



BOISE STATE UNIVERSITY

Higher Education Law Update

Matt Wilde
General Counsel

Texie Montoya
Associate Special Counsel

Boise State University



Recap - overview

- Higher education law attorneys are involved with virtually every part of the institution since legal matters can affect each and every function of the college or university.
- To some extent, we function as “generalists,” handling matters in multiple areas of law. While some of us are “specialists” and primarily focus on specific areas of law, and work primarily with one or two departments on campus.



Who is our client?

- “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” – Rule 1.13(a)
- Entity Approach: entity is the client, not its constituents (privilege remains intact)
 - But who’s our Governing Board? State Board is represented by the Attorney General; our duty is to the University itself, which is represented by the President.
- Who do we work with and alongside? See below



Comment 9 to 1.13

- Defining who your client is when you work for the government can be difficult
 - “Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.”



Recap – issues

As in-house counsel, we are involved with issues such as

- Governance
- Employment and human resources
- Student affairs
- Campus security
- Athletics
- Financial and business affairs
- Risk management
- Government and community relations
- Procurement and contracts
- Intellectual property
- Various forms of dispute resolution



Recap – areas of law

- Business, Finance & Contracts
- First Amendment
- Second Amendment
- Privacy Law
- Constitutional Law
- Development & Fundraising
- Employment and Labor Relations
- Environmental Law
- Governance – SBOE, internal policy development
- Intellectual Property (creation/licensing; use of others')
- Research & Technology Transfer
- Lobbying and Legislative Affairs (advisory)
- Litigation
- Real Property Acquisition, Development & Zoning
- Statutory & Regulatory Compliance
- Taxation



Recap - who

We work with a variety of constituencies outside and at the institution – both governmental and non-governmental



Recap – who (outside)

- The SBOE
- Other state agencies (e.g. State Risk)
- The US Department of Education, Office of Civil Rts
- Other federal agencies (e.g. U.S. attorney – ADA)
- The City of Boise
- ACHD
- Boise State University Foundation
- Boise State Alumni Association
- Bronco Athletic Association
- ACLU, developers, artists, associations, etc.



Recap – who (inside)

- Our Administration
 - The President, the Provosts, Administrative Vice Presidents (VP Student Affairs, our boss, etc.), senior administrators, deans, department heads
- Academic Departments
 - Staff and faculty
- Non-Academic Departments (e.g., Athletics, Security, Boise Public Radio, Health Center)
- Our Event Venues (Student Union, Taco Bell, Morrison Center)

Recap – what we do

- Contracts
 - Volume-wise – mostly contracts.
 - Drafting, reviewing, negotiating
 - Variety of contract types
- Counsel
 - Primarily, we counsel our University clients – research, interpret, and advise on the law.
- Also
 - We do some litigation, some immigration, and IP management

Recap – federal laws

- Unique to Education
 - Title IX
 - Clery
 - FERPA
- Other federal laws
 - Title VI
 - Title VII
 - ADA
 - ADEA



Update – Free Speech

- Watchdogs - Foundation for Individual Rights in Education (FIRE) always checking policies.
- Conflict: obligation to provide safe place to receive education and the largely unabated right of Free Speech under the Constitution.
 - Is “be respectful” inconsistent with right of free speech?
- Disruptors and Provocative public figures – inviting and disinviting speakers when you can’t provide a safe environment – Middlebury College
 - Dr. Charles Murray Intro by student group and leaders of the University
 - <https://www.youtube.com/watch?v=utwrCc5cSRY>



Free Speech - Iowa State University





Free Speech

- Trademarks – Iowa State University violates student group's First Amendment rights
- Gerlich v. Leath, 847 F.3d 1005, 1012-15 (8th Cir. 2017). NORML case at Iowa State; don't discriminate on the basis of viewpoint, if you allow mod of the logo by student group, you have to allow it for all. And in 8th Circuit, loss of qual. immunity for administrators



Update – Title IX

- “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”
 - 20 U.S.C. § 1681(b)
- Two sides to it, *generally* – facilities and scholarships and sexual harassment

Update – Title IX cont’d

- Rulemaking authority and process of prior administration called into question by Trump administration staffers at OCR and DOJ
 - Dear Colleague Letters, Questions and Answers
 - Previously referred to as “obvious” guidance which does not require public comment period
- Trends: more litigation, more respondent litigation and attention to due process



Update – Athletics

- News: U Minnesota TIX Case – near “boycott” of bowl game in support of TIX respondents
- Image and Likeness litigation – O’Bannon
 - NCAA amateurism rule challenged in antitrust case alleging NCAA prevents players from exploiting their right of publicity through group licensing arrangements (videogames, photos, archived film, game broadcasts, etc.)
 - Held: NCAA subject to Sherman Antitrust laws, and have been too restrictive to maintain amateurism. NCAA must permit its schools to provide up to cost of attendance (grant in aid PLUS cash), but does not require more.

Update – P3's

- As money gets tighter and competition for students heavier, alternative funding models become more attractive
 - Ohio State
 - 2012 - Privatized campus parking – (50 years, \$483M upfront)
 - 2017 - Privatizing Energy (50 years, \$1+B *upfront*)
 - Chicago – 2008 - privatized parking in 2008 with 75 year deal for \$1+B.

Update – P3's

- Boise State 644 bed dorm and Honors College to open in 2017 fall
 - \$40M construction, 50 year ground lease, State Board of Education approval, Permanent Building Fund Advisory Commission approval
 - \$6.5M food service facility
 - Annual ground lease payment to University
 - Transparent to the student experience



Additional notes

- Outside counsel
 - Specialty areas, for example
 - Immigration
 - Environmental Law
 - Unplanned resource allocations, like litigation
 - Often use outside counsel when State Risk plan is triggered
 - e.g., for torts because of our participation in State Risk
- Other JDs on campus
 - Institutional Compliance
 - Export Controls
 - Research Compliance
 - NCAA Compliance
 - Trademark and Licensing
 - And of course, many as faculty



- Any questions?



Matt Wilde

General Counsel

mattwilde@boisestate.edu

Texie Montoya

Associate Special Counsel

texiemontoya@boisestate.edu

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THANK YOU