

April 29, 2009

ROLE OF UNIVERSITY ATTORNEYS VIS-À-VIS INDIVIDUAL EMPLOYEES IN FACT-FINDING INVESTIGATIONS

The University Policy on Legal Services (No. 01-05-01) spells out the circumstances under which faculty and staff should consult the Office of General Counsel or UPMC attorneys in connection with University business. This statement addresses the question of the relationship of a University attorney (an in-house or outside attorney) to an individual employee when the attorney is investigating a particular matter.

By law, a University of Pittsburgh attorney, whether in-house or outside counsel to the University, owes allegiance to the University – that is, to the institution itself. The University seeks and acts through its Board of Trustees, officers, deans or other authorized representatives. The attorney takes instruction from the appropriate representative of the University, unless the attorney's independent professional judgment lead to a conclusion that the authorized representative is acting or has acted contrary to law or the University's interest.

The University's attorneys often must, in the course of their work for the University, communicate with faculty and staff to ascertain facts, consider alternative courses of action, and otherwise assist the University. When a University attorney interviews or communicates with an individual faculty or staff member about a University matter, the faculty or staff member should understand that the attorney may disclose to other University personnel, or to others if authorized by the University, the content of the communication to the extent that the attorney deems it appropriate to protect or promote the University's interest. Under certain circumstances, the University is required to report matters to the appropriate governmental entities. Although the communication between the attorney and the employee may in some circumstances be protected by the University's attorney-client privilege from compulsory disclosure to third parties, the decision whether to assert or waive the privilege belongs to the University, not to the employee.

In most circumstances, the interests of the University and its employees will be congruent. It is then appropriate for a University attorney to represent an individual faculty or staff member at the same time the attorney represents the University. Faculty and staff should be aware, however, that if it develops that the University's interests come into conflict in a material way with those of the employee, the attorney would have to withdraw from representation of the employee. In such situations, the attorney may often properly remain as counsel for the University even if the University takes a position adverse to the employee.

Once a University attorney becomes aware that the interests of an employee involved in an investigation may diverge in a material way from the University's, the attorney should preface any further investigation communication to the employee with an indication to that effect. Similarly, if the employee believes that his or her interests may be, or become, different from those of the University, he or she should so inform the attorney. In either case, the attorney should then advise the employee of the option to obtain independent legal representation. (The University's Policy and Procedure on Faculty and Staff Indemnification (No. 07-06-06) addresses the circumstances under which the University may indemnify an employee for the costs of such representation.)

Finally, it should be understood that even if the University's position is adverse to an employee, the University, through its counsel or other administrators, is generally entitled to access to information – documentary or oral – that came to an employee in the course of University employment. Thus, it is ordinarily proper for a University attorney to communicate with an employee about a University matter even when the attorney is not able to represent the employee in that matter.