



ACADEMIC SENATE, UC DAVIS DIVISION  
COMMITTEE ON ACADEMIC FREEDOM AND RESPONSIBILITY

ONE SHIELDS AVENUE  
DAVIS, CALIFORNIA 95616

May 18, 2012

RE: Egregious Academic Freedom Violation

Academic Senate:

The Committee on Academic Freedom and Responsibility (CAFR) has investigated a serious situation related to the academic freedom of an individual faculty member. By unanimous assent CAFR has found that the faculty member's academic freedom was violated by precipitous and inappropriate retaliatory statements of disciplinary sanction and legal action in the hours and days following the publication of a professional expert commentary perceived by some to be against University interests. Further, the violation persists such that the professor works in fear for his job and has to withhold his professional knowledge from students and society for fear of further retaliation. University administrators involved in the case misunderstand the University's policies and procedures regarding academic freedom and shared governance. The University's fundamental mission is to discover new knowledge and to disseminate that to its students and to society at large. CAFR calls upon the Academic Senate to affirm that professors should not be subjected to disciplinary sanctions, legal action or threats thereof for writing scholarly publications and professional expert commentaries, and that evaluations of the intellectual honesty of such writings require due process through shared governance according to APM-015 and APM-016 without circumvention to the legal system or to unregulated administrative action. CAFR calls upon the administration to apologize and take concrete actions to learn from its missteps, as enumerated below.

### **Introduction and Procedures**

According to Academic Senate bylaws, CAFR is charged with studying any conditions within the University that, in the judgment of the committee, may affect the academic freedom and responsibility of its individual members. When a faculty member brings forward a formal complaint, CAFR is obligated to investigate and write a report to the Academic Senate explaining our findings.

On November 22, 2010 a faculty member formally wrote an email to CAFR on the subject of "request for senate review" in which he sought advice about what he described as his being subjected to intimidation, threats, and harassment. The CAFR Chair undertook a preliminary investigation involving talking to several involved and peripheral parties as well as receiving documents in support of all perspectives. CAFR met to review the materials and discuss the situation. Before we could return formal advice, the Academic Senate Chair intervened to consult the Committee on Elections, Rules and Jurisdiction (ERJ) to evaluate whether this situation should be reserved for sole review by the Privilege and Tenure Investigative (PTI) committee. Although ERJ affirmed the independent and unfettered right of CAFR to proceed (as has occurred in similar situations UC systemwide in the past), the faculty member did not formally request that and CAFR informally advised the faculty member to contact PTI. All information regarding subsequent PTI activity is confidential and has been withheld from CAFR.



On December 21, 2011, the faculty member wrote to CAFR, “I would like to formally request a review of what I believe has been a blatant breach of my academic freedom.” CAFR informed the Senate Chair as well as the PTI Chair and then undertook an investigation. The investigation consisted of (a) reviewing the extensive past information from the complainant and from CAFR’s 2010 preliminary investigation, (b) inviting each direct party to meet with CAFR and then holding meeting with those who agreed, (c) reviewing a supervisor’s letter on behalf of one of the parties who declined to meet, (d) soliciting advice from the UC system-wide University Committee on Academic Freedom (UCAF), and (e) discussing the matter as a committee. These sources of information were used to write this report that presents the details of the situation and CAFR’s findings.

In preparing this report, a decision had to be made whether to redact the names of those involved. The faculty complainant agreed that his name could be used in the report. Given that information about the positions of the relevant parties is vital to laying out the events and complaint, it is impossible to completely hide the identities of those involved. The advice from experienced UCAF members was that the names of university officials need not be withheld, because they are in public positions that have accountability. Nevertheless, we have withheld the names of individuals other than the complainant, even though we cannot hold back the related information about their positions and actions, and it is difficult to write clearly without using gender-specific pronouns where necessary.

## Chronology of Events and Related Facts

1. Professor Michael Wilkes, M.D., is widely credited with originating "doctoring" courses that are now used by 33 medical schools. Prof. Wilkes was recruited to the UCD medical school (UCDMS) from UCLA in part to create a four-year sequence of "doctoring" courses at UCDMS. Prof. Wilkes won a teaching award in 2010. Prof. Wilkes has been a medical reporter for the *New York Times*, *ABC News*, McClatchy newspapers, and other media where he has provided professional expert commentaries. Among other topics, he is a recognized expert on prostate cancer. He has co-authored scholarly articles and professional expert commentaries about prostate cancer screening in both peer reviewed journals and newspapers. In 2010 he was serving as Chair of the Consensus Committee for the Centers for Disease Control and Prevention. He has also served as an organizer for an international medical student exchange program, helping to host students from Hungary.

