

From: Bob Downer [mailto:bobd@meardonlaw.com]

Sent: Friday, April 20, 2007 11:15 AM

To: Gartner, Michael; amir arbisser; Jenny Rokes; Mary Ellen Becker; vasquez.rose@principal.com; Ruth Harkin; Teresa Wahlert

Cc: miles@countrysiderenew.com; campbell.law@mchsi.com; clang@ifbf.org; jackevans@hallperrine.org; gwstein@iastate.edu; Geoffroy, Gregory L [PRES]; Fethke, Gary C; Ben Allen

Subject: RE:

I wanted to express a few of my thoughts as we go forward on the development and consideration of a proposed ethics policy. I am particularly concerned about how this policy may modify what has been delegated to the institutions with regard to employee grievances, discipline and appeals, and the existing policies and rules which might require review and change. There may, however, be some relatively easy ways to increase oversight while not making the board a glorified human resources department.

In my opinion it is not easy to define "ethical issues." For example, in the legal malpractice area the Iowa Supreme Court has opined that at least most legal malpractice also impacts ethics. For example, Rule 32:1.1 of the Iowa Rules of Professional Conduct starts with the sentence that "A lawyer shall provide competent representation to a client." In most instances the failure to commence a lawsuit prior to the running of the applicable statute of limitations would be said not to constitute "competent representation." However, in most instances I don't believe that most people would describe such a failure as a serious ethical lapse on the part of the lawyer, although it might clearly represent malpractice.

While I have not reviewed, and am not familiar with, policies at ISU or UNI with respect to dealing with these matters, I am familiar with the UI policy from having defended, some 10 years ago, a faculty member charged with an ethics violation. The University Operations Manual contains a chapter on "Hearing Regulations for Alleged Violations of Regents Rules." These matters have apparently been delegated to the institutions at least since June, 1971, with the Board of Regents being the last step in the administrative appeal process prior to the possible institution of court action. If we get involved in these types of proceedings at an early stage it seems to me that we could be tainting the appeal process. I think it is appropriate for the board to be the final administrative step, and would therefore not favor any action which jeopardized the board's ability to fairly act in that role. Further, under the UI policy either the person charged or the Provost can ask that the hearing be closed, and disclosure beyond those involved in the hearing process could jeopardize the rights of the accused or the interests of the institution. While I don't know if anyone who has been the subject of such proceedings has ever challenged the process in the courts, this is certainly a possibility if a claim could be made that the due process rights of those accused have not been protected.

I further have a concern about any possible impact on the University of Iowa Physicians (UIP) and the captive malpractice insurance carrier with respect to claims settlements. While any discussion of litigation strategy, etc. is the proper subject of a closed meeting under Iowa Code section 21.5(1)(c), it might not be possible to preserve confidentiality if information otherwise made its way into the public domain. As I will indicate more specifically later in this e-mail I don't have a problem with this information being disclosed in the aggregate and with anonymity as to the individuals involved. However, I am concerned with a disclosure that could target individuals. I have been involved in dozens of lawsuits over the past 40+ years in which people "bought their peace." In many cases this has been because the cost of litigation was felt to be higher than the cost of settlement. It is difficult, however, to adequately communicate these considerations to the

public. Settlement agreements frequently contain provisions for confidentiality, which are often a key ingredient in being able to effect these settlements, and I don't think it is in our interest to take away this possibility. We all know that recruiting of quality faculty is very competitive, and having the terms of settlement of medical malpractice claims being public information could be used against the Carver College of Medicine in the recruiting processes.

I believe that there is a way in which this information could be disclosed after the fact so that the board would know what such settlements are, both individually and collectively, but which would protect the interests of individuals. I have discussed this with Professor Arthur Bonfield of the UI law school, a widely recognized expert in the area and the author of the Iowa Open Meetings and Open Records laws, as well as the Iowa Administrative Procedure Act. He pointed out Iowa Code section 17A.3(1)(e), which provides as follows: "In addition to other requirements imposed by Constitution or statute, each agency shall...(e) Make available for public inspection and index by name and subject all final orders, decisions and opinions: Provided that to the extent required to prevent a clearly unwarranted invasion of personal privacy or trade secrets, an agency shall delete identifying details when it makes available for public inspection any final order, decision, or opinion; however, in each case the justification for the deletion shall be explained fully in writing." It is Professor Bonfield's opinion – which not all lawyers share – that a settlement is a "final order, decision" inasmuch as it disposes of the particular matter. There may well be other possible solutions, but this was one which seemed to me to possibly fit. If this matter is going to be pursued I would encourage that Professor Bonfield be consulted – he is not only one of the outstanding human resources in our Iowa public universities but has also been very generous with his time in promoting the public interest.

While I have probably gone on too long, I have one final comment. I don't know what the other two "major ethical issues" are to which Michael refers, but if one of those relates to the accessing of correspondence of another person by an employee at UIHC I would respectfully disagree that this is a "major ethical issue" which extends beyond the actions of one individual. Where we have tens of thousands of employees in our universities and special schools individual employees are, infrequently, going to engage in inappropriate and unlawful actions, e.g. theft, unauthorized use of institutional property, plagiarism. These are typically not actions that can or should be ascribed to the institutions as a whole, or even colleges or departments within them. I have looked into this matter extensively as Chair of the UIHC committee, and suffice it to say that my review clearly indicates that this was the act of one person.

I will be happy to discuss this with any of you who may wish to do so, and look forward to seeing you on May 1.

Bob

From: Gartner, Michael [mailto:MichaelG@iowacubs.com]
Sent: Monday, April 09, 2007 2:08 PM
To: amir arbisser; Bob Downer; Jenny Rokes; Mary Ellen Becker; vasquez.rose@principal.com; Ruth Harkin; Teresa Wahlert
Cc: miles@countriesiderenew.com; campbell.law@mchsi.com; clang@ifbf.org; jackevans@hallperrine.org; gwstein@iastate.edu; Geoffroy, Gregory L [PRES]; Fethke, Gary C; Ben Allen
Subject:

Colleagues –

I assume you were as surprised as I was to read in The Des Moines Register about the University of Iowa Law Professor who changed the evaluations and, then, about the settlement the university paid him.

This is at least the third recent incident in which major ethical issues have arisen at the university and about which the Regents were never informed. Nor was the Board office. I find this disconcerting, at best.

This latest development has become an issue with Legislators as well as with the press, which is yet another reason we should be fully informed on such issues so we can intelligently and honestly and openly answer questions that are being posed to us.

The Board of Regents is the governing body of the universities and should be apprised when ethical issues arise just as it is apprised when academic or financial issues arise. Therefore, I have asked Gary Steinke to work with the Board office to develop a policy that will ensure the Regents are immediately informed when an ethical issue arises and are completely filled in on details of any settlements the universities make of any kind.

If you have any suggestions for this proposed policy, please pass them on to Gary.

Best,

Michael

4/9/2007