



# Managing Your Campus Legal Needs: An Essential Guide to Selecting Counsel

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National Association of College  
and University Attorneys

**P U B L I C A T I O N   S E R I E S**

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# Managing Your Campus Legal Needs: An Essential Guide to Selecting Counsel

More than 40 years ago, at the height of the free speech movement on the Berkeley campus of the University of California, a scholar named Paul Denise wrote an essay in which he attempted to distill the distinctive characteristics making American colleges and universities so difficult to govern. The modern American postsecondary institution, Denise wrote, is unique among all other forms of educational enterprise “in its bewildering complexity and lack of intellectual coherence, in its bureaucratic indifference to individuals as such, in its compartmentalized dealings with students, in its overwhelming size and implacable institutional continuity, in its unabating demand for performance, and in its confidence in the efficacy of anxious motivation as well as its own anxious commitment to orderliness.”<sup>1</sup> American colleges and universities are unimaginably complex. Running them is a superhuman task, and managing their legal affairs is constantly challenging – but never dull.

This monograph is written primarily for college and university presidents and other administrators who use (or are thinking about using) the services of campus lawyers. It explains what those lawyers do, how their offices are organized, and what consumers of legal services have the right to expect from them. It addresses threshold questions a campus chief executive officer may wish to consider when deciding whether to establish a legal office and whom to hire to provide legal services.

The secondary audience for this monograph consists of the lawyers who provide those services, particularly lawyers new to the field of higher education law. The monograph explains what makes campuses different from other legal practice settings, how to conceptualize the role of campus counsel, and where to turn for peer advice.

As with other areas of legal specialization, higher education law requires practitioners to master a large volume of substantive law. Every lawyer who represents a college or university develops a working knowledge of the statutes, regulations, and court decisions that are unique to the field and that form its foundation. The substantive law of higher education is not the subject of this monograph; these pages focus instead on considerations of experience and professional judgment. Everyone who practices law in a college or university setting is familiar with the question, “So what is campus lawyering exactly? Who does it? Is it different from other areas of law?” This monograph offers general answers to those questions.

As used in this monograph, the phrase “campus lawyer” is used to describe any lawyer who provides legal services to a college or university client. While many such

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1. Paul S. Denise, “The Prophetic Microcosm and the Para-Curriculum (Some Thoughts Resulting from the Disjuncture of Relevance at Berkeley),” *reprinted at* University of California, *Free Speech Archives*, <http://bancroft.berkeley.edu/FSM>. The Denise article appears online at: <http://content.cdlib.org/xtf/view?docId=kt4489n6q1&doc.view=frames&chunk.id=d0e342&toc.depth=1&toc.id=&brand=oac>.

lawyers in fact work on campus as members of in-house legal departments, others are employed in law firms, centralized system offices, or the office of the state attorney general. The term “general counsel” refers to the campus chief legal officer, and “general counsel’s office” to the organizational home of campus lawyers, although other appellations are often used – “Legal Counsel,” “University Counsel,” “Legal Advisor,” and other variations.

While campus lawyers have many duties in common, the institutions they represent vary enormously in size, mission, structure, organization, and culture. Public institutions of higher education manifest legal and operational characteristics that make them different from private institutions. Community colleges, religiously affiliated colleges, historically black colleges, colleges with medical schools, colleges that operate Division I athletic programs, colleges in urban areas, multi-campus systems, proprietary colleges – each subcategory of higher education has its own operational idiosyncrasies, and it would be hubristic to suggest that all need or use legal services in the same manner.<sup>2</sup>

## **THRESHOLD QUESTIONS: IS IT TIME TO HIRE A CAMPUS LAWYER? IF SO, HOW?**

Given the size and complexity of the typical college and the litigious environment in which they operate, virtually every college in the United States regularly uses the services of a lawyer. At most medium- and large-sized colleges, the provision of legal services is formalized through either: (1) engaging a private practitioner or law firm on a fee-for-service basis, or (2) assigning legal duties to one or more salaried lawyers employed directly by the college (or the system of which the college is part). Historically, many small private colleges have relied for legal services on retained outside counsel while most medium- to large-sized colleges (public as well as private) employ an in-house general counsel who is responsible for managing the legal function internally, and who may engage outside counsel to perform some or even most of the legal work. While the number of higher education legal specialists is difficult to estimate, the leading professional association – the National Association of College and University Attorneys (NACUA) – has about 3,500 attorney members who represent 1,500 campuses.

Subsequent sections of this monograph will describe how a campus legal office is organized and what functions it typically performs. This section considers some preliminary questions that could arise at a college that employs its own in-house campus counsel. What factors should a board of trustees or a president take into account in gauging whether the time has come to establish a legal office? How should the college conduct the search for a new chief legal officer, and what kinds of candidates should the college consider?

The process of addressing these questions should begin with an *audit of current legal services and expenses*, a task that can be assigned to the chief financial officer, a senior member of the president’s staff, or an outside expert. The audit proceeds in three phases: data assembly, data analysis, and data projection.

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2. For the sake of simplicity, in addition to using the standardized “campus lawyer,” the monograph also uses other standardized terminology. “President” means the institutional chief executive officer, although that office is occupied on some campuses by a “chancellor.” Finally, notwithstanding the fact that higher education institutions come in many forms – colleges, universities, institutes, schools – the monograph avoids the cumbersome catch-all phrase “institutions of higher education” and refers to all interchangeably as “colleges” (and “college legal issues” and “college lawyering”).

**Assembling data on legal service utilization.** The auditor should assemble all billing records received from lawyers, law firms, and legal consultants for the provision of legal services to the college that cover a representative period of time (such as the preceding six or 12 months). Those billing records will consist of *invoices* showing the amount the college spent to procure those services and *time sheets* or *time records* reflecting the nature of the services provided. The audit, which may take two to four weeks to perform, ultimately will yield data on the *volume* and *predictability* of legal services the college already purchases, the *aggregate cost* of those services, the *users* of those services, and the *kinds of projects* for which users typically rely on the services of lawyers.