2. UCDMS faculty members advertised and subsequently held a public event at the UCD MIND Institute on September 28, 2010. The advertisement for the event most prominently states, “Prostate Defense Begins at 40”. There is also sizable text stating “Know Your Stats” with “About Prostate Cancer” in a very small font. There is also prominent text in red stating, “Attend a Free UC Davis Men’s Health Seminar”. The event was promoted with mention of special guest Guy McIntyre, a three-

**PROSTATE DEFENSE**

**Know Your Stats**  
About Prostate Cancer

The American Urological Association Foundation and the National Football League want you to Know Your Stats about prostate cancer. So all men over 40 should talk with their doctors about their PSA (prostate-specific antigen) score and get regular physical exams.

**Attend a Free UC Davis Men's Health Seminar**

\* Special Guest: Former San Francisco 49er and three-time Super Bowl champion GUY MCINTYRE

- Get the facts behind the men's "life expectancy gap"
- Hear up-to-date recommendations on screening for prostate cancer
- Get information on maintaining your sexual function, libido and energy
- Learn why healthy choices are important for men's quality of life

**Tuesday, Sept. 28** at UC Davis MIND Institute, 2825 50th St., Sacramento  
Registration/refreshments: 5:30 - 6 p.m. • Presentation: 6 - 7 p.m.  
**Space is limited! To register, please call 916-734-5154.**

**UC DAVIS HEALTH SYSTEM**

**AUA FOUNDATION**  
The Official Foundation of the American Urological Association

**NFL**

**Intuitive Surgical®** proudly supports this community education program.

No medical services are provided by the AUA Foundation or its agents or employees. Prostate cancer screening is rendered by qualified local physicians, laboratorians and affiliated personnel who are not employees of the AUA Foundation, the National Football League, or Intuitive Surgical®. None of these entities is responsible for the testing and care rendered.



time Super Bowl participant, and former player for the San Francisco 49ers. It also has the symbols or nameplates for UC Davis Health System, AUA Foundation, and NFL.

3. Prof Wilkes first learned of the event and promotional campaign on September 16, 2010. The same day he wrote an email to the UCDMS Executive Associate Dean, the Associate Vice Chancellor for Strategic Technologies and Alliances, and the UCDMS Associate Dean for Curriculum and Competency Development. The email noted a concern about the presentation and suggested a lack of objectivity by the American Urological Association with regard to the prostate-specific antigen (PSA) test. Prof. Wilkes suggested it was contradictory for UCDMS to teach evidence-based medicine and concurrently host an event promoting the use of PSA, which he characterized as "far away from evidence-based". The Executive Associate Dean wrote back the same day stating, "We cannot impinge academic freedom. maybe you need to be more interactive internally."

4. Prior to the event, Prof. Wilkes investigated the advertisement and planned event. By his account, this consisted of (a) attempting to talk with the faculty members hosting it, (b) conversing with football player Guy Macintyre and researching his payment, and (c) attempting to obtain event materials.

5. Prof. Wilkes did not attend the September 28, 2010 event, but two medical students did attend and recorded it with an audio device in a set of 7-minute clips. The students provided Prof. Wilkes with the audio recordings. One student wrote that a video was played that the student deemed to be "unabashed marketing" and the student reported that "the urologists mentioned having a baseline PSA at age 40 for predicting lifetime risk of prostate cancer."

6. On September 30, 2010 the *San Francisco Chronicle* printed an "Op Ed" article entitled "PSA tests can cause more harm than good" written by Prof Wilkes and a medical faculty colleague from another university. The article was edited by the newspaper to reduce the length (from 950 to 520 words), with the edited version provided to Prof. Wilkes the day before it was published using the standard editorial practices used by major newspaper outlets. An online version of the article was subsequently published on October 01, 2010 (see Appendix 1). The thesis of the article is that PSA tests can cause more harm than good, so men should be informed about the pros and cons of the tests to enable them to make informed decisions. The article provides several sources of evidence and professional judgments in support of the thesis. The authors used the event hosted by UCDMS faculty members to illustrate societal problems associated with PSA testing. The authors suggested and described possible financial motivations for the event, and in doing so they provided two caveats: (a) they can't know why UC Davis offered the event and (b) they "wonder whether it just might have to do with money". These are clear statements that their ideas are speculative commentary.

