

Episode 6: Part 1 — Title IX Investigations the NPRM and more with Scott Schneider

Courtney Bullard:

Welcome to The Law and Higher Ed podcast. My name is Courtney Bullard, CEO of Institutional Compliance Solutions, and your host. I'm a Tennessee attorney, and I began ICS after serving as campus counsel for eight years at a university system. In that role, I handled all legal matters affecting the campus, or as I like to say, I did everything but divorces.

I bring that on-the-ground experience with me in working with clients today and that experience shaped the mission behind ICS, which is to provide legally sound, but also practical advice to the institutions that we partner with. Today, I specialize in compliance with Title IX and related laws and regulations as a result of my experience in the area on campus, since the Title IX boom in 2011.

This podcast provides relevant, tangible information that you can utilize in your professional life right now and even maybe your personal life. Through interviews with campus leaders and subject matter experts and informational episodes, you have access to information at any time, any day that has both legal and practical implications for your career and your campus. So let's get to it.

My guest this week, Scott Schneider, is an attorney and he and I have had similar career paths, both working as in-house counsel for an educational institution, and then going out and starting in private practice from scratch and building our own practice. He is a partner with Husch Blackwell and he assists education entities with complex legal issues, including particularly sensitive matters like institutional response to sexual assault. He has a lot of other areas that he dabbles in as well, but all primarily in higher education. You'll hear in our discussion, him break down his background and different areas of expertise.

I want to talk to him though and thought of him because of our similar experiences in house and thought he would be a great resource for discussing when to hire an external investigator, what types of traits an internal or external investigator needs to have to do the job well and then what's happening in Title IX and higher education today. He's a lot of fun, got a great personality and I really enjoy talking with him. We had so much to talk about that I divided this podcast episode up into two parts, and I hope that you enjoy this episode as well. Hi Scott.

Scott Schneider:

Hey Courtney, how are you doing?

Courtney Bullard:

I'm good. I'm continuously amazed at how large yet how small the higher ed world is and having the opportunity to interview you as part of this podcast is a perfect example. As I told you before, I've heard your name for the past three years since starting ICS and we have sometimes been quoted in the same articles. So it is a pleasure to talk with you today and I really appreciate you participating in this episode, because I know you're a tad under the weather.

Scott Schneider:

Likewise. Look, happy to be here and I'm sorry that my mom has been calling you for the last three years.

Courtney Bullard:

No, you're good, you're good. You've been out ... I see your name and I'm just glad we've gotten to touch base because I think there's-

Scott Schneider:

Likewise.

Courtney Bullard:

I think collaboration is everything in this business. So based on my own imperfect research, there are not many of us and by us, I mean attorneys who've been in-house counsel at a college or university, who are now practicing or consulting or something. I know for me, when I went to UTC as in-house counsel, I said I would never leave. I was going to retire there, this is the dream job. Then of course over time, things changed and clearly my entrepreneurial spirit took over but tell me about your background and how you got into higher ed law and what you're doing today.

Scott Schneider:

Sure. So this is a bit of a long and maybe even boring story, but I'll do my best to make it interesting. So after law school, I went to the law school in Virginia and decided I wanted to go back home and home was New Orleans and went to work for ... I knew I wanted to do the labor and employment law and so went to work with a pretty big boutique firm and was there for a decade and made partner and all that sort of stuff and did all sorts of litigating, every sort of employment dispute imaginable. At some point just really got, I think, a little bored with that. There was an opening at Tulane to go and work in their office of general counsel. I knew probably nothing about education law prior to that, or very little, I certainly knew labor and employment law in that context, but nothing like FERPA, or that sort of stuff, or student affairs law.