**Analyzing the data.** The next step involves categorizing legal costs to get a sense of who on campus incurs them and for what reason. Legal costs typically can be divided into five generic categories (with the caveat, of course, that some costs fit into more than one category):

- **Business and financial affairs.** This embraces the negotiation and review of complex contracts and leases, real estate matters, money and investment management, assisting in the negotiation of gift agreements and other development office-related work, physical plant maintenance, and all forms of litigation involving business matters (e.g., breach of contract, general liability claims, and so forth).
- **Human resources.** This includes employment-related lawsuits and grievances, discrimination and affirmative action matters, benefits, collective bargaining, and all other labor-management issues.
- **Academic and student matters.** This category includes employment matters that are faculty-related (rank and tenure issues), student affairs, student discipline, extracurricular activities, athletics, and the handling of all litigation and grievances brought by faculty members or students. It also includes patent, copyright, and other intellectual property issues.
- **Compliance.** This catch-all category, which overlaps to some extent with others, covers compliance with legal obligations imposed by federal, state, and local laws. It might include, for example, such matters as physical access requirements under the Americans with Disabilities Act, classroom access under the same statute, student records issues under the Family Educational Rights and Privacy Act, zoning and law use obligations, tax issues, and (for colleges of sufficient size) laws and regulations covering health care, Medicare, and federally sponsored biomedical research.
- **Corporate governance.** The last category includes the kinds of corporate work any lawyer who represents institutional clients routinely performs. It encompasses such matters as ensuring that the college's bylaws are amended when appropriate, conducting board meetings in compliance with applicable statutes and bylaws, reviewing minutes of board meetings, drafting board resolutions, detecting and preventing institutional conflicts of interest, and – perhaps most important of all – providing confidential counsel when asked to do so by the president, the board chair, and other college leaders.

**Data projection.** The first two stages in the audit process enable the college to develop a sense of how legal expenses currently are incurred. The final phase takes into account what is known and what can be surmised about the college's future evolution. For example, if the college has ambitious growth plans involving the construction of new campus buildings, officials can predict with confidence that the negotiation of

construction contracts and the adjudication of construction claims will tax that portion of the legal budget going forward. If a collective bargaining agreement is about to expire, or if layoffs threaten to generate a surge of employment-related grievances and lawsuits, the legal budget for human resource support obviously will grow. As discussed in the preventive counseling section on pages 21–22, a prudent investment of legal dollars today can prevent expensive compliance or litigation problems in the future.

It is also during this final phase that the “science” of assembling and analyzing data is enriched through the “art” of doing some realistic thinking about institutional legal needs that have been ignored over the years due to financial constraints or under-prioritization. Just as institutions incur deferred maintenance backlogs over the years, so too do they build an inventory (often without even realizing it) of deferred legal projects – institutional policies that are not reviewed and updated periodically, standard-form contracts that do not reflect changes in applicable law, and even relationships with outside law firms that have been allowed to grow stale as key personnel retire or the law firm’s focus changes. The audit process, however, allows the college to prepare an inventory of legal projects that have been neglected or ignored over the years.

The analysis generated during the audit enables the president to address two operational questions: is it time to centralize management of the legal function in a campus lawyer, and, if so, what qualifications should such a lawyer possess? If legal expenditures are acceptably low and if the college can adequately protect against foreseeable legal risk by relying on specially retained lawyers on a case-by-case basis as the need arises, then there may be no purpose served by hiring a campus counsel. On the other hand, if the audit reveals a substantial and fairly predictable volume of legal work from month to month and year to year, and if legal expenses can be contained through judicious attention to compliance and preventive law, then there may be significant benefits – managerial as well as financial – in entrusting supervision of that work to a lawyer who can develop an ongoing relationship with the college and its leaders.

The purpose of the audit is not merely to develop a *financial* rationale for establishing a campus legal office, although financial considerations are always important. A good higher education lawyer – whether employed as inside counsel or by an outside law firm – brings a set of valuable analytic skills to the college’s leadership team: the ability to think clearly and in linear fashion; discretion; the ability to react calmly in crisis situations, and the related ability to reduce litigation threats; facility in oral and written communications; problem-solving capabilities; and sound judgment. Shrewd presidents know that having a lawyer on staff significantly enriches the college’s overall management capabilities, and an audit can illuminate that fact by showing not only the dollars and cents the college spends on legal services but the range – and sensitivity – of projects entrusted to lawyers.

The audit also helps identify the skill set that a campus lawyer should possess (which in turn can inform the search for the new lawyer), and it provides an educated snapshot of the work the campus lawyer will be expected to perform. If the college’s legal work consists principally of generalized work – some contract negotiation, a dab of litigation management, a dollop of collective bargaining, and a steady diet of regulatory and compliance matters – then the president may want to hire a lawyer with substantial experience as an in-house counselor, preferably in the college context. On the other hand, if the audit reveals that the college has particularized needs – in construction litigation, for example, or in business and transactional law – then the president may wish to explore the possibility of appointing as general counsel a specialist with suitable skills obtained

through experience at a law firm (*if* the president is wholly comfortable that today's specialized skills will also be needed tomorrow and next year and the year after that). The variations are myriad; but a careful and thorough audit that sheds light on the college's preexisting need for legal counsel and intelligently predicts future needs can provide the analytic foundation for informed decision making.<sup>3</sup>

The search for a campus lawyer should be conducted in the same manner as any other high-level administrative search: through a combination of advertisements and interviews.<sup>4</sup> For illustrative purposes, a sample (truncated) advertisement is reproduced in the footnote below.<sup>5</sup>

Should an executive search firm be employed to conduct general counsel searches? Unlike searches for presidents, provosts, and top-ranking finance officers, where search firms are the national norm, there is no tradition of using them for lawyer searches. That may be changing, however, as more executive search firms add capabilities for attorney searches.

One other recurring question is whether an internal search committee should be part of the process of hiring a general counsel. To some extent, institutional culture determines the answer: if the college ordinarily constitutes search committees for upper-level administrative vacancies, then there is no reason to make an exception for the general counsel (and *vice versa* – if there is no tradition of appointing search committees for administrative positions, then one may not be necessary for the campus lawyer). There are advantages in using a search committee, particularly at colleges that are hiring a general counsel for the first time. A president's decision to hire campus counsel can generate uncertainty if the reasons for doing so are not communicated clearly. The search committee process allows constituents from the faculty and staff to develop a better understanding of the president's decision, and can assuage concerns by giving affected groups a voice in the selection process.