The Executive Associate Dean says that he received "multiple faculty complaints" about the article, but the timing of those complaints is unclear, so they are not assigned a sequence in the numbered chronology

7. At 7:02 am on the same day the article appeared in print (9/30/10), the Executive Associate Dean wrote an email to the UCDMS Associate Dean for Curriculum and Competency Development with



copies going to the Associate Vice Chancellor for Strategic Technologies and Alliances and Prof. Wilkes in which he stated that (a) Prof. Wilkes would not be invited to continue as doctoring Instructor Of Record (IOR) after the academic year and (b) resources to support Prof. Wilkes' Hungarian student exchange would be ceased after completing commitments to date. In a meeting with CAFR, the Executive Associate Dean acknowledged that he had read the *San Francisco Chronicle* article before he wrote this email.

10. At 8:30 am on October 2, the Associate Vice Chancellor for Strategic Technologies and Alliances wrote to Prof. Wilkes that the Executive Associate Dean "is clearly upset that the Men's health issue is being played out in the paper and through the students rather than an academic debate or issue specific seminar as he would expect in a University." [In a meeting between CAFR and the Executive Associate Dean, the Dean corroborated this when he said that his issue with Prof. Wilkes was not the debate about PSA, but rather the propriety of how Wilkes engaged in the debate].

11. At 10:45 am on October 2, the Executive Associate Dean refused a request by Prof. Wilkes to talk and informed him that further information would be coming about his "future with Doctoring 4 and with your position as Director global health for UCDHS." UCDHS is the UC Davis Health System.

12. On October 5, Prof. Wilkes wrote an email to the faculty members who hosted the event in which he wrote, "I am sorry if this caused your team unnecessary angst" and explained that his original article was substantially cut and edited in a way that he felt created a more negative tone. He offered to take them to lunch and discuss educational opportunities. He also explained more about his scholarly position on PSA testing.

13. According to the UCDMS Executive Associate Dean, a meeting was held between the UCDMS Dean, the UCDMS Executive Associate Dean, and the Health System Counsel some time after the article was published. The UCDMS Dean made the decision to have the Health System Counsel write a letter to Prof. Wilkes.

14. The Health System Counsel wrote a letter to Prof. Wilkes in which he expressed the University's concern about factual inaccuracies pertaining to UC Davis in the online version of the article. To CAFR's knowledge, the Health System Counsel was not present at the event. The letter alleges that there are five false statements in the article, provides the statements, and describes reasoning as to why the statements are false. The origin of the scholarly analysis is not stated and there is no indication that a scholarly review was conducted. The letter then ends with the following paragraph, "The purpose of this letter is not to stifle legitimate public debate, academic freedom or policy advocacy about the role of PSA screening or broader issues- far from it. I am simply pointing out that there are numerous errors of fact in your article, that they were injurious to the University interests and reputation and thus potentially actionable under the law of defamation."

15. Prof. Wilkes alleges that he was also told that his space was going to be re-assigned, although there is no documentation of that. In a meeting on November 30, 2010 between the CAFR Chair and the Executive Associate Dean, the intention of re-assigning Prof. Wilkes' space was confirmed by the Executive Associate Dean.



16. As of May 1, 2012, none of the actions against Prof. Wilkes stated by the Executive Associate Dean (i.e. change in IOR, cessation of resources for Hungarian exchange, removal as Director of global health for UCDHS, and reassignment of space) have occurred.

### **Allegation of Violation of Academic Freedom**

Prof. Wilkes alleges that his academic freedom has been violated and that he has been subjected to threats and harassment by the University as a direct response to the publication of his article in the *San Francisco Chronicle*. Prof. Wilkes alleges that the fact that the University has not carried out the actions against him to date is irrelevant in that the threatening proposed actions, including the threat of legal action against him, have not been withdrawn and there has not been any apology by the University for inappropriate behaviors that violated his academic freedom. As a result of the University's actions against him, Prof. Wilkes is concerned about his employment status and concerned about his right to continue to freely pursue his scholarly research and professional expert commentary about ethics in medicine. The fear he feels and expresses has resulted in him have turning down opportunities for commentaries out of fear of further intimidation and loss of his job.

