



CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT

Kimberly Harrington had spent two years in the Hotel and Restaurant Management program at Florida State University. Nevertheless, the twenty-year old left FSU to enroll in the Culinary Apprenticeship Program at Delgado Community College in New Orleans.

After she registered at the College, but before classes began, school officials assisted her in securing employment at the New Orleans Convention Center. There, she would occasionally see John Veller, Delgado's Director of the Culinary Program.

Harrington volunteered to serve as Veller's teaching assistant. That job would involve, among other things, attending wine events offered in connection with the Program's wine tasting class. Consequently, soon after Harrington enrolled, Veller asked her to attend a wine tasting one evening at a hotel near the Convention Center.

Veller met Harrington at the Convention Center and drove her to the function. From there, Veller drove Harrington to two other restaurants (both of whose owners Veller knew); they ate dinner together at one restaurant.

After dinner, Veller and Harrington stopped at the home of a friend of Veller's who owned yet another restaurant. Harrington appreciated the opportunity to meet the owners of all these establishments.

Following this last visit, however, Veller raped Harrington in the driveway of his friend's home.

Veller (who ultimately was found guilty of raping Harrington) had assembled a criminal record of offenses for which he had previously served time over the years before he started at Delgado. By the time the College hired him, Veller had been convicted of possession of marijuana with intent to distribute; theft or grand larceny; and interstate transportation of forged securities.

If Delgado officials had performed a criminal background check, they would have discov-

ered Veller's criminal record. The College, however, looked no further than Veller's academic credentials and qualifications before it hired him.

A Louisiana appellate court held that Delgado's failure to perform a criminal background check on Veller rendered it liable in Harrington's negligent hiring claim against the College.

"Delgado breached its duty by hiring Veller, a convicted felon who had served time in prison," the court announced.

"A professor is in a position where character, moral turpitude, and a clean record should be essential. The risk of being raped or harmed by a professor in a position of authority can be associated with the duty to use reasonable care when hiring."

The court rejected the College's claim that the rape occurred solely within the realm of a personal relationship between Veller and his student: "The harm to Harrington was attributable to Veller's employer(s) due to his capacity at Delgado and with the Culinary Apprenticeship Program."

Decisions such as that in *Harrington v. Louisiana State Board of Elementary and Secondary Education* (which issued in 1998) are forcing many employers to take a second look at their hiring practices.

As information on applicants' criminal convictions becomes more accessible, no doubt both public and private employers will consider criminal background checks on their prospective hires.



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CORPORATE VENTURES IN THE PUBLIC SETTING: What to Know about Forming Partnerships

Remember the days when a handshake was all you needed to “seal the deal?” For those of you who have tried to successfully negotiate a cooperative venture between your college and an outside party, the seeming impenetrable tangle of fiscal and legal “gotchas” probably makes you want to scream in frustration.

The frustration is real, but so are those pesky fiscal and legal mandates. For instance, if we stray into activities for which the Arizona State Legislature hasn't given us authority in law, we aren't likely, among other things, to have insurance coverage for that activity. If a cooperative venture permits an outside entity to use facilities or resources that we have funded through tax-exempt financing, we risk losing the tax exemption for that financing.

Here are some questions that you can ask to help you avoid pitfalls. It's not an exhaustive set, but it will give you an idea of what you need to look for as you set out in the negotiations.

- *What's the primary objective of the venture?* Is it educational in nature? The benefit to the District of the venture must relate to the powers that the Legislature granted the District as a place of public higher education. The law does not permit us, for instance, to lease our land at a bargain price to assist in economic development in the county.
- *If one of the objectives is revenue generation, does the generation of income as well as its intended use meet fiscal and legal requirements?* As a public entity, we are also prohibited from entering into a true, legal partnership with an outside party, so sharing revenues and losses in a venture with an outside party isn't appropriate. Still other laws, as well as Governing Board policy, preclude us from engaging in an activity that competes with something offered by the private sector. And income we may garner from activities such as advertising in a conference brochure is subject to income taxation, because advertising doesn't relate to our educational mission.
- *Is there a balance between benefits that the District offers to the outside party, and the tangible benefit that the District gets back from the venture or outside party?* Generally speaking, public enti-

ties in Arizona can't give away or provide access to their resources without getting something of commensurate and tangible value back. So, for instance, a college has allowed a charter high school to place a modular building on its property, in exchange for the college's use of the building in the evening for its classes. In doing so, the college properly calculated that it gained more value in getting the use of the building for free than it gave up in permitting the school to place its building on unimproved college property for free. However, if the college didn't get the use of the building at night, it would need to charge the school rent for using the property.



- *Will the venture involve an outside party using or having a presence at a facility or having access to technology that the District purchased using tax-exempt loans that haven't been paid off?* Tax laws preclude us from getting the benefits of low-interest tax-exempt financing, and then permitting an outside commercial entity to benefit through use of our facilities or technology funded with that money. This includes letting an outside entity have exclusive rights to our output (such as classes) using those facilities or technology, as well as providing certain naming rights to a large donor.
- *Is the venture one that the District should compete or does it involve the purchase of goods, construction or services that must comply with the District's procurement procedures?* In some cases, we may need to select the outside party for the venture through some competitive means, depending on the opportunities and resources that we intend to provide for the venture. Additionally, a venture idea may require the construction of a facility or the buying of goods or services for its implementation. Where significant public funds are involved in a venture, it generally means that public procurement procedures need to be followed, regardless of who the purchaser is.