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3. While it is not essential that the legal audit be conducted by a lawyer, and while this monograph has already suggested that in the absence of an on-campus attorney the audit be assigned to the chief financial officer or a senior member of the president's staff, it is highly desirable to involve a lawyer or even to hire one specifically for that discrete task. Deciphering lawyers' time sheets is a skill learned through experience, and an attorney who has prepared time sheets can do it quickly and with added comprehension.

4. Among other places, an advertisement should be posted in the National Association of College and University Attorneys' "Position Registry," a free online service that circulates job announcements to several thousand campus lawyers nationally. Information on NACUA's Position Registry is available at: [www.nacua.org/membership/PositionRegistry/registry.asp](http://www.nacua.org/membership/PositionRegistry/registry.asp).

5. \_\_\_\_\_ College seeks an experienced General Counsel. The General Counsel is the chief legal officer of the College. Subject to the direction of the President of the College, the General Counsel oversees the provision of all legal services to the College. He or she has general charge of all legal matters pertaining to the College and its governing board; attends meetings of the board and its committees; is responsible for the representation of the College in all legal proceedings; and advises the board, its Committees and Officers, the President of the College, and other College officers on legal questions as may be required.

The General Counsel has a dual reporting relationship to the governing board and the President of the College, and provides proactive professional advice on critical strategic, legal, and public policy issues.

Preference will be given to candidates who possess the following:

- Strong academic credentials that include a J.D. from an ABA-accredited law school.
- Membership in the [name of state] bar or eligibility for membership within six months of employment.
- Demonstrated legal and ethical stature, maturity, competence, and confidence to operate with credibility at the executive level, as well as a professional history of maintaining objectivity while achieving appropriate outcomes.
- A minimum of 10 years of broad general legal practice, including increasingly responsible experience at a senior level in a private, public, or non-profit in-house setting, preferably as a specialist in higher education law.

At the same time, the relationship between the president and the general counsel differs from other high-level relationships because of the highly sensitive work the general counsel is often called upon to perform for the president. Thus, at the end of the process, the president must have the latitude to select the candidate with whom he or she is most comfortable and cannot allow the search committee to become a point of veto in the selection process.

## HOW TO ORGANIZE THE COLLEGE LEGAL OFFICE

While virtually all colleges use the services of attorneys, the structures they have adopted for employing their lawyers vary significantly. The structural relationship between a college and its counsel depends on such factors as the size of the college, its location, the complexity of its legal needs, its historical relationship with particular lawyers or law firms, and the preferences of the president, the governing board, and senior administrators. Counsel may be engaged as either “inside counsel” (salaried employees of the college) or “outside counsel” (independently employed lawyers, usually working in law firms or law practices, engaged on a contractual basis to provide legal services). Many colleges use both. Multi-campus state university or community college systems may use a hybrid “inside-outside” model in which the system has a centralized legal office but assigns “general counsel” to represent individual institutions within the system. At some state-supported institutions, the general counsel reports to the president but also has a parallel appointment as an assistant attorney general with a parallel reporting obligation to the attorney general’s office.

### The In-House Legal Office

The in-house lawyer typically works for the college, much the same as other salaried employees. He or she usually works in a campus legal office – the “general counsel’s office” – and, as mentioned earlier, can be referred to by a number of different titles, e.g., “General Counsel,” “Legal Counsel,” “College Counsel,” “Vice President for Legal Affairs,” or “Special Assistant to the President for Legal Affairs.” An in-house lawyer also may have other responsibilities within the college, such as corporate compliance officer or secretary to the governing board or the college. At some institutions, in-house lawyers cherish the opportunity to teach undergraduate or law school classes.

Although the in-house lawyer serves as counsel to the college, he or she typically reports to the president and serves “at the pleasure of the president.” This means that a change of administration may bring a change in the appointment of counsel although, as an empirical matter, most new presidents retain an experienced general counsel because of his or her institutional memory and the particularly sensitive issues he or she may have handled prior to the new president’s arrival.

The size of a college often dictates how many, if any, other attorneys will be employed by the legal counsel’s office. Generally, the larger the college, the more attorneys it will employ. Additional attorneys may provide expertise in specialized areas of the law. For example, an institution with a medical school may find it has enough legal work related to health care issues to justify employing one or more full-time health care attorneys. A college with a unionized work force may decide to employ an in-house labor lawyer. Higher education law, like virtually every other field in American law, has become more specialized over the last few decades. A generation ago, college legal offices were



smaller and colleges were more likely to hire experienced generalists as their in-house lawyers. There still are many colleges, in fact, that have single-practitioner legal offices that rely on an experienced generalist to handle matters in-house and hire outside specialists when the need arises. Colleges with larger in-house offices tend to hire lawyers who specialize in a specific segment of the legal portfolio: litigation, intellectual property, academic (faculty and student) matters, health law, corporate compliance, employment and labor, taxation, planned giving, real estate, etc. In the typical multi-lawyer in-house office, lawyers may be deployed by *subject matter* (one lawyer, for example, might handle all real estate matters regardless of whether they arise on the college's "east campus" or "west campus"); by *client* or *unit* (one lawyer might be assigned to the development office, another to the medical school, a third to the facilities division, a fourth to the dean of students); or – more typically – by a *combination* of the two (the lawyers for the medical school, for example, might be responsible for all legal matters but may retain the services of a real estate specialist when a major issue in that area arises). Assigning lawyers to particular clients or legal issues, and fine-tuning those assignments as the college's legal needs change is perhaps the most significant realm of managerial decision making entrusted to the general counsel who manages a multi-lawyer in-house office.