### **Key Factors in Defense of University**

Removal of Prof. Wilkes' IOR appointment: The Executive Associate Dean alleges that there was faculty and administrative discontent over Prof. Wilkes' teaching, course management, and collegiality, and that these factors were the basis of the decision to remove him as IOR of Doctoring 3. There is widespread documented information that the Doctoring sequence as a whole had problems, so a Doctoring Task Force was established. This group was reviewing the courses in the series one at a time starting at Doctoring 1. In interviews and emails, different individuals pointed to very different concerns about the Doctoring sequence, so CAFR could find no clear consensus. As of March 2012 the Doctoring Task Force had yet to address Doctoring 3 or 4 as far as CAFR knew. According to a December 2010 email to the CAFR Chair from the Associate Dean for Curriculum- because the Doctoring Task Force would not be able to complete its work in time to make a decision about Doctoring 3 before it was to be taught the next time, the chairs of internal medicine, family medicine, and psychiatry met and recommended to the Executive Associate Dean that the IOR for Doctoring 3 be changed. The three chairs confirmed in an email to the CAFR Chair in December 2010 their agreement with this recommendation and alleged that their concerns go back to September 2009, even if the formal recommendation was not made until the time the *San Francisco Chronicle* article was published.

Removal of space: The Executive Associate Dean alleges that the space was needed by the home department that holds that space.

Removal of Hungarian student exchange of directorship of global health of USCHS: The Executive Associate Dean alleges that the program was being implemented poorly and that he had issued multiple warnings about how Prof. Wilkes was running the program.

Overall, the Executive Associate Dean alleges that the timing of the actions against Prof. Wilkes was purely coincidental.



Letter from Health System Counsel: In a February 2012 letter to CAFR, the UC Davis Chief Campus Counsel provided the following information specifically pertinent to this review: (1) the Health System Counsel "letter in no way proposes or imposes disciplinary sanctions against Dr. Wilkes, (2) "Publicly broadcast false statements that injure the University's interests and reputations are potentially actionable as a tort. Such a statement is a fact. It is not a threat and it is not a sanction.", (3) "As indicated above in APM 016, faculty members remain subject to compliance with University rules and regulations, as well as laws, outside the scope of faculty discipline and 'faculty are subject to appropriate administrative actions for failure to comply with such rules and regulations.' "; and (4) "The administrative action elected in this case was simply to provide information to Dr. Wilkes regarding the false information in his article and the potential legal exposure for broadcasting false information that is injurious to reputation. For these reasons, there was no requirement to first pursue disciplinary action against Dr. Wilkes under APM 016."

### Relevant Authorities

1. "The University of California is committed to upholding and preserving principles of academic freedom. These principles reflect the University's fundamental mission, which is to discover knowledge and to disseminate it to its students and to society at large. The principles of academic freedom protect freedom of inquiry and research, freedom of teaching, and freedom of expression and publication." (APM 010 ¶1).
2. "Members of the faculty are entitled as University employees to the full protections of the Constitution of the United States and of the Constitution of the State of California." (APM-010, ¶3).
3. "The University seeks to provide and sustain an environment conducive to sharing, extending, and critically examining knowledge and values, and to furthering the search for wisdom. Effective performance of these central functions requires that faculty members be free within their respective fields of competence to pursue and teach the truth in accord with appropriate standards of scholarly inquiry." (APM-015, ¶1).
4. Faculty have a constitutionally protected right to freedom of expression which includes the free exchange of ideas (APM-015, Part I).
5. "No disciplinary sanction for professional misconduct shall be imposed by the administration except in accordance with specified campus procedures adopted after appropriate consultation with agencies of the Academic Senate..." (APM-015, Part III A(1)).
6. "No disciplinary sanction shall be imposed until after the faculty member has had an opportunity for a hearing before the Divisional Committee on Privilege and Tenure..." (APM-015, Part III A(2)).
7. "While Administrative Officials may delegate many of their responsibilities, they cannot delegate accountability." (UCD Administrative Responsibilities Handbook, p. 8).
8. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) was a United States Supreme Court case which established the actual malice standard which has to be met before press reports about public



officials or public figures can be considered to be defamation and libel. According to the actual malice standard, there has to be a reckless lack of investigation, which is a difficult standard to prove.

## CAFR Findings

With respect to the actions taken by the UCDMS administration, CAFR finds that Prof. Wilkes academic freedom has been violated. Prof. Wilkes was told that he would lose his IOR position for Doctoring 3, his space, and his directorship. That is undisputed. We can never know with 100% certainty that the actions by the Executive Associate Dean were a direct response to the *San Francisco Chronicle* article, but there is a very strong appearance of impropriety on the basis of several lines of evidence.

