



September 15, 1986

ADMINISTRATIVE MEMORANDUM NO. 78 REVISED

TO: All Administrative Unit Heads

FROM: Thurman Owens *TO*

RE: UNIVERSITY OF CINCINNATI POLICY/PROCEDURE ON REPRESENTATION, INDEMNITY & IMMUNITY OF UNIVERSITY OFFICERS AND EMPLOYEES

POLICY:

Effective March 13, 1980, the Ohio General Assembly enacted Sections 9.85, 9.86, 9.87 and Sections 109.36 through 109.366 of the Revised Code. These sections provide for representation/defense, indemnification and immunity of state officers and employees sued for damage or injury caused in the performance of their duties and are applicable to officers and employees of the University of Cincinnati.

PROCEDURE:

I. Representation(Defense)

The Ohio Attorney General is required, upon receipt of a written request from the officer or employee, to provide a defense for University officers and employees sued in civil actions which result from the performance of their duties. Such defense is provided either by Special Counsel appointed by the Attorney General for that purpose or by a member of the Attorney General's staff. The officer or employee may, at any time and at his/her own expense, retain counsel of his/her own choosing and provide his/her own defense.

- A. All notices of legal claims or lawsuits received by University employees or faculty not working in the Medical Center as well as their Requests for Representation are to be sent to Legal Advisory Services, M.L. 623.
- B. All notices of legal claims or lawsuits received by Medical Center employees or faculty and their Requests for Representation are to be sent to Risk Management & Insurance, M.L. 785.

- C. Legal Advisory Services or Risk Management & Insurance will assign an in-house attorney to coordinate and manage the defense. In general, Legal Advisory Services will be responsible for coordination of all non-Medical Center claims and Risk Management & Insurance will be responsible for all Medical Center claims. Modifications to this general rule may be agreed upon for reasons of efficiency in claims management.
- D. Risk Management & Insurance is responsible in all cases for determining whether insurance coverage is available. If it is available, Risk Management & Insurance is responsible for notifying the appropriate insurance company of the claim and for keeping the insurance company advised of claim status and progress. In cases being managed by Legal Advisory Services, the assigned in-house attorney is responsible for providing Risk Management & Insurance with the information needed to accomplish this.
- E. When a legal claim or lawsuit is to be defended by the Attorney General or Special Counsel, the in-house attorney assigned to the case is responsible for sending necessary legal documents (e.g., summons and complaint) to the Attorney General or Special Counsel and for providing a written report containing the following elements:
1. present or former position, job title or classification of the officer or employee;
 2. pertinent facts and an opinion that the officer or employee was within the course and scope of his/her employment or official responsibilities and does not come within the exceptions of R.C. 109.362. (See G. below.)
- F. Assuming representation is appropriate and desired by the officer or employee, the assigned in-house attorney is responsible for obtaining a signed letter from the officer or employee requesting representation by the Attorney General or Special Counsel (Attachment I).
- G. Legal Advisory Services is responsible in all cases for reporting on the status of all claims and lawsuits to the University's Board of Trustees and for reviewing and paying the fees of Special Counsel representing the University or any of its officers or employees. In cases being managed by Risk Management & Insurance, the assigned in-house attorney is responsible for providing Legal Advisory Services with the information needed to accomplish this.

- H. There is no authority for the Attorney General or Special Counsel to represent state officers or employees when any of the following apply:
1. the officer or employee is a party to a criminal matter; or
 2. the state is plaintiff; or
 3. the officer or employee was acting manifestly outside the scope of his/her employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner; or
 4. the officer or employee is covered by a policy of insurance purchased by the University requiring the insurer to provide a defense and counsel in the action, and the amount of the claim against the officer or employee is not in excess of the amount of coverage under the policy of insurance.

II. Indemnification

The state (University) is also required to indemnify University officers and employees from liability incurred in the performance of their duties, for amounts they become liable to pay under a judgment or settlement in a civil action arising under federal law, the law of another state or the law of a foreign jurisdiction. The maximum amount of this indemnification which can be paid directly from state funds is \$1,000,000.00 per occurrence. The following procedure applies when this indemnification is to be paid directly from state funds (e.g. unencumbered general funds appropriations of the University) and only in that instance:

- A. The in-house attorney assigned to the case prepares an Indemnity Agreement (Attachment II). The Agreement must be signed by the officer or employee to be indemnified and by an officer authorized to contract on behalf of the University.
- B. The in-house attorney sends the signed Indemnity Agreement to the Attorney General. The Attorney General will sign the agreement, forward it to the appropriate office for payment under procedures outlined in R.C. 9.87 and return a copy to the University.

The University duplicates and supplements this indemnification through its self-insurance trust and/or the purchase of insurance. When indemnification of an officer or employee is to be made from the trust, or funds other than unencumbered general funds appropriations, the following procedure applies:

- A. The in-house attorney assigned to the case prepares an Indemnity Agreement (Attachment II). The Agreement must be signed by the officer or employee to be indemnified and by an officer authorized to contract on behalf of the University.
- B. The in-house attorney sends the signed Indemnity Agreement to Risk Management & Insurance for processing and payment.

