Overview of Higher Education Law for Non-Lawyers

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A. What do we mean when we speak of "the law"?

1. Source of law:
   a. U.S. Constitution
   b. Federal
   c. State
   d. Local
   e. "Private" sources of law such as accreditation rules, NCAA requirements, contractual obligations

2. Kinds of Law
   a. Constitutional requirements
   b. Statutes
   c. Regulations
   d. Agency guidance (e.g., “Dear Colleague Letters”)
   e. "Case law"

3. Contractual Obligations
   a. Accreditation standards
   b. Institutional policies
   c. Collective bargaining agreements
   d. Memorandums of understanding

4. International Laws
   a. Laws of the country in which your faculty, staff or students are working.
   b. Licenses
   c. Agency approvals
   d. Employment policies

5. Private Institutions v. Public Institutions: Some of the laws applicable to state institutions are different from laws applicable to private institutions. For example:
   a. Open meetings requirements
   b. Sovereign immunity
   c. Benefit rules
B. How is higher education regulated and otherwise subject to laws?

1. As Public Agencies, Non Profit Corporations, or for Profit Corporations
   a. Charters
   b. Incorporation documents
   c. By laws
   d. Business licenses

2. As providers of Higher Education
   1) Financial aid regulations (Title IV of the HEA)
   2) Clery Act
   3) Title IX

3. As Businesses
   a. Employers
   b. Contractors
   c. Property owners
   d. Landlords
   e. Parks and recreation

C. A Few Myths Relating to the Law

1. If it’s not written and signed, it’s not really a contract.
2. We should never do anything that might risk litigation.
3. It doesn’t matter if we get sued, we’ll win.
4. If there’s a lawyer in the room, everything we say is privileged.
5. Email is confidential.
6. My conversations with my colleagues are confidential.
7. Television shows give reliable accounts of legal proceedings.
8. Newspapers provide reliable accounts of legal issues and disputes.

D. What are some major areas of law relevant to higher education?

1. Governance
   a. The authority and responsibility of trustees, officers, administrators, or others to take particular actions on behalf of the college.
   b. How the Board conducts its business (e.g., open meetings, selection of auditors, compliance with institutional bylaws).
   c. Shared Governance.
   d. Conflict of Interest

2. Compliance. Higher education is a “regulated industry.” Colleges and universities are subject to thousands of federal, state, and local laws, regulations, and ordinances. Your school may have a dedicated compliance office or compliance may fall to many individual administrators. Compliance work overlaps with legal work, but the approaches differ.
3. **Student affairs**
   a. Financial aid and the myriad regulations that apply to any institution that accepts Federal student assistance, including audit requirements.
   b. College- and University-specific regulations like FERPA and Clery reporting requirements.
   c. Student conduct codes and disciplinary proceedings
   d. Scholastic honesty requirements
   e. Student health and safety issues
   f. Disability accommodations
   g. Students who pose threats to self or others (a current hot issue)
   h. Fraternities and Sororities
   i. Students as employees (and sometimes unionized employees)

4. **Landlord/Tenant**
   a. Residence halls
   b. Family housing
   c. Faculty housing
   d. Conference facilities

5. **Civil Rights Laws**
   a. Anti-discrimination and anti-harassment laws including:
      Sexual harassment and gender based misconduct (current hot issues)
   b. Individuals with Disabilities -- ADA/Title 504 (a current hot issue)
   c. Compliance, litigation, and reporting requirements
   d. OFCCP; OCR; State and Local Agencies

6. **Employment and Labor Law**
   a. Unionized and non-unionized environments:
      Collective bargaining agreements v. institutional employment policies
   b. Faculty (a special category of employees)
      1) Appointments
      2) Tenure, non-renewal and termination.
      3) Special faculty rights and responsibilities, e.g., Academic Freedom
   c. State and federal wage and hour laws
   d. Anti-discrimination laws.
   e. Students as employees
   f. Employee benefits

7. **Campus safety and security**
   a. Clery Act and similar state laws
   b. Alcohol and drug laws
   c. Hazing
   d. Minors on campus – safety, abuse protection
   e. Police/security force
8. Athletics.
   a. National Collegiate Athletic Association; other League/Conference rules
   b. Contracts with coaches
   c. Safety and liability issues
   d. Property management: stadium and grounds; parking; concessions

9. Financial matters
   a. Payroll requirements
   b. Finance – e.g., institutional assets (UPMIFA), bond-financing
   c. Development – e.g., gifts, scholarships, endowments, state fundraising rules.
   d. Taxation – e.g., the “990,” payroll taxes, UBIT
   e. Record keeping

10. Local/Town-Grown Matters
    a. Zoning
    b. Property taxation
    c. Student housing, parking, and noise
    d. Public support: fire and police

11. Intellectual property and technology transfer
    a. Patent
    b. Trademark
    c. Copyright
    d. Bayh – Dole Act
    e. Institutional vs. Individual intellectual property (IP) rights
    f. Music downloading and the use of films, DVDs, and other copyrighted material both in and outside the classroom.

12. Litigation
    a. Court
    b. Administration hearings
    c. Arbitrations and mediations

13. Investigations

14. International Activities
    a. Overseas campuses
    b. Study abroad programs.
    c. Business and research overseas
    d. Employees in Foreign countries
    e. US laws governing overseas activities and foreign nationals: Export Controls, FCPA, etc.
    f. Foreign nationals as faculty, staff and students/SEVIS requirements
    g. Immigration
    h. Travel requirements
15. **Criminal law**
   a. Law enforcement subpoenas and searches
   b. Criminal investigations of community members
   c. Alerts for campus incidents

E. **Some Special Issues about Dealing with Lawyers**

1. Who is the client?
2. Attorney-client privilege
3. The critical importance of candor and “full disclosure”
4. Insurance and indemnification

F. **Where to Find the Law?**

1. Your campus has a lawyer either in house, or on retainer or contract, available to help with these issues. And the lawyer has access to NACUA, which has extensive resources.