- 1) The timing of events is highly suspect beyond any reasonable doubt. The Executive Associate Dean admits the disciplinary email was written after reading the article and characterized the email as "intemperate." The Executive Associate Dean agreed the email has an appearance of impropriety, based upon its close proximity to the timing of the article, even though he denies that the timing is connected. He characterized the email as "reflexive" and said if he had it to do over again, he would not have sent the email.
- 2) There is no evidence to indicate that Prof. Wilkes' space was under review for reassignment prior to the date the article was published. Space is always a stressor, but by all accounts Prof. Wilkes has a well-funded research program that warrants the space he is allotted. There is no independent reasoning behind reassigning space at that specific moment in time.
- 3) There is no evidence to indicate that the Hungarian student exchange and Prof. Wilkes' role as director of global health for UCDHS was under review or had reached a level of poor performance to necessitate cessation at that specific moment in time.
- 4) By all accounts, there was never any discussion to remove Prof. Wilkes as IOR of Doctoring 4, but the Executive Associate Dean sent a threatening email shortly after the article appeared that Prof. Wilkes should expect further information regarding his role in that course.
- 5) With regard to Doctoring 3, the information is highly conflicting and complex. On one hand, Prof. Wilkes won an award for his outstanding teaching in 2010 and is highly lauded by his students. The Executive Associate Dean described Prof. Wilkes to CAFR as "a gifted educator who uses technology well." On the other hand, some faculty and administrators had concerns in 2010 that pre-dated the *San Francisco Chronicle* article. The UCDMS has in place numerous faculty bodies that play a role in curriculum and instructors, including an Executive Committee, a Committee on Educational Policy, a Doctoring Steering Committee that meets monthly, and a Doctoring Task Force. The fact that the Executive Associate Dean and the chairs of internal medicine, family medicine, and psychiatry abruptly decided to supersede the normal procedures of faculty shared governance and faculty oversight of administrative actions related to IORs is peculiar. Taking a decision on such a conflicted matter without faculty consultation and doing so on the very day a controversial article was



published is at best very poor leadership, but more reasonably evidence of direct retaliation against Prof. Wilkes.

- 6) Removal of IOR, space, and a directorship would constitute disciplinary sanctions and stating these sanctions to a faculty member in response to alleged (by other faculty) or perceived (by the Dean) faculty misconduct requires that the administration proceed in accordance with specified campus procedures adopted after appropriate consultation with agencies of the Academic Senate (APM-015, Part III A(1)). No such procedures were followed regarding an evaluation of faculty misconduct. Instead, a final decision was given to Prof. Wilkes at 7:02 am on the very day the article was published.
- 7) The fact that none of the stated disciplinary actions has actually been carried out demonstrates that they were taken precipitously in the heat of the moment as a retaliatory action. The desire to act out against Prof. Wilkes at that moment trumped due process according to University policy and procedures for disciplining faculty for their conduct.
- 8) The fact that none of the stated actions has been formally withdrawn in writing (as they were presented in writing) demonstrates that they are intended as a persistent threat. There was no indication given to CAFR that Prof. Wilkes' space or directorship are under formal review. Therefore, continuing to leave these stated actions as they are serves no purpose other than to intimidate Prof. Wilkes.

With respect to the letter written by the Health System Counsel, CAFR finds that the University violated Prof. Wilkes' academic freedom by acting precipitously to threaten potential legal action prior to a full and fair assessment of the facts or any establishment of "actual malice". Contrary to the statement by the Counsel in his letter, CAFR finds that the purpose of the letter requested by Dean Pomeroy was precisely to stifle legitimate public debate and impinge on Prof. Wilkes' academic freedom. A key line of evidence substantiating this judgment is that neither Dr. Wilkes' co-author or the San Francisco Chronicle were sent letters by the Health System Counsel, even though they were mutually involved in writing and editing the article. Dr. Wilkes was not a sole author of the Op Ed. CAFR investigated and found out that only Dr. Wilkes was sent a letter. The UC Davis Chief Campus Counsel stated that the letter was intended to only be informational. If that was true, then why not send that information to all parties involved, since they would all bear equal jeopardy? The fact that the letter was only sent to Dr. Wilkes is an inconsistency that presents a strong appearance of impropriety on the part of the Health System Counsel if the goal truly was to be informative. Furthermore, the defamation standard for showing actual malice is high and notably the letter from the Health System Counsel does not address the topic of actual malice, only the presentation of perceived false statements. That is a surprising omission if the claim of defamation is to be taken seriously as informational instead of as a threat. Establishing actual malice would require a more substantial effort than undertaken by the Health System Counsel to determine what prior investigation Dr. Wilkes had undertaken. CAFR was able to establish that Dr. Wilkes did try to investigate the event prior to its occurrence and he did speak to the former football player.