An officer or employee cannot be indemnified under the following circumstances:

- when the officer or employee acted manifestly outside the scope of his/her employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner; or
- for any portion of a judgment that represents punitive or exemplary damages; or
- for any portion of a consent judgment or settlement that is considered unreasonable by the Attorney General and the University; or
- to the extent the officer or employee is covered by a policy of insurance for civil liability purchased by the University (in which case any indemnity is expected to be provided by the insurance).

III. Immunity

Except for civil actions arising out of the operation of a motor vehicle, and civil actions in which the state is the plaintiff, a University officer or employee is not liable (is granted immunity) under state law for damage or injury caused in the performance of his/her duties. This immunity is not available in circumstances where the officer or employee acted manifestly outside the scope of his/her employment or official responsibilities, or with malicious purpose, in bad faith, or in a wanton or reckless manner.

The grant of immunity does not affect any other immunity from civil liability that is conferred upon an officer or employee by the Revised Code or by case law, and does not extend to actions arising under federal law, or to actions arising under the law of another state or a foreign jurisdiction (in which cases defense and indemnity would be available). In addition, the grant of immunity does not affect the liability of the state in an action against the state in the Court of Claims based upon the acts or omissions of the officer or employee, in which case only the state (University) would be the named defendant.

In general, this means that state law based claims involving damage or injury by a University officer or employee in the performance of his/her duties must be brought only against the state (University) in the Ohio Court of Claims. Individually named defendants in these actions are automatically dismissed. Generally, this also means that such claims filed in other state courts (e.g. Common Pleas, Municipal) must be removed to the Court of Claims. On receipt of notice of any such claim, the officer or employee should follow the procedure set forth at I., herein.

IV. Motor Vehicles

If a University officer or employee allegedly causes damage, injury, or death by the operation of a motor vehicle, he/she is not granted immunity from a civil action. However, any person, or his/her representative, who is damaged, injured, or killed by the operation of a motor vehicle by a University officer or employee in the course of University business is required to first attempt to have his/her claim compromised by the University or satisfied by the University's liability insurance. If the University does not compromise the claim or if the University's insurance does not pay the full amount of the claim, the person or his/her representative may then bring an action to recover his/her claim or the unpaid amount of the claim against the University in the Court of Claims. The action in the Court of Claims cannot be filed until a reasonable time after the request for compromise or until 60 days prior to the expiration of the statute of limitations on the claim.

The person or his/her representative cannot bring an action against the University employee or officer until the action in the Court of Claims is terminated. If the Court of Claims determines that the University is not liable, the bringing of an action against the officer or employee is not prohibited, however, the person or his/her representative cannot bring an action against the officer or employee if he/she recovers against the University in the Court of Claims. The statute of limitations on the claim against the officer or employee does not run during the time that the action against the University is pending in the Court of Claims.

Questions about this Policy/Procedure may be directed to either Legal Advisory Services (475-3483) or Risk Management & Insurance (475-6108).

HD4296B

ATTACHMENT I

REQUEST FOR REPRESENTATION

I hereby request that the Ohio Attorney General or Special Counsel appointed by the Ohio Attorney General, represent me in the civil action captioned _____
No. _____ in the _____ Court,
brought by _____
against _____ in which I am named
a defendant.

Date _____

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|-----------------------------------|---|----------------|
| _____ , <u>et al.</u> , | : | |
| | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | CASE NO. _____ |
| | : | |
| _____ , | : | |
| University of Cincinnati | : | |
| Officer/Employee, <u>et al.</u> , | : | |
| | : | |
| Defendants. | : | |

INDEMNITY AGREEMENT

1. The University of Cincinnati has determined that the alleged actions of Defendant _____, while performing his/her duties as _____, giving rise to the above captioned action, were not within the terms of Section 9.87(B) (2), Ohio Revised Code, in that Defendant _____ did not act manifestly outside the scope of his/her employment or official responsibilities, did not act with malicious purpose or in bad faith, and did not act in a wanton or reckless manner.

2. The University will indemnify Defendant _____ by paying or having paid the amount negotiated in settlement of this matter as described in paragraph 3 of this agreement, which amount is hereby determined to be reasonable.

3. In settlement of the above agreed action, \$ _____ will be paid to Plaintiff _____, whose address is _____.

4. This indemnity agreement is hereby agreed by Defendant _____

Defendant
University Officer/Employee.

5. This indemnity agreement is hereby agreed by the University
of Cincinnati.

University of Cincinnati
Contracting Officer

6. Section 9.87(B), Ohio Revised Code does not prohibit the
State from indemnifying Defendant _____, as set
forth above, and this indemnity agreement is hereby agreed pursuant
to Section 9.87(E)(1), Ohio Revised Code by or on behalf of the
Attorney General of the State of Ohio.

ATTORNEY GENERAL

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