So long story short, I probably did ... They interviewed me, it was an in-person interview. I probably did the worst interview in the history of the world. I mean, I was a babbling idiot. I suspect I was not their first choice, I may have been their third or fourth choice, but ultimately everybody else decided they didn't want to do that. They stayed in their law firms. So long story short, I was hired by Tulane and it started off as do labor and employment law and which in the academic setting was so unique and so interesting and learning about how to deal with faculty issues, which are so unique than any other sort of issues. But then gradually, my role started expanding to doing student affairs and doing Title IX and sitting on the behavioral intervention team and then negotiating contracts, negotiating technology contracts and being involved in athletics. It was like, "Oh my God." I was just, from a practice perspective, in heaven. I mean, it was just the most interesting practice humanly imaginable and it was something at law school, I don't even think there was a course on education law. If there was, I didn't know about it and didn't have any interest in it.

Courtney Bullard:

Yeah, I agree with you. That doesn't exist and I didn't know either until ... our paths are pretty similar, but yeah, I'm sorry.

Scott Schneider:

Yeah, no, no, no. So long story short, I mean, I just totally was smitten with it. It's just a fantastic area, started doing ... The law school asked me to come in and teach some classes on higher education law, which had normally been taught by Amy Gajda, who is probably one of the most important scholars and I didn't even know this, it's just serendipity, in higher education law, one of the most important academics in higher education law. So started teaching that course and just really fell in love with the practice. So I was at Tulane for six years and had the same kind of itch to, I want to go out and work with all sorts of different schools, to get a real sense of ... I thought I had really understood Tulane and everything that we should make about Tulane, but to work with different institutions, to get a sense of how other institutions work, even start to get into the public school issues, due process, First Amendment issues, which are just so fascinating to me.

So basically left Tulane to build a practice really from scratch back with my old firm. Then long story short, after my daughter graduated from high school, my wife and I had been wanting to move. So we moved from New Orleans to a place that we love, which is Austin, Texas, and that's where I've been ever since, so that's the ... There was no plan, I think to get into higher education law, certainly when I was in law school. It just developed, almost just out of pure luck and happenstance, but it's just been a really fun, fun ride.

Courtney Bullard:

Yeah, I tell people ... I don't know if you get these calls, I get calls, "How did you get where you are? I want to do what you do." I'm like, "Well, 18 years of going through the higher ed world and experience and luck," because just like you here, at Chattanooga, UTC is the only college that has in-house counsel. When I got hired, they didn't have anybody and I was the first one to get hired. I don't know that I had a horrible interview, but it was the most intense interview process. Law firms, it's like, "Hey, you're cool. You're licensed. Okay, we'll hire you. You got good grades in law school," or whatever, but going through the higher ed interview process, I mean, it was a couple days and it was intense and anyhow, I always say, "I don't know why I got hired, but I did." And I'm so happy that I did, but I did everything but divorces, is what I say. I was the Jack of all trades, master of none, but it was fun because no two days were the same.

Scott Schneider:

Oh no. I mean, it was same thing for me. I mean, it was a two day interview process and it was waves of people coming to meet with me. Yeah, it was overwhelming and at least in my head, I thought this is ... The entire time, for two days, I thought, "I am an idiot and this is a disaster and there's no way that these people will hire me." But yeah, the practice was fascinating. I mean, one day I remember it was negotiating a contract with the Dalai Lama and it was like, "Okay, how did I get involved in the-"

Courtney Bullard:

Only in higher ed.

Scott Schneider:

It was so funny, I included ... So he was going to be Tulane's commencement speaker and was Tulane's commencement speaker. I'm negotiating a contract with his office and I included in the contract, a liquidated damages provision in the event that he wouldn't show up. I got this really interesting phone call from his office and they call and they say, "We can't agree to a liquidated damages provision." I said, "Why not?" They go, "The Dalai Lama is the most ethical man on the planet. When he commits to doing something, he will be there."

Courtney Bullard:

You've offended him.

Scott Schneider:

I said, "Yeah, buddy, I hear that all the time. He needs to agree to the liquidated damages provision." It was pretty cool work.