By definition, a threat is a statement of an intention to inflict damage in retribution for something done or not done. The words in the letter exactly conform to that definition, so it is certainly a threat. When a University lawyer sends an official letter on University letterhead to a professor



(excluding his co-author and newspaper editor from similar action) stating that the professor's academic writings or professional expert commentary are potentially actionable under the law and the letter fails to provide the key information that makes the professor's writing "actual malice", then that is absolutely a threat. In fact, since most faculty do not have their own legal counsel, it is essentially a gamble preying on the ignorance of faculty. Further, the letter had an immediate chilling effect upon Prof. Wilkes' willingness to engage in his long-time established practice of providing professional expert medical commentary for various reputable publications, and also his willingness to engage medical students in important teaching dialogue. The effect of the letter has been to suppress Prof. Wilkes' academic freedom and to instill in him a fear of legal retaliation and unemployment if he presents scientifically sound, but perhaps controversial material. This violation was carried out by the UCDMS Dean in demanding the letter be written and the Health System Counsel for writing it.

- 1) Beyond any doubt, Prof. Wilkes is a scholar with expertise on prostate cancer. APM-010 and APM-015 present no limitation as to the venues, format, or content of scholarly publication and professional expert commentary. Scholarly publications commonly include professional judgments and speculations, which are in due course subject to scholarly discussion and/or critique. Consequently, any article Prof. Wilkes writes on prostate cancer, drawing on any information related to that topic, is scholarly and pertains to his professional obligations acting as a faculty member. University oversight and discipline of faculty as pertains to scholarly writings is governed by APM-015 and 016. Therefore, by circumventing the required venues for oversight and discipline of faculty scholarship, the University violated Prof. Wilkes' academic freedom by sending him a threatening letter on legal affairs letterhead in place of pursuing appropriate investigation and potential discipline.
- 2) The stated purpose of the Health System Counsel's letter was to take issue with the truth of statements made in the article. That is inherently a scholarly discussion, not a legal one. If the UCDMS Dean wanted to address that, then the Academic Senate is the body charged with evaluating the merit of scholarship. The Health System Counsel is not a scholar on prostate cancer and is not qualified to render a judgment as to the veracity of statements in the article, which is exactly what he did in the letter. The fact that the letter's stated purpose was to render such scholarly judgment is the strongest evidence that the topic at hand was in fact Wilkes' intellectual honesty. Contrary to the claim by the Chief Campus Counsel in the subsequent letter to CAFR, the topic of intellectual honesty is definitely covered by APM-015, which states the ethical principle that professors "accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty." The letter by the Health System Counsel directly accused Prof. Wilkes of violating these ethical principles. As a result, the letter has everything to do with faculty conduct. Therefore, by circumventing the required venues for oversight and discipline of intellectual honesty, the University violated Prof. Wilkes' academic freedom by sending him a threatening letter on legal affairs letterhead in place of pursuing appropriate investigation and potential discipline.
- 3) In the letter by the Chief Campus Counsel that defended the original letter, the claim is made that faculty members remain subject to compliance with University rules and regulations and that faculty are subject to appropriate administrative actions for failure to



comply with such rules and regulations. Indeed, if a faculty member fails to return a library book they may be disciplined and so on. Unfortunately, neither the original letter to Prof. Wilkes nor the subsequent letter by the Chief Campus Counsel state any specific University policy as having been violated. In fact, no one has ever written or stated a University policy that Prof. Wilkes violated. Therefore, that defense of the letter is baseless.