And the list goes on. The point of this is to make you aware that there are “i's” to be dotted and “t's” to be crossed.

By design and happenstance, children frequently visit our college campuses. Wherever they are—the recreational facilities, classrooms, grounds, or anyplace else—their safety and well being are very important to us, and so is the potential liability that comes with their presence on our campuses.

Why Are These Children On Our Campuses?

Depending on the college, children may be as much a part of our environment as students, faculty, or staff. The campus visits that concern us the most are those in which parents are not present to supervise their children.

Children may regularly come to our campuses to attend an educational or sports program, such as

- a day care center,
- a summer camp,
- an early-college entry program, or
- a tutoring or community-service program.

Some children just pass through, making short visits on occasion or coming just once. They may be

- prospective students;
- companions of a parent or other family member who studies or works at the college
- participants in school field trips;
- spectators or participants in a sporting event, play, concert, or other program;
- attendees at a commencement ceremony;
- library patrons;
- users of our recreational facilities, such as a ball field or playground; or
- neighbors cutting through the campus on foot or on a bike.

What Could Happen?

The short answer is: just about anything. Consider some of the possible situations:

1. Falling objects may hit a child. These accidents are most likely if a child pulls something down from a desk or other height, and it falls on the child.

2. Injuries may occur from falls. A child may fall out of a window, off a bicycle, or off a stairwell.

3. Sports programs can cause accidental injuries. Young children who participate in organized sports as well as those who play recreational sports, like bike riding and skate boarding, are highly susceptible to injuries. Approximately 775,000 of those youngsters go to emergency rooms for treatment every year.

4. Drowning claims the lives of about 1,500 children each year in the United States. Toddlers and adolescent boys are most at risk.

5. Allergic reactions to foods or insect bites, sprained ankles, splinters, and falls from bikes are just some of the medical problems we may have to address.

6. There may also be custody problems. These situations typically involve the release of a minor to a non-custodial parent.

7. Sexual molestation may involve child-to-child, student-to-child, or staff-to-child cases. The institution may be sued over negligent hiring, retention, and supervision; negligent failure to provide and maintain a safe business premise; and negligent minor business invitees by the defendant.

8. Problems may also occur with minors being exposed to adult topics and activities.

9. Children's presence on campus may prove distracting to other workers, interfere with their parents' work, and create an atmosphere that makes it difficult for staff, faculty, or students to perform efficiently.



What Can We Do?

As you can see, the potential risks are great, and the cost in human hardship and legal liability can also be great. There is much that we can do to minimize the risks and protect our institution from liability. This will be discussed in the Fall 2006 issue of *In Brief*.

FREE SPEECH AND WORKPLACE COLLEGIALITY

Most institutional decision-makers would no doubt urge that lively discussion among faculty and administrators about a school's mission and values is essential.

Institutional leaders typically insist, however, that such dialog take place in an atmosphere of collegiality. What is a lively discussion for some may, for others, create a toxic environment that frustrates a school's effectiveness. If the dialog takes place in a public institution, another factor is introduced: the extent to which that dialog enjoys protection under the First Amendment to the US Constitution.

In *Connick v. Myers*, the US Supreme Court developed a two-step process for determining whether an employee's workplace speech is protected by the First Amendment. The first step is a determination of whether the expression in question touches on a matter of public concern; under *Connick*, that question "must be determined by the content, form, and context of a given statement..."

This first step is a threshold inquiry; if the speech at issue does not pertain to a matter of pub-

lic concern, there is no First Amendment protection and, therefore, no need for further review.

If, however, the speech does bear on a matter of public concern, the test then proceeds to the next step: "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Whether the expression is protected by the First Amendment depends on how the balance finally tilts.



In *Schrier v. University of Colorado*, for example, the University terminated the chairmanship of a medical school professor who had taught there for more than twenty years. The professor had voiced his concerns about fiscal and programmatic implications of a decision to relocate the University's Health Science Center from Denver to nearby Aurora.

The court acknowledged that the subject matter of the professor's speech--"the potential impact a relocation would have on patient care, education and research"--was indeed a matter of public concern.

But in balancing the University's interests against the professor's interest in free expression, the court ruled against the professor, holding that his "protected speech impaired harmony among co-workers, detrimentally impacted close working relationships within the School of Medicine, impaired his performance as department chair, and interfered with the University's ability to implement" the Center's relocation.

No doubt many will wonder how the purposes of academic freedom--still a "special concern" of the First Amendment--are served if faculty and other employees fear reprisal for criticizing school policies or practices.

Many who work in the public college or university setting, then, will likely seek greater protection under their institution's policies rather than from the First Amendment.

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