Courtney Bullard:

I've reviewed so many contracts, but yeah, I always said, only in higher education. My second day on the job, they wanted to land a Black Hawk helicopter in this field and I'm like, "What? I've never dealt with anything like this before. I don't know what the risk management issues are." So it was fun though, very fun. Obviously you weren't an idiot in your interview because you got hired, but it is such a different world. As an attorney, being interviewed by a bunch of non-attorneys, I knew a little bit about the higher ed world, but of course, nothing like it is when you go work inside of it and live, eat, and breathe it. It's just different. Then watching the search process and interview process, or being a part of it, when we had a new chancellor, or a new provost, or what have you, it's just different than the private world.

Scott Schneider:

Yeah and Tulane was still in the process of recovering from Katrina, which shut the school down for a semester.

Courtney Bullard:

Yeah, I can't imagine that alone and the legal ... everything that went with that, yeah.

Scott Schneider:

It's very, very interesting, but another favorite, it just dawned on me, one of my favorite contracts. It was a Tuesday and I walked in the office and you never know what to expect. Long story short, they said, "Hey, on Wednesday, we're going to have a camel on campus for hump day."

Courtney Bullard:

That's awesome.

Scott Schneider:

The director of risk management said, "We need a contract in place." I was like, "What contract is this?" So I think I drafted the first ever camel use agreement in the history ...

Courtney Bullard:

I love it.

Scott Schneider:

Yeah, it was so much fun.

Courtney Bullard:

I love it. That's college campuses. Same as you, I started the behavioral intervention team at UTC and served on it. Obviously you're dealing with some pretty heavy stuff, but it was my favorite group of people. Student affairs is my favorite group of people in general, no offense to everybody else, but I had a great time with them and it was just cool. Very neat working on a college campus, I say, it keeps you young. I teach as an adjunct, do you still teach?

Scott Schneider:

Yep, sure do.

Courtney Bullard:

Yeah, and I like doing that because it keeps a toe in the water I guess.

Scott Schneider:

Yeah, no and I'm with you, student affairs folks are my favorite. I think the student affairs legal issues are the most interesting. The behavioral intervention team time was always ... It was very stressful, but it was also just super, super interesting.

Courtney Bullard:

So when we prepared for the podcast, you mentioned, that we're in the business of giving bad news, which is true a lot of times as lawyers. On the positive side, I wanted to find out what you enjoy most about your practice now. I know we've probably touched on it, which is learning about different institutions and just everything that comes along with higher ed and it's such a dynamic environment. Anything we haven't touched on?

Scott Schneider:

I love billing hours.

Courtney Bullard:

Stop it. For all the non-lawyers listening. They're like, "Okay, we've got to listen to two lawyers, have all these liquidated damages jokes." That's the worst part about private practice.

Scott Schneider:

Yeah, I hate billing hours and that will never change. I will never like it. Look, the thing I like about what I'm doing now is what I've already alluded to, having the opportunity to work with with different teams, different schools. I think that difference between being in-house and being external is when you were in-house, you were involved more on the ground level of issues. So your phone was ringing, I think about a lot of the times, trivial things, which was fun and it was good. Here, I feel like when my phone is

ringing, we're in crisis mode and I dig that. I like working through and having a perspective and getting a school from a place that's a mess to a good place. I don't know how else to put that. That's the part of this that I really, really like and I'll be honest with you, I also ... I miss when I was in house, I miss litigating.

Courtney Bullard:

Now this is where you and I differ. I'm not a litigator and I don't want to be a litigator. I have litigated, but it's not something that I want to do or [crosstalk 00:15:45].

Scott Schneider:

Well it waxes and wains for me. There are days and it really depends ... I don't want to overstate it, but having a good client that is sophisticated and understands the nuance and risks of litigation. The other issue with litigation that can be frustrating is you realize that in this profession, there are a ton of very broken people, right?

Courtney Bullard:

Yes, yes.