- 4) Both the Health System Counsel and the Chief Campus Counsel stated that publicly broadcasting false statements that injure the University's interests and reputations are potentially actionable as a tort. However, the University did not convene a scholarly evaluation by peers in the Academic Senate to determine if in fact any false statements were made or present information to show that the statements rose to the high standard of "actual malice". The choice to not send a warning letter to the *San Francisco Chronicle* and the other author is indicative of the weakness of the potential action. According to legal sources, the fact that the allegedly defamatory communication is essentially true is usually an absolute defense; the defendant need not verify every detail of the communication, as long as its substance can be established. The defendant in this case would be one of the nation's foremost experts on medical ethics- who better to make professional judgments in a public article? This goes to the heart of there being some possibly mistaken statements in the article, as the occurrence of some false statements do not rise to the standard of defamation- a fact that the Counsel chose not to reveal to Prof. Wilkes. Furthermore, legal sources indicate that a public official or entity (even non-governmental) must prove that a libelous statement "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard to whether it was false or not" (New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). Neither Counsel made an allegation of actual malice in their letters and it was clear in our communications that Prof. Wilkes was deeply concerned with getting to the truth. CAFR has established that Prof. Wilkes did conduct some investigation about the UCDMS event prior to its occurrence and he was certainly already among the foremost experts on the topic of prostate cancer. Simply not attending the event and being precluded from receiving the powerpoint presentation in advance do not rise to the standard of actual malice. Consequently, it is very difficult for a plaintiff to prevail in a libel action. Knowing that and without providing Prof. Wilkes with any actual information about defamation and the "actual malice" standard, the only reasonable conclusion is that the sole value in making a statement of this nature to a professor is to intimidate and threaten. The failure to follow appropriate procedures, the precipitous timing of the letter, and the low potential for achieving the "actual malice" threshold demonstrate the punitive purpose of the letter as a threat to harm and stifle Prof. Wilkes.
- 5) The fact that the University would take the position that it is appropriate to take legal action against a professor whose scholarly writing or professional expert commentary is perceived as injurious to University interests and reputation is an unprecedented affront to academic freedom and the people of California. APM-010 states that the University's fundamental mission is to discover new knowledge and to disseminate it to its students and to society at large. APM-010 is intended to protect scholarly publication without caveat as to the subject matter of the scholarship. Circumventing University policy and procedures that serve the University's fundamental mission by precipitously launching legal action or threats thereof is an outrageous abuse of power that undermines the standing of the University in society.



The University ought to abide by its own policies and seek to address allegations of faculty misconduct through its internal procedures prior to threatening or taking legal action.

## Conclusions

CAFR finds that Prof. Wilkes was and continues to be subjected to egregious threats and unfounded potential disciplinary sanctions by UCDMS administrators and the UCD Health System Counsel. These threats and potential disciplinary sanctions stem from the perception of faculty misconduct in terms of intellectual dishonesty related to statements made in a newspaper Op Ed he wrote in which a University event was used as a case study to illustrate questionable practices in the health sector. UCDMS administrators stated that they would have preferred that Prof. Wilkes keep the matter internal, but in fact there is no limitation on faculty in presenting their scholarship and professional expert commentary publicly. In fact, faculty are encouraged in policies and practices to demonstrate to students real-world applications of the topics of their scholarship and to get involved in societal matters to bring their professional capabilities to bear on important topics of the day. That is exactly what Prof. Wilkes did. It is not for CAFR to evaluate the merits of the contents of Prof. Wilkes' article, and neither is it for the Health System Counsel or administrators to decide either. Assessment of faculty scholarship, including issues related to faculty conduct are governed by shared governance procedures in APM-015 and APM-016. The timing of the stated sanctions immediately following the publication of the article and other evidence indicate a strong appearance that the two were linked. Further, the emails and letters by UCDMS administrators and the Health System Counsel were so precipitous, beginning with the strongest sanctions at 7:02 am on the very day of publication, that they were without rational scrutiny and lacked evaluation of the facts. The Health System Counsel letter arrived just 19 days after the publication and purports to present a thorough scholarly rebuttal, but without having followed any appropriate procedure for faculty assessment of scholarly content. The letter was only sent to one Op Ed author and failed to present and explain the basis for actual malice. Writing on the letterhead from legal affairs to tell Prof. Wilkes that his scholarly writing was potentially actionable under the law of defamation was a blatant threat intended to damage him and in fact there is little legal potential for successfully pursuing action against a foremost national scholar on the topic of his scholarship to meet the standards for defamation. Finally, the contention that the University may take legal action against faculty for their scholarship or professional expert commentary any time it is perceived to injure University interests and that the University may do so without any faculty consultation regarding matters related to faculty misconduct renders University policy and procedures impotent and alerts society that the University cannot be trusted as a truthful and accountable purveyor of knowledge and services. It is far more injurious to University interests that Prof. Wilkes' scholarship is being stifled through unjust and unreasonable threats of legal action and potential disciplinary sanctions than it is to have society know what Prof. Wilkes' professional judgment is about PSA tests and what his speculations are about any associated University financial motivations.

