Coates' Canons Blog: Legal Ethics Lessons from ECU

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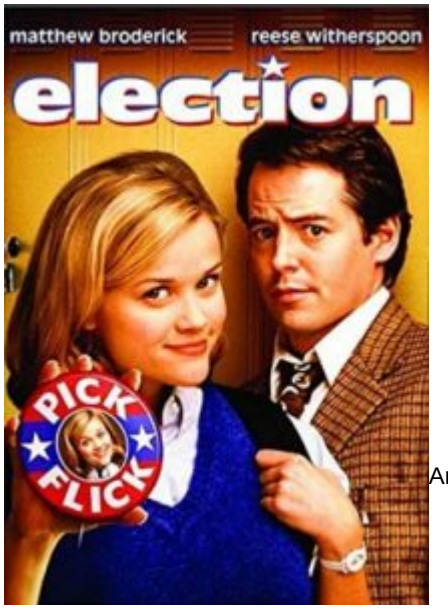
Article: https://canons.sog.unc.edu/legal-ethics-lessons-from-ecu/

This entry was posted on February 10, 2020 and is filed under Ethics & Conflicts, Professional Responsibility For Government Attorneys



Anyone who has seen the Reese Witherspoon/Matthew Broderick classic high school satire Election knows that it is never a good idea for administrators to mess with student politics. The recent mini-scandal out of Greenville suggests that at least a few members of the East Carolina University Board of Trustees missed that movie. While this most recent kerfluffle is bad news for ECU, it is a fine learning opportunity for any attorney that represents any type of organization.

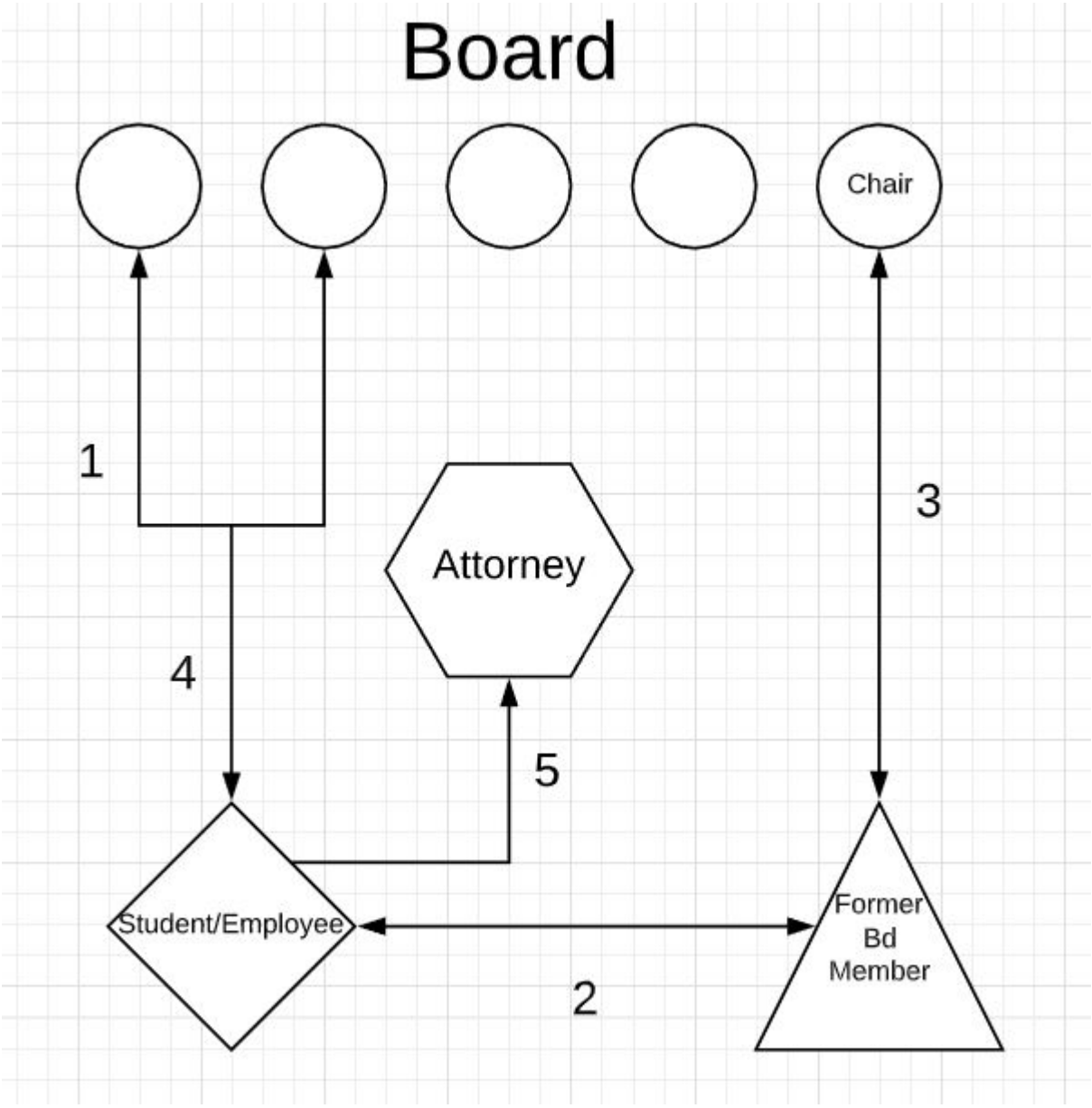
Just months after its interim chancellor resigned in the face of criticism for his night out drinking with students on 5th Street, ECU was back in the headlines for allegations of misconduct by two members of its Board of Trustees. The saga started when a student who was interested in running for ECU student government president was approached by an ECU trustee to discuss her potential campaign.