Scott Schneider:

Sometimes in litigating cases, you have no choice, but to have to deal with these incredibly broken people. I can say when I started practicing law, I mean, that's all I did, was litigated, litigated around the country. Boy, when I would have to deal with a difficult personality, I would lose my mind. I mean, it probably sent me to a doctor to get blood pressure medication. It's just crazy and I think now, I've learned to not get so impacted by it, but still, if you were to catch me on a day where I say, "I hate litigating, I hate doing this blah, blah, blah, blah, blah, blah, blah." It's undoubtedly because I'm dealing with some jerk attorney on the other side.

Courtney Bullard:

Absolutely.

Scott Schneider:

It's jerkiness towards no particular end. It's not solving a problem, it's not advancing the ball. It's just someone is just a really bad person. So that's the one part of litigating, I think that I'm not all that crazy about, but I don't ... I just-

Courtney Bullard:

Well and you run into that even ... I mean, even when I'm doing external investigations, or somebody lawyers up in the middle of a student conduct process, I mean, certainly can encounter that at lots of levels, but once you get into litigation, they're in your face all the time.

Scott Schneider:

Yeah, I mean, that's one of the things ... I mean, one of the developments and I think we've both seen it around the same time. I don't know that adding attorneys to the student disciplinary process has served

anyone particularly well, most importantly, the students accused of misconduct. I mean, at least initially, it was very rare for me to see an attorney representing an accused student who was doing anything that was adding value in any way. I mean, now maybe that's that started to change a little bit and some really top notch practitioners have started to enter this area, but it's been a really weird development and everybody goes, "Oh wow, adding attorneys to the mix is probably really helpful for these students." At least in my experience, I mean the advice that is being given a lot of times is really, really bad.

Courtney Bullard:

Yeah, I totally agree. They're not well represented and it just causes more problems. I mean, what I see is all these lawyers and they're like, "Well, I'm going to go into higher ed. It's the new biggest thing," but they know nothing about it. Then they come in and they represent a student, usually they're criminal defense attorneys or something and nothing against them, but they don't know how the process works on a college campus and they're trying to insert what they know about how the law works in civil court or criminal court into this campus process and causing all kinds of problems. But when I was in-house counsel, I felt I could do a better job at helping because I knew the attorneys and I would just call them and be very blunt with them and say, "This is how a campus process works. If you keep doing this in this way, you're not going to help this student." But now that I work with colleges all over, I don't know these attorneys and it's a whole different ball of wax, but I completely agree with you. I don't think they help, but I know that everyone's lawyering up.

When I was at UTC. I will say though, anytime it dealt with the PhD program or the CRNA program, in there if something happened, they always lawyered up. But to me that was higher stakes because it was a professional program and it definitely didn't help, but still, that was very typical. But over the eight years I was there, it was like every year more and more attorneys started getting involved with accused students.

Scott Schneider:

Yeah. I mean, the ones ... I've been blessed that there've been attorneys I've dealt with, that you can have candid and rational conversations with and those are great but man, the ones that really don't know anything and are super opinionated and aggressive towards no particular end, drive me a little batty.

Speaker 3:

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Courtney Bullard:

The only other time I think lawyers can help is when there is litigation, especially when I was in house and you had a student, or faculty, or staff member who was particularly difficult, it was usually a faculty or staff member and then they hired a lawyer, let's say it was a tenure and promotion issue. They did hire a lawyer and it took the administration out of the middle of it so they could go back to doing what they're supposed to do, which is the business of higher education and not trying to field all this stuff and I could step in and take over. That was helpful but in the student conduct side of things typically, you're not ... I completely agree, not helpful, but we're seeing it more and more. All these student conduct professionals, it's like they have to have a honorary JD or something in order to manage, they've got to have some pretty strong backbones to not get walked all over when that happens.

Scott Schneider:

Yeah, I can think of many employment cases that I've handled, both in house and as external counsel where I was like, "God, I hope this person hires a lawyer because this is maddening." Typically they hire someone and it's helpful and you can have a rational conversation.

