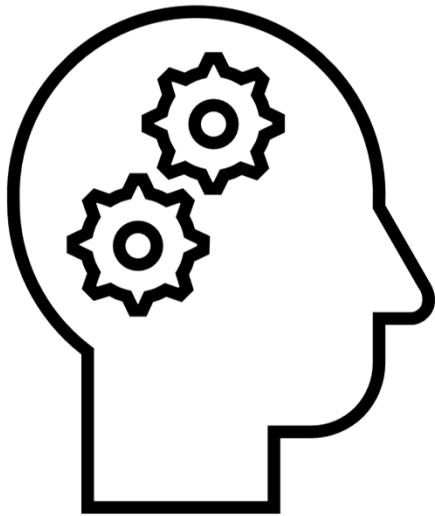
Should you inform the president? What do you do if the president reminds you that this is to be kept quiet, because the publicity will be bad for the university? In other words, the directive is to just leave this one alone.



Should you make a
report to the TIX office?



Should you speak with
the dean again?



Should you conduct your own fact gathering?

Key Takeaways

Who Speaks for the Client?

- You represent “the organization acting through its duly authorized constituents.” (Rule 1.13(a).)
- This will often be your chief executive, as the individual responsible for running the institution day to day. But it can also be the board, when matters arise at a level that would implicate the Board’s responsibilities. Factors to consider include:
 - Specific allocations of responsibility in your by-laws or articles of incorporation.
 - The gravity and scale of the matter.
 - Your lines of supervision and reporting: if you report jointly to the chief executive and the board, this can reasonably indicate an institutional decision both chief executive and board are, at the least, to be jointly informed of major legal issues.

Key Takeaways

Confidentiality and Privilege

- Whoever speaks for the organization in a particular situation generally has the authority to require you to keep something confidential within the organization.
- But this is limited by certain factors:
 - A matter being managed by the chief executive may rise to a level of significance that the board needs to be informed (and becomes, in a sense, a duly authorized constituent under 1.13(a)).
 - Where keeping something confidential would support a violation of a legal obligation to the institution or of law that might be imputed to the institution, and that is likely to result in substantial injury to the institution, you need to act in the best interests of the organization.
- Strategically, where you cannot conform to a directive from your supervisor to keep something confidential, consider whether you can convince that supervisor to make the necessary disclosure him or herself, in part based on these factors. At the least, be as transparent as possible, to reduce potential resentment.
- Like confidentiality within the organization, privilege belongs to the organization, not any individual.
- When consulting with individuals during an investigation or other matter, especially those who may be personally at risk due to improper behavior, provide an Upjohn warning to inform them clearly that you represent the institution, not them, and that the privilege of what they tell you will be controlled by the institution. See ABA Model Rule 1.13(f).



Key Takeaways

Interplay of Title IX and Ethical Obligations

- Title IX regulations require reporting allegations of sexual harassment known to certain individuals to the Title IX coordinator, and your institution's policies or state law may have broader reporting requirements.
- This means that under 113(b), keeping such an allegation confidential from the Title IX coordinator probably would represent a violation of law that could result in substantial injury to the institution. So your ethical obligation likely is *not* to maintain the confidentiality of the information, but rather to insure a proper report is made.
- Remember that parties to a Title IX matter have substantial procedural rights, particularly regarding the investigation process. It is critical that you do not take any actions that would compromise with those rights, such as engaging in conversations with witnesses or parties that could in any way interfere with the investigation.



We Welcome Your Questions!



Scenario 3

Kat Confident is the General Counsel and Secretary of the Board of Mindful University. A month ago, an associate legal counsel ("Associate") in Kat's office sought advice from Kat. In the course of working on a compliance matter with the facilities department, Associate comes across information creating a suspicion that the director of the facilities department has been embezzling funds from the university.





Associate followed the paper trail which raised even more suspicion. Associate then accessed archived files in the GC office and discovered that the facilities director had been disciplined two years ago for mismanaging funds and the director's VP had been directed to implement controls. Associate went to Kat for advice about what to do.