Concerned and a bit confused, the student sought advice from a family friend who was a former ECU trustee. That former trustee conferred with the current board chair, who apparently was no great friend of the trustee who had contacted the student. After getting feedback from the former trustee, the student agreed to meet with the trustee who had reached out to her. Unbeknownst to that trustee, the student made plans to record their discussion.

Two trustees attended that meeting, in which they apparently offered to donate to the student's campaign and help her win the election in exchange for her future support as a voting member of the board.

Shortly after that meeting, the student presented her recording to the ECU attorney. He shared with it the board chair, who immediately demanded that the other two trustees resign. They declined, and the chair then asked the UNC Board of Governors to intervene. That led to the resignation of one of the trustees and a censure of the other.

This flowchart illustrates the many lines of communication and their chronological order:



As it played out, the attorney (thankfully) did not face any particularly thorny ethical or practical issues. By the time the attorney learned of the problem, the student had already recorded her meeting with the two trustees. The chair was already aware of the issue and prepared to share it with the rest of the board.

But a small change in this timeline would have created major headaches for the attorney. Suppose that the student had approached the attorney immediately after being contacted by the first trustee. At that point, no one else on the board would have known about that trustee's attempt to influence the student government election.

Should the attorney share this information with the entire board? Should he speak directly with the trustee who contacted the student? Should he tell just the chair and let him decide how to respond? What if the student tells the attorney she wants to meet with the trustee and record the meeting to obtain evidence of his misconduct? Does the attorney have an obligation to warn the trustee of the student's plans?

These questions don't have easy answers, in part because the N.C. Rules of Professional Conduct don't provide clear guidance. Rule 1.13, the primary rule governing organizational attorneys, creates an obligation to report up the chain of command when the attorney learns that a "person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization . . . "

In other words, if the conduct by the board member isn't illegal or in violation of an obligation to the organization, then the attorney is not *required* to report that information to the full board. It seems to me that a trustee's intervention in a student government election is unseemly but not illegal or in violation of a formal duty to the university. Accordingly, I don't think Rule 1.13 would have required the attorney to report what he learned about the incident to the full board.

But of course a good organizational attorney is concerned with reputational harm to her client as well as legal harm. Just because Rule 1.13 would not require the reporting of unseemly conduct by a board member to the full board, the attorney could and probably should alert other organization officials if a board member is about to act in a fashion that would subject the organization to substantial negative media coverage—especially when that organization had suffered substantial negative PR just a few months ago.

How the attorney might raise the issue with other organization officials is a practical issue and not an ethical one, but still

thorny to navigate. Perhaps a confidential conversation with the board member in question would be enough to nip the problem in the bud. If the chair had a good relationship with that board member (or at least a better relationship than existed among the ECU board members), perhaps the attorney could rely on the chair to deliver the necessary message. Or perhaps the entire board needs to be reminded about the consequences of this type of behavior. Depending on the politics and relationships involved, there is likely more than one reasonable response to this situation.

Most readers of this blog do not represent universities, but the ethical and practical issues involved in this scenario could easily arise while representing any organization, be it a corporation, a city, a county, or a school board.

Pretend that the person contacted by the board member was a junior employee rather than a student. That employee is concerned that the board member wants the employee to engage in potentially inappropriate behavior. Rule 1.13 would apply and the ethical and practical concerns would be similar regardless of the type of organization involved. If the board member's conduct involved illegality or the violation of a duty to the organization, Rule 1.13 would require the attorney to share this information with a "higher authority"—perhaps the president, CEO, or board chair. If the board member's conduct was troubling but not illegal or otherwise in violation of a duty to the organization, then the attorney would have a decision to make about whether and how to share the information.

Would the attorney have any obligation to look after the interests of the employee who reported the board member's inappropriate conduct? Could the attorney agree to keep the whistle-blower's report confidential? As cold-hearted as it sounds, the answer to both questions is no. The attorney represents the organization, not its employees.

As I discuss in this post about the Penn State scandal, organizational attorneys must always prioritize the interests of the organization above the interests of the organization's employees and constituents. And the attorney must take steps to make sure that those individuals know that the attorney is representing the organization and not them.

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