Courtney Bullard:

Yeah, we're not all bad. That's what I hope this podcast will bring out. Some of us are friendly and reasonable and nice-

Scott Schneider:

Most of us, yeah but most lawyers are bad, so feel free to-

Courtney Bullard:

I know, it's kind of true and it's funny because when I started at UTC, they had no attorneys and I was under the general counsel's office for the UT system and they would use them for help but of course they were in Knoxville. So not being on campus, they were seen as like big brother, UT Knoxville and UTC, that's how they would view them. So when I came, they were so suspicious of me. It was like I had to work very hard to earn trust and say, "Look, we're on the same team. I'm going to tell you no sometimes, or that this is not a good idea, but that doesn't mean we're not on the same team." But it took some time, especially with some of the faculty, to earn that trust and respect so that everyone could do their job.

So I wanted to talk to you a little bit about external investigations and some of it might be because that's a lot of what I'm doing lately. For whatever reason, I feel like my practice goes in seasons. Sometimes I'm training, sometimes it's internal investigations, sometimes it's dealing with a crisis like we talked about, but that's the season I'm in right now. So I wanted to hear from your perspective, what you think a ... Well first, when you think a college or university, or even a corporation, should look to hire an external investigator?

Scott Schneider:

Well, I mean, I think there's some hallmarks. I mean, look, there are some investigations that you realize are going to have the potential to be high profile, either because of what is being investigated, or who is being investigated. From an institutional perspective, you want an end result that the public has confidence in. So certainly, I think whenever we have a concern about this is going to become an issue

that the university community as a whole will be aware of, the broader public will be aware of and we need to investigate it. At the end of it, we need those constituencies to have a high degree of confidence that we got it right. I think that's when I'm going, "I want an external investigator to come in and do the investigation."

I mean, there are other examples. I mean, if there's a potential for internal conflicts of interest, for instance, that's another example. If we're going, "Oh my God, our office is completely overwhelmed with complaints and volume. We're not going to be able to give each of the cases that we have in front of us the sort of attention that these things deserve." Then I'm looking for an external investigator as well. So, I think that hits most of the areas where I'll get retained, or even when I was in house, I was looking for someone else to come in and take a look at something.

Courtney Bullard:

That's sort of when I started getting the bug to go out on my own, was when I was hiring external investigators and something that struck me recently, here in the investigation I'm doing now, I was thinking to myself, "If they'd hired just an attorney who had no experience working on a college campus, there would be so much ramp up time in trying to understand the inner workings of what's going on in this particular situation." That was some frustration I had when I hired outside counsel for investigations was not understanding some of the intricacies that go into dealing with faculty, or staff, or even institutional leadership, or something like that. I don't think it's a must, but I do think it helps. Do you find that that's something that you think people should be looking for when they're hiring an external investigator? By that, I mean that on the ground experience like you and I have had? I know there's good people out there doing investigations that have never worked in house, so don't get me wrong, but I do think it helps.

Scott Schneider:

Yeah, I think it helps. It certainly has helped me. I mean, I can only speak for myself, I just always ... If it's a student on student issue, I do think these investigations require a unique skillset that I think you start to develop by being in house and seeing how these things can potentially unfold in really weird ways. I don't think for instance, there are tons of people who for years and years and years have investigated workplace harassment complaints involving employees. I just don't think when it's a student on student situation that the sort of tactics and approach that you use for an employee on employee situation in the non-academic setting works well in that context.

I also think it helps even when it's not student on student, when it's a faculty member. To be able to not only speak the lingo, but understand what the heck is going on. For me, when I transitioned from a law firm to in house, it probably took me a good nine months to understand, "Wow, higher ed employment issues are super, super unique and different." So yeah, you can do a good job with investigations, I think and not have that background, but it absolutely helps. I don't know that it's mission critical, but it helps, yeah.