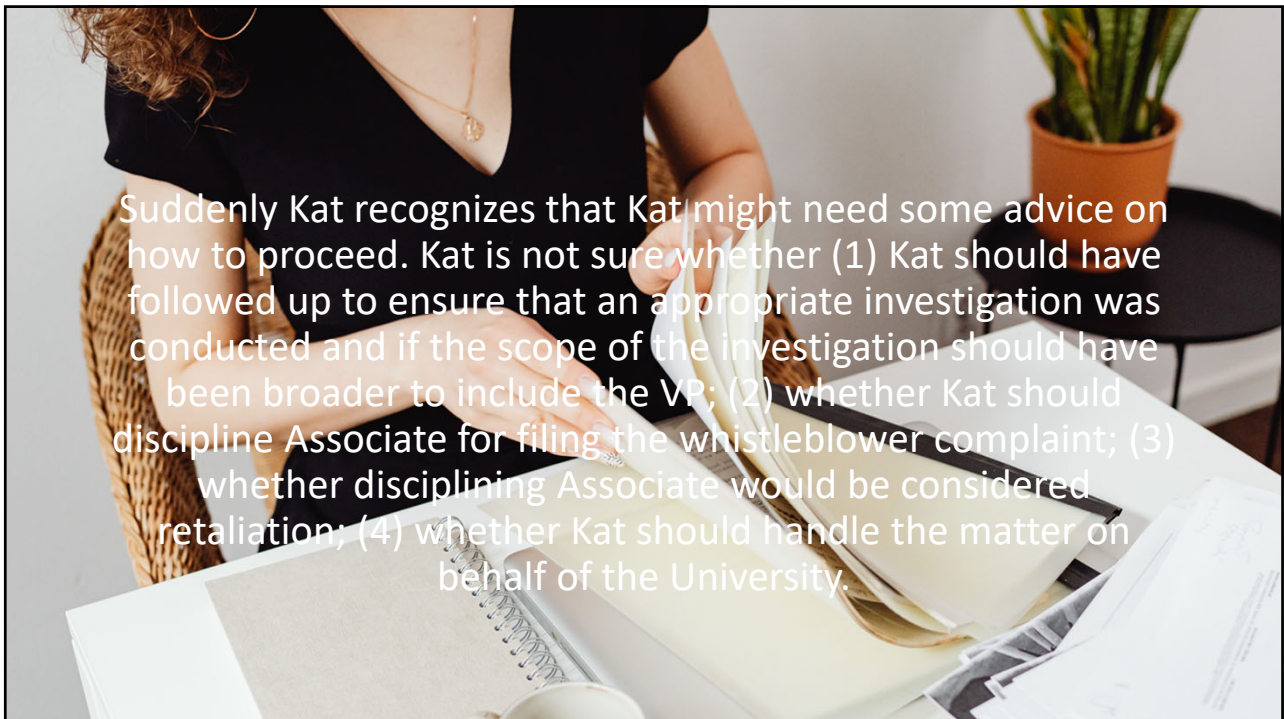


Kat advises Associate to contact VP who oversees the facilities director and advise VP that a formal investigation needs to be conducted into the alleged misconduct by the facilities director. VP tells Associate that VP will personally conduct the investigation.

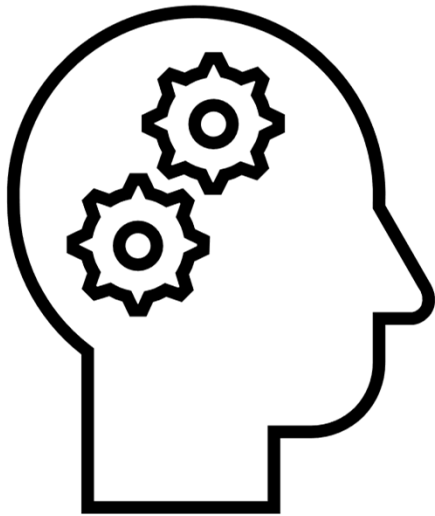
A few weeks later, Kat asks Associate how the investigation is going and Associate informs Kat that VP was going to personally conduct the investigation. Kat asks VP about the matter and VP reports that it is resolved.



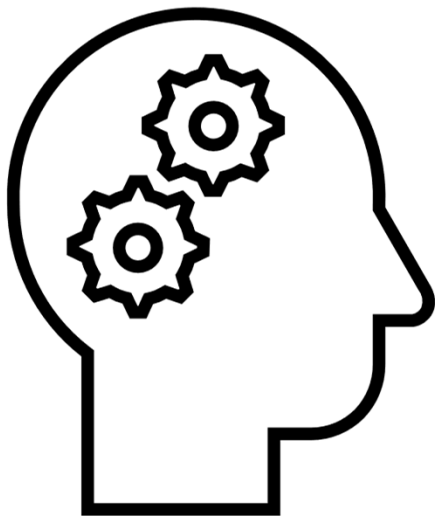
A month later Associate informs Kat that Associate has filed a whistleblower complaint with the State hotline alleging that funds are being embezzled in the facilities department. The complaint goes to the President and the President directs Kat to handle it.