CAFR recommends to the Academic Senate that the following actions be taken:

- 1) The Representative Assembly vote to affirm the academic freedom right of Prof. Wilkes and all other faculty to publish scholarly articles and professional expert commentaries that address ethics and societally relevant critiques.



- 2) The Representative Assembly vote to express severe disapproval in the perspective that the University may take legal action against professors whose scholarly publications or professional expert commentaries may be perceived by University administrators to injure University interests.
- 3) The UCDMS Dean, UCDMS Executive Associate Dean and Health System Counsel must within 6 months all promptly and publicly accept responsibility for serious errors of judgment, write individual apologies to Prof. Wilkes, and rescinding all disciplinary actions stated, proposed, or taken against Prof. Wilkes.
- 4) The UCDMS Dean must within 6 months take concrete steps to prevent future violations of academic freedom rights, including training administrators, their staff, and faculty on academic freedom rights.
- 5) The UCDMS Dean must report back to the Academic Senate 6 months hence about what training activities have been done.

Sincerely,

Committee on Academic Freedom and Responsibility

Unanimous Assenting Committee Members:

Moradewun Adejunmobi, Professor  
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### Appendix 1: San Francisco Chronicle Online Article

#### **PSA tests can cause more harm than good**

Michael Wilkes, Jerome Hoffman

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UC Davis just announced a seminar for the public on "men's health." That title notwithstanding, the program appears to be entirely about prostate cancer and in particular about the prostate specific antigen screening test. Prostate cancer can be devastating, and the PSA is intended to find cancer early - in time to do something about it.

If only it were that simple. Research has shown that there are steps people can take to improve the quality and length of their lives, even before they're having any symptoms. (That's what "screening" for disease is.)

Unfortunately, though, the devil's in the details, and many possible screening programs turn out not to do any good - and in fact some tests like PSA cause harm. That's why virtually all expert public health panels do not recommend the PSA test.

A blood test that isn't accurate can fail to find disease that's present, leading to false reassurance. It can also report disease when it's not really there, leading to unnecessary use of other tests (like biopsy) that are not so benign. Perhaps most concerning, the PSA test frequently identifies something that qualifies as cancer under a microscope but acts nothing like cancer in real life. That is to say, the large majority of PSA-discovered "cancers" would never cause any problem whatsoever if they went undetected.

But because doctors can't tell whether one of these "cancers" is benign (as it usually is), or might occasionally be one of the bad actors, finding something through screening invariably leads to treating it.

Most of the men so treated would have been just fine if they never knew about the cancer. But when they're treated (whether with surgery, radiation or chemotherapy), the majority suffer really life-affecting effects, such as impotence and/or incontinence. That's why both of the two very large trials of PSA screening published in 2009 found no (or at most a tiny) benefit, but a great deal of harm.

Sadly, most men are never told the facts about the test, nor are they encouraged to make their own informed decision. The UC Davis course doesn't even acknowledge a problem with prostate cancer screening. Its expert presenters - including two urologists and a professional football player (!) - will tell you that you need to "know your (PSA) statistics" beginning at age 40. Contrast this to the comments of Dr. Richard Ablin, the inventor of the PSA test, who has publicly called it "a hugely expensive public health disaster," with accuracy "hardly better than a coin toss."

We can't say why UC Davis offers this course that ignore scientific evidence, but we wonder whether it just might have to do with money. Testing for and treating PSA-identified cancer is a large part of the practice of many urologists so it may not be surprising that urology groups take a



far more positive stance on the test than almost any other doctors. They also fund a pro-PSA lobby that now includes the National Football League.

Health care spending is threatening to wreak greater and greater havoc on our economy. That's not to say we shouldn't invest in treatments that lead to improved health, even when they're expensive.

And UC Davis, the NFL and surgical device companies have the right in our society to promote events in order to increase their profits. But we worry when companies and doctors with a conflict of interest sponsor what could be considered an infomercial endorsement to unsuspecting men without telling them they might end up being harmed as a result of a simple PSA blood test.

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<http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/10/01/EDET1FLK3B.DTL>

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