Courtney Bullard:

No, right. I was an employment lawyer too, before going in house, although I did have some experiences working with some student on student issues with colleges, but it wasn't anything like being in house. But I remember when I first got hired and I was at a state institution and I sat down the HR director and

I'm like, "Wait a second. This person hasn't shown up for work except two times in a month and they haven't been fired? I don't understand what's going on." It took me a long time to understand like the culture of ... Well, not to understand it, but to accept it, I guess. The culture of, especially with faculty who were getting close to retirement age, who were trying to dictate their schedule, or just not really wanting to teach, and the fact that they were tenured and what you could and couldn't do. I mean, it's just a whole different ball of wax, but as an employment lawyer background, I mean, they got so tired of me in that first year. "What do you mean we don't do sexual harassment training and require it." The provost is like, "Well, I don't want to ... I can't really require the faculty." I'm like, "What? Why not? Yes, you can. It's an affirmative defense. Why would you not be doing this?" So it definitely was a little bit of a shock to the system.

Scott Schneider:

Yeah. There was always, for me a concern about, am I developing some form of Stockholm syndrome? Which I think, I did feel a compulsion, and even as external counsel to say, "Yeah, I get this is the way you all do it here, but let me tell you, this is a problem."

Courtney Bullard:

Yes, rip the Band-Aid off.

Scott Schneider:

So, I mean, there's always that. Part of, I think, the benefit of being external counsel and this was ... You talked about one of the reasons why you made the move. One of the reasons I think I made the move, I mean, I agree with you. I like the entrepreneurial aspect of this. It's been fun to develop a quote unquote business. I've enjoyed that in ways I never thought I would enjoy that. Certainly if you'd talk to me after coming out of law school, no, that's not what I wanted to do. I wanted to be in court. I wanted to litigate. I never wanted to do business development. I love it. Now, I love it, I don't know what-

Courtney Bullard:

Yeah, it's fun.

Scott Schneider:

Yeah but the thing I think that was just notable to me, was there would be things when I was internal that you'd recommend. You'd see a problem for instance, and go, "Wow, this is the way we need to fix it." You had to be very, very delicate about how you approached it, because there are all these political ramifications and someone's toes are going to be stepped on, et cetera, et cetera, et cetera. There was also this sense of also, "Well, maybe I don't even need to listen to this person. I mean, what do they know? They're internal." Then some external person would come and I can think of in particular, this one situation, I won't mention a name, who was saying exactly the same thing that I've been saying for nine months and everybody is like, Moses parting the sea here. "Oh my God."

Courtney Bullard:

Yes, oh yes. We've lived parallel lives, for sure.

Scott Schneider:

It's like, "Wow, this is frustrating." So part of being external that I totally love is I can give unvarnished opinions that aren't in any way ... I'm not trying to be political. I don't have to work with people who are going to be-

Courtney Bullard:

Exactly.

Scott Schneider:

I'll just give you an honest, reasonable opinion and for instance, if you have a policy or process that I go, "Yeah, I know you've done this for five or six years now and this is the way you do it, but good Lord, this is a terrible way of doing things." Number one, I can say that, and there are no political ramifications for me, but then also people listen to it and apply it.

Courtney Bullard:

Yep, weird.

Scott Schneider:

It's just a really nice way of approaching things but yeah, so as far as the external investigations, I mean, I find that that's what I'm typically ... One of those three scenarios is what I'm typically involved. I mean, it's a high profile investigation, it's a very difficult investigation. Someone is overwhelmed or something like that, or there's some internal conflict of interest.

Courtney Bullard:

I hope you enjoyed part one of my conversation with Scott Schneider. As you can tell, we have a lot in common and have had parallel paths in our careers and could probably talk for hours about our experiences, which is why this has become a two part episode. Please tune in to part two where Scott and I talk about the traits of a good Title IX investigator, his thoughts on the NPRM or the new proposed rules, and also what he would be doing if he were not a lawyer and his day of hooky. See you next episode.

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