The in-house model for providing legal services to college clients offers certain advantages that could be viewed as mirror images of perceived disadvantages in the outside-counsel model. Typically, the in-house model is thought to offer five primary advantages:

- **Availability on campus.** In-house lawyers are only a short stroll away from their principal clients. They can be summoned or consulted quickly when necessary. They interact with their clients over meals, at social occasions, at sporting events, and in a variety of other settings and circumstances that foster cohesion. Because they have only one client – the college – they never (or rarely) are unavailable due to conflicting professional obligations.
- **Familiarity with higher education legal issues.** As with in-house counsel anywhere, a lawyer who provides services for only one client develops a deeper, more sophisticated knowledge of pertinent law than a practitioner in private practice whose exposure to the needs of that particular client may be more episodic. The in-house lawyer also has good instincts about institutional priorities.
- **Institutional memory and understanding of internal politics.** Working closely with the college and its senior managers, an in-house college lawyer inevitably develops sensitivity to the client's idiosyncrasies – its personalities, organizational quirks, history, and culture – in a way and to an extent that an occasional or even regular visitor could never do.
- **Cost savings.** These can be substantial, particularly when factoring in the long-term savings associated with effective preventive counseling. Assume a campus lawyer works 40 hours a week, 50 weeks a year. That would be 2,000 hours of work in a given year. If the campus lawyer were paid \$120,000, earned another \$30,000 in benefits, employed an assistant (\$40,000 plus \$10,000 in benefits, or \$50,000), and used phones, stationery, computers, utilities, postage, and office space (\$50,000), then the total cost of that lawyer would be about \$250,000 a year. That equates to about \$125 an hour for the lawyer's time – which is considerably less than what a law firm might charge for the equivalent legal effort.

- **Prepayment.** This cryptic term encapsulates what many people see as the principal advantage of having an in-house lawyer. The cost of the in-house legal office is incorporated into the institutional budget and fixed in advanced. Clients who use the services of the in-house legal office for particular matters typically are not charged for those services. This encourages clients to call their lawyers sooner rather than later, and is widely seen as promoting a valuable preventive law component into the work of the in-house legal staff.

## Using Outside Counsel

Most outside attorneys engaged by a college or university are employed in private law firms (although state-supported colleges may receive legal support from their state attorney general's office). The college may have a relationship with a particular attorney – often a more senior member of the firm – or a longstanding relationship with an entire firm. Given the range and complexity of legal issues facing colleges today, it is not uncommon for a college to use the services of more than one attorney at an outside firm or to engage the services of more than one firm.

Outside counsel are not employed by the college. They are independent contractors. They generally work for other clients in addition to the college. If a college grows dissatisfied with the services of an outside attorney or firm, it can terminate the relationship at any time, easily, with or without cause, and engage another law firm.

A state's Attorney General and Assistant Attorneys General are employees of the state. As with private counsel, they typically will have more than one college or other state agency as clients. Even when a state has attorneys in the Attorney General's office who provide services to public colleges, it still may contract some legal services to private law firms either because a particular expertise is required or because the interest of the "state" may not align with the interest of the institution, and a conflict or potential conflict necessitates private institutional counsel.

Outside lawyers traditionally bill on a retainer basis, an hourly basis, or some combination of the two. A *retainer* typically means that the college pays the lawyer a set amount of money for a set period of time – typically one month or one year – and the lawyer performs whatever services are needed or requested during that time for that one flat fee. *Hourly billing* means that the lawyer charges in increments of one hour – typically tenths of an hour, just as he or she does with other clients – for time spent working on college-related matters. Under an hourly billing arrangement, the lawyer makes an entry in a timekeeping diary each time he or she performs a task (speaking to a college official on the phone, drafting a letter, doing legal research, appearing in court, and so forth). Those entries are used once per month or once per quarter to generate a bill. Hourly-rate billing has the advantage of precision; the client is charged only for lawyer time actually expended, nothing more, nothing less. It has the disadvantage (compared to a retainer arrangement) of lack of predictability in terms of cost. In addition, hourly-rate billing can discourage clients from calling their lawyers (since each call generates a charge), which ultimately may not be in the best interest of the college.

The outside counsel model is thought to offer the following primary advantages:

- **Access to expertise in many areas of the law.** The college can customize its legal needs by using lawyers or law firms with expertise in specific subject areas, and thus be assured of access to a specialist on any given issue.

- **Cross-institutional experience.** An outside lawyer who practices in the area of higher education law often has several or even many college clients, and the experience gained in working with a variety of higher education clients may enhance the services provided to each college.
- **Greater capacity to handle litigation.** Lawyers who specialize in litigation can take advantage of supports and cost-saving short-cuts that can save their clients expense and agony. The litigation departments of law firms have paralegal support, automated document storage, access to expert witnesses, videotaping facilities, and other conveniences. Full-time litigators accept and accommodate the disruption and scheduling challenges presented by trial practice. Also, a lawyer who regularly appears in court may be more comfortable with courtroom procedure and the expectations of particular judges than an attorney who only occasionally goes to court.
- **Professional detachment.** This is perhaps the most important professional characteristic an outside lawyer possesses. Outside counsel can bring a level of objectivity that is not always easy to maintain when one is employed on a day-to-day basis with people embroiled in a legal controversy.

In general, the outside counsel model works most effectively when outside counsel meet regularly with the president and other senior administrators, attend board meetings, and spend dedicated time on campus. It also benefits both parties to develop (and adhere to) well understood rules on how work is referred to outside counsel and who has the authority to incur legal expenses. This entails identifying a gatekeeper through whom work is channeled. Such a person might be the president, provost, chief financial officer, or other college official capable of managing the work of outside counsel and reviewing bills. College officials must understand that only the gatekeeper can engage a lawyer or refer discrete matters to a lawyer; similarly, outside lawyers must be told who the gatekeeper is and to check with him or her if referrals come from other college offices.

## THE PROFESSIONAL AND PERSONAL CHARACTERISTICS OF THE CAMPUS LAWYER

Every college is different, and the chemistry between a particular college president and campus counsel has unique characteristics. That fact notwithstanding, all successful campus lawyers share certain professional and behavioral traits. The following list delineates the essential qualities that every campus lawyer ideally should possess.<sup>6</sup>

- Excellent judgment, critical thinking, strong writing, and reasoning skills, persuasiveness, the ability to command respect, and unquestioned integrity – skills all good lawyers possess.
- A positive, can-do attitude. It is striking how often this is the first characteristic campus clients look for in their lawyers. The most successful higher education lawyers are those who aid in the solution of legal problems rather than interposing obstacles and constantly saying no.

