

Internal Certification Issues

- Really just referring to fundamental fiduciary duty
- Due diligence in all professional duties
- Due diligence is comprehensive-have to be responsible in inquiring as well as in addressing.

Outline

- Sarbanes Oxley
- Business Relationship
- Procurement
- Gifts/Estates/Trusts
- University Resources
- You & OGC

Sarbanes-Oxley

- Technically not applicable to State University
- But trend is to treat as though it were
- Additional duties on directors, attorneys, & accountants
- Law wants to emphasize fiduciary duty responsibilities in order to maintain financial integrity of institutions and the market's (public's) perceptions of those institutions.

Sarbanes-Oxley

- Code of Ethics for Senior Financial Officers-Section 406
- Emphasis on an organization's ethics, training, compliance & enforcement
- Ethics in all facets-operations, internal controls, conflicts of interests, employee reviews, reporting, etc.

Sarbanes-Oxley

- Impacts reporting of financial statements
- Credit rating agencies on debt issuances, etc.
- Still in formative stages
- Duty of attorney to report to the CEO “breach of a fiduciary duty”.

Business Situation Relationship

- **Fiduciary Duty**
 - Real Estate Developer hires you as an agent to recommend local land for purchase/development:
 - Friend owns particular properties
 - You own part of a business which could be a potential seller of land or could profit from development of a particular piece of land
 - Other related financial personal interest

Business Situation Relationship

- Developer hires atty. to handle land acquisition:
- Atty. owes a primary duty of loyalty to client and to client's interests first & foremost-can not "profit" off of client opportunity
- Atty. also has to use best fiduciary practices in expenditures of clients funds-investigators, travel, copy service, trust funds, etc.

Procurement

- Contracting official needs to be able to justify their decision-making and course chosen
- Would you spend your money this way?
- Inaction can also be construed as breach of fiduciary duty
- Always recognize the need to be able to address a potential bid protest.

Procurement

- Contracting officer can & usually should ask for professional input in a wide variety of ways and from variety of people but.....
- Authorized Contracting personnel can not yield decision-making authority to the user or to the attorney
- Always recognize the need to be able to address a potential bid protest.

Procurement

- Actions taken are within the individual's legal authority
- No oral obligations-they can be contracts also
- Avoid detrimental reliance situations-have to be aware even in "gratuitous transactions" scenarios.

Procurement

- Contract Compliance
- Contract performance issues; important to not allow contractor to dictate course of compliance;
- Inspectors have to be given professional protection & respect
- Discussion should be encouraged; no “badgering” of a subordinate to change a professional opinion in order to avoid a “difficult” scenario.

Procurement

- Contract modifications have to be accomplished pursuant to authorized procedures and justified on a sound fiduciary basis
- Professional opinion should be documented pursuant to one's authority.

Gifts/Estates/Trusts

- Do not represent valuations to outside entities-only representation as to items or dollars given
- On bequests need to have full inventorying of all assets
- Estates required to furnish a complete accounting
- Trusts need on-going accounting on an annual basis.

Gifts/Estates/Trusts

- Administration of Trust funds-has to be in accordance with good fiduciary practice as referenced in the bequest & pursuant to the dictates of the testator, testatrix, grantor, donor, etc.
- Need fiduciary decision-making in negotiation of an A&M remainder interest in a split-interest trust such as a CRAT/CRUT, etc.

Gifts/Estates/Trusts

- Not just discretionary to the trustee;
- A statutory requirement-annual accountings pursuant to Tx. Property Code 113.151 and Tx. Probate Code 114.001;
- Needed for purposes of reviewing income, expenditures, proper application of trust funds, etc. They can tell you a lot.

University Resources

- Everyone's job description to certain extent includes protection of University resources
- By definition abuse of those resources is outside one's scope of employment.

University Resources

- Scenarios-
- Protection of assets entrusted to employees-i.e. automobile. Would you let that employee use your car?
- Good internal controls are designed, implemented and followed
- Care of University assets is stressed & monitored.

University Resources

- Compliance with safety regulations to protect people and physical property
- Security
- Environment & environmental compliance
- Makes good financial sense as well

University Resources

- Understanding of compliance with internal controls
- Diligent reporting to internal audit or supervisory chain of command of lack of internal controls
- Reporting of losses caused by lack of proper internal controls
- Objective is to protect University property against fraud, waste, & abuse.

University Resources

- No authority other than in limited circumstances to use University resources for outside entities-Tx. AG Opinion No. MW-373 (1981).
- Collection of receivables, percentage of write-offs should be within department mission and limitations or additional procedures should be implemented, etc.

University Resources

- Employees are adequately trained in their professional areas of responsibility
- Overtime is justified based on a reasonable fiduciary standard
- Potentially abusive or discriminatory situations have been addressed.

You.....

- Have to remember that you are not absolutely legally liable for any or all problems
- But you could be responsible if you did not exercise reasonable fiduciary judgment or utilize professional standards.

Office of General Counsel

- Utilize the Office of General Counsel for
 - Assistance in spotting issues
 - Analyzing duties
 - Understanding complexities of the law; and
 - Obtaining a recommended course of action
 - General Counsel can also seek an AG opinion if necessary.

In Conclusion...

- Always be “in scope” of your authority
- Be aware of your applicable professional standards
- Apply them to all decision-making; and...
- Timely ask for help if not sure.