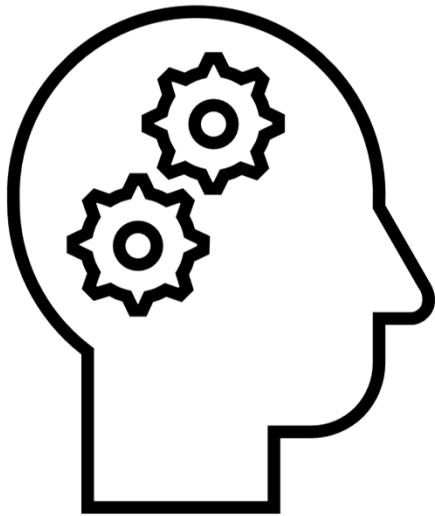
Suddenly Kat recognizes that Kat might need some advice on how to proceed. Kat is not sure whether (1) Kat should have followed up to ensure that an appropriate investigation was conducted and if the scope of the investigation should have been broader to include the VP; (2) whether Kat should discipline Associate for filing the whistleblower complaint; (3) whether disciplining Associate would be considered retaliation; (4) whether Kat should handle the matter on behalf of the University.



Should associate have conducted the inquiry into the questionable financial practices that led to the embezzlement suspicion, even though it was outside of the scope of the project?

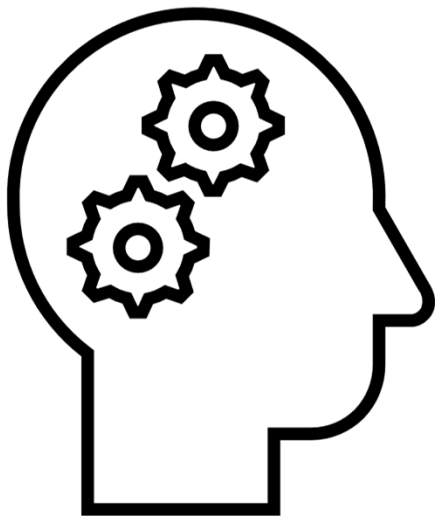


Should Associate have allowed VP to conduct the investigation or should Associate have insisted that the investigation be conducted by Associate/GC office?

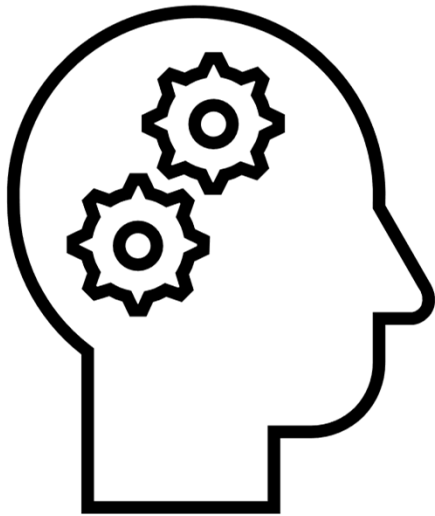


Should Kat engage outside counsel to represent the University in responding to the state whistleblower inquiry?

If so, should Kat manage the matter?



What are Kat's responsibilities with respect to Associate?



What if the state's inquiry determines that there was an institutional cover-up regarding the embezzlement, including confirmation of embezzlement by the facilities director, continuing enablement by the VP, even after the VP had notice, and that Kat/legal counsel office also had knowledge and failed to take appropriate actions?

Should Kat retain outside counsel to protect Kat's interests?

Could Kat use legal department funds designed for hiring outside counsel to hire an attorney to represent Kat's interests?

Can Kat continue to advise the president or board on any aspect of this matter?

Are there any conflicts in Kat advising the university regarding discipline of facilities director, VP, Associate?

Key Takeaways

Advisor

- Especially as counsel for colleges and universities, it is important to exercise independent professional judgment and render candid advice. This includes not only referring to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.
- **Comment [5] to Rule 2.1** ...“A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.”

Organization as Client

- The college or university is the client, not any individual. Determining who is the authorized constituent can be tricky. On-going credibility with constituents is important for continued competent representation. Lawyers have an ethical obligation to inform employees if the lawyer reasonably believes that the college or university's interests are adverse to those of the employee with whom the lawyer is dealing.

Advocate in non-adjudicative proceedings

- A lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to [candor towards the tribunal; fairness to opposing party and counsel; impartiality and decorum of tribunal].

Key Takeaways

Confidentiality of Information

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by the crime fraud exceptions or the lawyer is seeking advice to follow ethical rules.

Communications

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Responsibilities of a Supervisory Lawyer

Lawyers supervising other lawyers must make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. A supervisory lawyer may not ratify another lawyer's violation of the Rules of Professional Conduct.

Reporting Professional Misconduct

As a self-regulating profession, we must all vigorously endeavor to prevent violations of the Rules of Professional Conduct. However, we must exercise judgment on how to comply with this rule in terms of reporting the conduct of other lawyers.



**We Welcome
Your Questions!**



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