6. This list is derived in large measure from *The College and University Legal Department*, a 1989 memorandum prepared by Martin Michaelson of Hogan & Hartson and Paul M. Shapiro, former head of the legal office at the University of Connecticut, for NACUA's *Ad Hoc* Committee on Professional Relations. Some of the items have been rephrased and combined with other items on the list.

- Sensitivity to legal ethics because ethical considerations proliferate when a lawyer represents a corporate organism as complicated as a college.
- Discretion and, even more important, a reputation for discretion.
- Skill at interpersonal relations, particularly the ability to forge consensus out of the discordant views of many clients without losing their trust and confidence.
- Decisiveness, and its cousin, the willingness to accept risks.
- The ability to manage time effectively, which in turns promotes the ability to handle many matters simultaneously.
- Confidence without arrogance.
- Professional and thoughtful demeanor, including objectivity and detachment when needed.
- A strong commitment to the college's interests without undue attention to personal promotion.
- "Early access to decisions in progress" – a wonderful aphorism coined by Michael Weston, former General Counsel at Northwestern University, to capture the relationship good lawyers must cultivate and preserve with the president and other institutional decision makers.

## WHAT CAMPUS LAWYERS DO

### Two Threshold Considerations

Before discussing the specifics of what campus lawyers generally do on a daily basis – what matters they typically handle, and how – there are two preliminary variables that should be considered in determining the structure and function of the legal office. These two issues frequently are the first to arise when a college considers whether to internalize the legal function.

First: What is the legal office's mission? There is no better answer than the one supplied in the 1989 paper written by Martin Michaelson and Paul Shapiro:

[T]here is a broad continuum of missions of, and expectations placed on, in-house legal departments at [colleges and universities]. At some schools, the legal office is viewed as a "fire department" by the president, deans, and senior administrators. They look to the in-house lawyer to perform competent work in response to unavoidable legal questions, mainly involving urgent trouble.... Counsel at such schools have a limited but useful role. By contrast, at [other] schools, the general counsel and other in-house attorneys are truly counselors to the college. Their office is viewed as the institutional conscience, and the lawyers are respected advisors to the college on a broad range of initiatives as well as problems (some of which are not primarily legal initiatives or problems) covering all legal questions.<sup>7</sup>

If the college is establishing an in-house office for the first time, it needs to give sustained thought to the mission it wants the office to serve. *All* in-house legal offices are responsible for the day-to-day management of institutional legal issues. Will the office also be expected to perform the function Michaelson and Shapiro characterize as "true counseling"? Will campus lawyers be called upon for advice on business matters, political

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7. See n. 6, *supra*.

relationships, strategic planning, and other top priorities of the college's leaders? If so, the college must organize the office and hire lawyers with those additional functions in mind.

Second, and closely allied to the first: to whom should the legal office report? This monograph asserted earlier that the general counsel typically reports to, and serves at the pleasure of, the president;<sup>8</sup> however, a direct reporting line to the president is by no means the only reporting structure colleges use. The general counsel will have greater visibility internally and is more likely to be included in the college's decision-making process if she or he reports to the president rather than one of the president's direct reports. If that is not the structure at a particular college, it does not detract from the importance of the campus legal office, but it does mean – in the opinion of many experienced college general counsel – that changing the reporting relationship ultimately should be one of the general counsel's aspirational goals.

Reporting to someone other than the president can pose potentially difficult ethical and practical issues for the general counsel, who may be told by his or her supervisor not to disclose or discuss particular projects with the president or board. Under the code governing legal ethics in most states, the general counsel is professionally obligated to represent the institution as a whole, not any particular office or department, and the president – as the chief operating officer and chief institutional representative to the governing board – is logically the officer whose fiduciary and professional obligations best fit those of the general counsel.<sup>9</sup>

## Two Primary Roles

One of the great joys of college lawyering is the tremendous diversity of legal issues. Campus lawyers typically organize their offices and their work effort into two broad functional categories: *counseling*, meaning advising clients on the interpretation and applicability of legal documents (contracts, laws, institutional policies, regulations) that relate to specific legal problems, and *formal dispute resolution*, managing advocacy for the college in formal proceedings (lawsuits, administrative hearings, grievances, compliance investigations, and the like).

**Counseling.** The range of counseling assignments a campus lawyer may undertake is virtually limitless. Among the most common are the following.

1. **Governance.** This is in large part what was referred to as “corporate” work in an earlier section of this monograph. The campus lawyer may be asked to resolve questions related to the authority of officers, administrators, trustees, or others to take particular actions on behalf of the college, including questions concerning the manner in which the board conducts its business (e.g., open meetings, selection of auditors, compliance with institutional bylaws).

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8. In 2006, NACUA conducted a comprehensive survey of attorneys representing member institutions. The survey revealed that 83.3 percent of chief campus lawyers are members of their institution's senior executive body of officers – often called the “cabinet” – who report directly to the president. National Association of College and University Attorneys, *2006 Joint Compensation and Benefits and Provision of Legal Services Survey*.

9. Of lesser importance is a related concern: what should be the chief lawyer's title? This is not always a matter entrusted to the chief lawyer to decide. While there are advantages to having the title “Vice President and General Counsel,” a title with a well understood corporate meaning, other titles certainly suffice (see pages 2 and 6). Titles communicate messages, and the title chosen for the chief campus legal officer should be determined based on the institution's structure and its aspirations for the legal office.