2. More generally, there are a few terrific general resources
   c. University of Vermont website for this program (see appendix)

3. Compliance
   a. Higher Education Compliance Alliance. [www.higheredcompliance.org](www.higheredcompliance.org)
   b. Campus Legal Information Clearinghouse at the Catholic University of America. [counsel.cua.edu](counsel.cua.edu)
Appendix: Vermont Conference Sessions by Area of Law

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<th>To learn more about</th>
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<tr>
<td><strong>Academic Freedom &amp; Freedom of Speech</strong></td>
<td>• 2C. Academic Freedom and Highly Provocative Speech on Campus</td>
<td>• 2012 Session 2C. Balancing Public Interest &amp; Academic Freedom in Responding to FOIA Requests</td>
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<td>• 2012 Session 4A. State of Academic Freedom at Public Colleges and Universities</td>
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<td>• 2012 Session 6C. Free Speech, Exercise Assembly</td>
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<td>• 2011 Session 1C. Volatile and Hurtful Speech</td>
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<td><strong>Athletics</strong></td>
<td>• 2B. Current Issues in College Athletics</td>
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<td>• Affinity Group: Athletics</td>
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<td><strong>Campus safety and security</strong></td>
<td>• 2A. Intro to the National Center for Campus Public Safety</td>
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<td>• 3A. Alcohol Abuse on Campus</td>
<td>• 2012 Session RT3. Deconstructing the Myth that Campuses are Unsafe</td>
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<td>• 4B. SaVE Act</td>
<td>• 2012 Session 3C. Developing a Proactive Clery Compliance Program</td>
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<td>• 7C. Beyond the Dear Colleague Letter: What to Do and Avoid When Responding to Sexual Assault on Campus</td>
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<td>• 8B. Best Strategies for Protecting Minors</td>
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<td>• 1B. Affirmative Action in Admissions after Fisher v. University of Texas</td>
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<td>• 6C. Emerging Issues in Accommodating Students with Autism-Related Spectrum Disorders &amp; Other Cognitive Disabilities</td>
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• 7C. Beyond the Dear Colleague Letter: What to Do, and What to Avoid, When Responding to Sexual Assault on Campus  
• Affinity Group: Disability Support Services | • 2011 Session 2A. What You Must Know About the Dear Colleague Letter on Sexual Violence  
• 2011 Session 3B. Dealing with Disabled Staff & Students  
• 2011 Session 7A. Students in Danger of Harming Themselves or Others  
• 2011 Session 8B. Cyber-bullying |
| **Compliance** | • 1A. President Obama’s Affordability and Quality Initiative for Higher Ed  
• 4C. Compliance for Smaller Institutions  
• 5C. The Nightmare of Obtaining Necessary State Approvals for Distance Education Programs  
• 8A. What Higher Ed Needs to Know About the Affordable Care Act  
• See specific areas of compliance | • 2012 Session 2B. FERPA Update  
• 2011 Session 5B. Program Integrity Rules  
• |
| **Contracts** | • 2012 Session 4C. Contract Basics | |
| **Cyberspace** | • 4A. Emerging Issues in Social Media  
• 5C. The Nightmare of Obtaining Necessary State Approvals for Distance Education Programs | • 2012 Session 7B & 8B. E-Discovery 1 & 2  
• 2011 Session 1B. Privacy in the Digital Age  
• 2011 Session 3C. Internet Communications in the Academic Environment  
• 2011 Session 5C. Surfing, Shopping, and Blogging  
• 2011 Session 8B. Cyber-bullying |
| **Employment and labor law** | • 3B. Privacy Issues re Employer Access to Hardware and Email  
• 4A. Emerging Issues in Social Media  
• 5B. Legal Ethics: Representing Institutional Officials in Criminal Matters  
• 2012 Session RT2 – Faculty Unions Revisited: Will Yeshiva Be Reversed or Ignored?  
• 2011 Session 5C. Surfing, Shopping & Blogging: Regulation of Employee Social Media Use  
• 2011 Session 6C. Strategic Update on Organized Labor |
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<td>• 1C. Legal &amp; Practical Issues re Faculty Early Retirement Programs and the Greying of the Academic Workforce • 3C. Purloining Faculty Intellectual Property • Affinity Group: Faculty Issues</td>
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<td>International Activities &amp; Visitors</td>
<td>• 7B. Basic Principles of Immigration Law Governing Students, Faculty and Staff</td>
<td>• 2012 Session 5B. Study Abroad Risk Management • 2012 Session 6B. Immigration Processing • 2011 Session. Managing Safety &amp; Liability In Study Abroad Programs</td>
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• Affinity Group: Student Judicial Affairs Officers | • 2011 Session 2B. Conducting Student Disciplinary Hearings: Procedural Best Practices and Due Process Requirements  
• 2011 Session 4B. Student Affairs Issues Related to Community College Students  
• 2011 Session 7B. Managing Safety & Liability In Study Abroad Programs  
• 2011 Session 8C: Emerging Trends in the Management of Risk Associated with Student Life |
| Working with lawyers and legal matters | • 5B. Legal Ethics: Representing Institutional Officials in Criminal Matters  
• Affinity Group: Lawyers | • 2012 Session 8A. Attorney-Client Privilege  
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• 2012 Session 6A. The Basics of Conducting Investigations  
• 2012 Session 7A. Increasing Legal Mandates for College Training  
• 2012 Session 7B & 8B. E-Discovery 1 & 2 |