2. **Review of policies and procedures.** The lawyer audits institutional practices and procedures to ensure compliance with law and good practice. He or she assists in drafting new policies and amending existing ones.
3. **Employee relations.** The campus lawyer renders advice on the faculty appointment and review process, non-renewal or termination of faculty and staff, the negotiation of collective bargaining agreements, discrimination and harassment complaints, compliance questions under the Americans with Disabilities Act and other anti-discrimination laws, and adherence to state and federal wage, overtime, and employee benefits laws.
4. **Student affairs.** Legal issues abound whenever the college is involved in student conduct. Lawyers participate, either behind the scenes or directly, in student disciplinary proceedings, institutional responses to student health and safety issues, the processing of student records, and the activities of student organizations. More and more, campus lawyers are asked to assist in responding to parent concerns.
5. **Regulatory compliance.** Higher education has been described by Federal Court of Appeals Judge Richard Posner, himself a former law school faculty member, as a “regulated industry,”<sup>10</sup> and America’s colleges and universities are subject to thousands of federal, state, and local laws, regulations, and ordinances. It is the campus lawyer’s Herculean task to ensure that all campus programs are operated in compliance with applicable laws and regulations.<sup>11</sup>
6. **Campus security.** State and municipal laws define the authority of campus police or security forces. Lawyers frequently are asked to assist with statutory reporting and record-keeping requirements, and to respond to incidents involving campus security or complaints of police misconduct. At institutions with private police or security forces, campus lawyers participate in training and policy matters.

10. *USA Group Loan Services, Inc. v. Riley*, 82 F. 3d 708, 714 (7th Cir. 1996).

11. In 2006, when U.S. Secretary of Education Margaret Spellings constituted a special task force to study the future of American higher education, two NACUA members – Craig Parker and Margaret O’Donnell from the General Counsel’s Office at The Catholic University of America – prepared an analysis for Secretary Spellings titled *Memorandum to the U.S. Commission on the Future of Higher Education: Some Observations on the Federal Regulation of Higher Education* (April 21, 2006). That memorandum, which is still available on the U.S. Department of Education website at: [www.ed.gov/about/bdscomm/list/hiedfuture/reports/parker.pdf](http://www.ed.gov/about/bdscomm/list/hiedfuture/reports/parker.pdf), contains this eye-opening passage conveying the critical but highly arcane nature of regulatory and compliance work in college legal offices:

... [T]here may already be more federal regulation of higher education than in most other industries. American campuses:

- have the burden of all laws applicable to any employer (ADA, I-9, HIPAA, nondiscrimination regulations, affirmative action); and
- are regulated by environmental rules as much as most American industries; and
- are regulated as “Internet Service Providers” (Digital Millennium Copyright Act) and by copyright rules in their libraries, publishing and course materials; and
- are regulated in research including human subject research, animal regulations, foreign export rules, classified research, federal contracts and patent law; and
- are regulated as financial institutions under Gramm-Leach-Bliley, and the Antiterrorist Financing rules; and
- are regulated for tax purposes, including charitable giving; and
- are also regulated in ways that are unique to education in general (and in some cases only college campuses) including extensive immigration regulations for students and scholars; comprehensive financial aid and student data reporting rules under IPEDS; campus safety under the Campus Security Act, Drug Free Schools acts and other laws; student records under the Family Educational Rights and Privacy Act (FERPA); Title IX, Sexual Assault Victim Bill of Rights; and the Equity in Athletics Act....

It is probably fair to say there is not one institution in the country that is able to be in complete compliance with all of these federal laws. The problem is not that institutions don’t want to comply. The volume, complexity and constant change in the regulations make it impossible to do so completely.

7. **Athletics.** Any lawyer who works at a college with an intercollegiate athletic program must understand conference and National Collegiate Athletic Association compliance rules and respond to the standard array of issues that arise when students engage in activities that can lead to injuries and institutional liability.
8. **Financial matters.** Campus lawyers are consulted on gift agreements, scholarships, endowments, the tax aspects of proposed transactions, the management of institutional assets, and bond financing.
9. **Government relations.** Lawyers must understand the limits on lobbying activities imposed by the college's tax-exempt status. They often are called upon to analyze the potentially pernicious legal consequences of legislative and regulatory proposals.
10. **Town-gown relations.** Lawyers frequently are part of the campus team charged with negotiating, mediating, and soothing relationships arising from disputes or misunderstandings between the college and the municipality in which it is located. These disputes can involve student housing, parking, noise, truck traffic, zoning, tax questions, and a host of other related issues.
11. **Contracts.** Campus lawyers review contracts with vendors, suppliers, and other organizations and, when necessary, enforce the college's contract rights. Today, on many campuses, contract work focuses on multi-million-dollar construction contracts and complex, high-risk contracts involving international transactions. Contract work that used to be performed by generalists is now often assigned to lawyers who specialize in that field.
12. **Intellectual property and technology transfer.** Faculty research can generate valuable intellectual property, which the campus lawyer is responsible for protecting and ultimately commercializing. Lawyers handle patent and copyright matters. They grapple with emerging legal issues involving file sharing, music downloading, and the use of films, DVDs, and other copyrighted material both in and outside the classroom.
13. **Crisis management.** Many institutions have formally constituted crisis management teams, with lawyers as members. Campus lawyers can be useful in advising on statutory or regulatory reporting requirements and in drafting and reviewing media statements.
14. **Sensitive dispute mediation.** The general counsel often functions as the president's confidential consigliere – the "fix-it" person to whom the president turns for counsel on the most sensitive conflicts within the administration or between the president and the board.
15. **Simple handholding.** Lawyers bring an important set of analytic skills to any problem. They are linear thinkers. They are comfortable at the intersection of policy and politics. They tend to write with precision and articulate their views concisely. For all these reasons, college presidents and board members often seek advice from lawyers on issues that are not purely the domain of the campus counsel. Good lawyers serve as sounding boards, wise counselors, task force organizers, and listeners.<sup>12</sup>

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12. There are nevertheless limits a prudent campus lawyer should observe when asked to perform in a capacity other than legal advisor. The following is from an outline presented at the NACUA Annual Conference in 2005:

"A lawyer, particularly one with a reputation for discretion and good judgment, may be asked by the president to perform sensitive assignments that are not, strictly speaking, lawyer's work. Variation on the same theme: an issue that

**Formal dispute resolution – litigation, arbitration, grievances, administrative hearings, and other adversarial proceedings.** An adversarial proceeding has two defining characteristics. First, its subject is the resolution of a dispute between the college and a third party (who might be an employee, a student, a vendor, a government agency, or somebody else with a relationship to the college). Second, it is resolved by a neutral fact finder – a judge, an administrative agency, an arbitrator – in accordance with mutually understood rules of procedure. Adversarial proceedings take many forms and involve campus lawyers in many different ways:

1. **Court litigation.** Litigation lawyers interview witnesses with knowledge of relevant events; collect, preserve, and disclose to the opposing party all pertinent documents; review documents produced by the opposing party; prepare college witnesses to testify; attend depositions with college witnesses as they are deposed; and represent the college in court hearings and at trial.
2. **Arbitration and mediation.** Many disputes are resolved through alternative dispute resolution (ADR) rather than litigation. ADR is often used to adjudicate construction and labor disputes, as well as employment-related grievances. It is less formal than litigation and generally proceeds to resolution more quickly; however, the role of college counsel in ADR is similar to his or her role in litigation.
3. **Contested administrative proceedings.** College lawyers appear before administrative boards and agencies for matters such as tax appeals, zoning questions, complaints of discrimination, grievances arising under collective bargaining agreements or institutional grievance policies, and internal disciplinary cases.

## **RELATIONSHIPS BETWEEN CAMPUS LAWYERS AND OTHER MEMBERS OF THE CAMPUS COMMUNITY**

One way to view the job of the campus lawyer is to conceive of it as a set of relationships. The lawyer maintains relationships at every administrative and operational level within the college; indeed, that is one of the attractive things about *being* a campus lawyer. He or she performs distinctive duties at each level. The role played by the general counsel when advising the president or the governing board, for example, is substantively different from the role he or she plays when solving the day-to-day legal problems of program directors and administrators.

Campus lawyers have two other sets of relationships that warrant close scrutiny: relationships with outside counsel (whether in private law firms or state attorney generals' offices) who perform legal work for the college, and relationships with the other lawyers and staff members within the general counsel's office.

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does not raise legal concerns is nevertheless dropped in the lawyer's lap, accompanied by the query, 'Can we do this?' Pitfalls lurk. A lawyer who renders advice on matters that fall outside the jurisdiction of the general counsel's office is (a) rendering advice *in lieu of* somebody else, thus incurring a permanent enemy, (b) stepping into a policy-making role for which he or she may not be suited, and (c) potentially losing attorney-client privilege in the matter. It is generally important for a lawyer to respect the boundaries of the general counsel's jurisdiction, and to insist (politely) that others do the same." Pamela Bernard and Lawrence White, *Representing a College or University: Ethics and the Role of a University Counsel*, June 25, 2005, page 10.



**Relationships with the governing board.** The responsibilities of the governing board are defined by principles of fiduciary duty and dictated by the statutory law on nonprofit corporations in the college's state of residence. The general counsel must understand those obligations and ensure that the governing board does in fact conduct its business in accordance with its fiduciary and legal duties. If the general counsel also serves as secretary to the board or has other explicit board-related duties, then, at a minimum, he or she should:

- **Master the bylaws.** If the bylaws incorporate extrinsic parliamentary rules such as *Robert's Rules of Order*, the general counsel should bring the rules to each meeting and be at least passingly familiar with what the rules require and how to use the index.
- **Review the agenda in advance** to anticipate any bylaws-related or parliamentary problems that might arise before or during the board meeting.
- **Review every resolution** to be considered formally by the board and any standing committee.
- **Review (and edit as appropriate) the minutes** of every Board meeting.
- **Ensure that the college complies with the jurisdiction's nonprofit corporation act.** The act normally establishes minimal procedural requirements for quorums, number of meetings, filling vacancies on the board, and other operational details. The general counsel should be familiar with those requirements to prevent the board from adopting a proposed amendment to the bylaws that would violate the act. In most jurisdictions, the nonprofit corporation act requires corporations to file annual reports, sometimes accompanied by an annual fee. The general counsel should ensure that *somebody* – if not him or her, then the secretary to the board or someone in the president's office – files the required paperwork with the Secretary of State or equivalent.

When working with the institution's governing board, the campus lawyer should always remember that the president has a unique relationship with trustees and that it is not unusual for the president to institute formal rules governing contacts between trustees and other college officials. At some colleges, such contacts are discouraged (if not banned outright) and all communications with trustees are expected to be routed through the president's office. At other colleges, officials are expected to respond promptly and without presidential intermediation if trustees call with questions, and to notify the president immediately when such exchanges occur; rarely (or never) are they to initiate exchanges with trustees on their own. To be effective as possible, the campus lawyer must understand what the president's expectations are in communicating with trustees.<sup>13</sup>

**Relationships with the president.** At its heart, the relationship between the president and the college lawyer is highly personal and depends in large part on mutual trust and respect. In a presentation at the 1992 NACUA Annual Conference, the President of The George Washington University, Dr. Stephen Joel Trachtenberg, made the following observation:

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13. And concomitantly – the president must understand that there are special circumstances under which the campus lawyer may be required for ethical or fiduciary reasons to communicate with trustees even if the president objects (or would object if he or she were told). In the work lives of most campus lawyers, this happens rarely or never, but when it does the lawyer frequently has no choice – and is entitled to the president's understanding.

What must [the lawyers in the General Counsel's Office] keep in mind as they build their relationship with the school's President? Keep it as well-tuned as possible.

To begin with, of course, academic lawyers need to take careful account of the culture of the school that employs them.... [They] must also, of course, take steady, ongoing account of other campus issues – especially where the school's President is concerned. In part, that will involve matters of workload, and of a President's ability to handle the routine stresses of his or her job. In other words, timing is important; don't raise serious legal issues to a man or woman who is visibly engaged by the current Presidential workload – unless the issue is one that obviously can't wait.

At most colleges, the general counsel has a natural tendency to identify himself or herself – or to be identified in the minds of others – as the *president's* lawyer. In fact, the rules of professional conduct in all states make it clear that the *entity itself* is the general counsel's client.<sup>14</sup> Ordinarily, the president acts for and in the name of the college and conflict problems generally do not arise or are not serious when they do; however, in the rare instance when friction does develop between the president and the governing board, it can be difficult and painful for the general counsel to decide which set of potentially contradictory instructions to follow.

A recurring and invariably difficult problem is what the general counsel should do when a vice president asks to see him or her, closes the door, proceeds to complain in great detail about the mistakes the president is making, then cautions the lawyer, "Don't tell the president I told you all this." Is the president served – or disserved – when the general counsel knows more than the president about a particular issue? Should the general counsel keep no secrets from the president? Or are there times when the general counsel can play a useful role by listening to confidential entreaties that would otherwise go unspoken? Again, the general counsel must remember that the client is the college proper, not any individual officer or employee. There may be *some* times when the client's interests are served most effectively by relating significant or widespread concerns to the president without identifying sources, and *other* times when the opposite applies.

**Relationships with institutional peers and subordinates.** Lawyers are service-providers who help their clients solve problems. They aid in identifying solutions to problems; they are not themselves the causes of problems. They should not be – nor should their clients perceive them as being – naysayers, obstacles to be overcome (or ignored). A service orientation is essential in addressing the wide variety of clients a college lawyer serves.

There are several offices that do not report directly to or through the general counsel's office, but whose work nevertheless involves areas of high legal exposure. At a minimum, a good campus lawyer will establish productive working relationships with these offices and, as time permits, meet regularly with them to ensure that the work they perform is vetted with some care. These offices include:

- The affirmative action office or the office that, by whatever name, processes discrimination complaints and responds to the Equal Employment Opportunity Commission and other external agencies when discrimination charges are filed against the college.

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14. See, e.g., American Bar Association, *Model Rules of Professional Conduct*, Rule 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

- The offices that manage employee grievances. There may be separate offices for faculty and staff members.
- The risk manager. At many colleges, one office is responsible for purchasing insurance and processing routine claims (such as slip-and-fall cases or workers' compensation claims) under those policies.
- The media or public relations office – particularly at public colleges in open-records-law states or at any college embroiled in a highly visible campus controversy.

**Relationships with outside law firms.** At many colleges today, the general counsel is responsible for engaging outside counsel, overseeing their work, and reviewing their bills. Colleges have become more sophisticated purchasers of legal services. In turn, the structural relationship between colleges and their outside law firms has changed. Outside attorneys who used to work directly with the president now interact more frequently with the general counsel, who may sometimes question tactical decisions and scrutinize costs more assiduously. The arrangement is viewed by some as being more formal, and in some respects more arm's-length.<sup>15</sup>

The college's desire to control legal costs can sometimes cause friction with the more profit-oriented leanings of law firms. Nevertheless, a skillful in-house lawyer (or college president) understands that outside counsel perform a vital function, and seeks to manage the relationship deftly, respectfully, and professionally. In an outline prepared for the NACUA Annual Conference in 1993, Peter Ruger, former General Counsel at Washington University in Saint Louis, and Philip Burling, former outside counsel to Boston College, offered five wise principles the in-house general counsel (or college president) should observe in managing relationships with outside law firms:

- Hire outside counsel carefully. The best way to assure quality at an affordable price is by hiring the right lawyer at the outset.
- Communicate what your lawyer needs to know. Granted, it costs you money when you send the lawyer something to read (such as the *whole* faculty handbook instead of just the pertinent portions), but it's money well spent. If you understand your institution's idiosyncratic culture and your lawyer doesn't, it's your fault.
- Give your outside lawyer the sympathy, understanding, and assistance you expect in return. There's a temptation sometimes to wash your hands of a problem by assigning it to outside counsel. Don't ignore the problem once it's been farmed out. If your lawyer has questions, answer them patiently. If your lawyer sends you a draft, read it promptly, compliment the lawyer's efforts (if appropriate), and offer useful comments.
- Cultivate your lawyer. Send thank-you notes for jobs well done. If you have extra basketball tickets, send them to your outside law firm. Most lawyers in private practice enjoy having colleges and universities as clients, and their enthusiasm for the work is worth nurturing.

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15. "Previously, corporations relied on a firm for legal and general advice. The situation today departs in two directions: First, the firm now performs specific, designated tasks, and second, the client's business is no longer concentrated in a single firm. Both of these developments necessarily promote an instrumental conception of outside lawyers. They tend more to be 'hired guns,' chosen for a particular job, and less and less members of an ongoing relationship with responsibility for the client's overall well-being." A. Chayes and A.H. Chayes, "Corporate Counsel and the Elite Law Firms," 37 *Stanford Law Review* 277, 294 (1985).

- Try not to get in the way. Sometimes an outside lawyer can function more efficiently by dealing directly with other university officials. Don't insist on attending every meeting or participating in every telephone call. Trust your lawyer to get the job done.<sup>16</sup>

### Relationships with other staff members in the General Counsel's Office.

The in-house campus lawyer is expected not only to practice law but also to manage an office. The amount of time and effort devoted to managing human and capital assets obviously varies with the size of the office. Fortunately, even the largest in-house legal offices tend to be small in comparison to those managed by other senior administrators. Even a small office, though, merits attention to managerial detail.

The general counsel performs four primary managerial tasks:

1. **Managing the office's personnel.** The general counsel *recruits* new staff members and provides orientation for them, sets *standards* for the professional and ethical conduct of staff members, *evaluates* their performance, and tends diligently to their morale and *professional development* to help ensure that they stay current in their field.
2. **Managing the office's workload.** It is the general counsel's responsibility to manage workflow and ensure that staff members, particularly lawyers, are deployed in the manner best suited to meet the legal needs of clients. Since clients consult lawyers in times of difficulty and stress, they must have the utmost confidence that their lawyer will be competent, attentive, and focused.
3. **Managing the office's budget.** This entails not only traditional budget chores (monitoring expenses, preparing budget documents, and representing the office in the budgeting process), but also, in this age of high technology, assessing the cost-effectiveness of various hardware-software configurations and exploring the affordability of on-line research tools and lower-cost options (e.g., CD-ROM technology, hard-copy library resources, and the Internet).
4. **Managing the work of outside counsel.** The general counsel is responsible for selecting and engaging outside counsel, tracking the college's expenditures on outside legal services, and ensuring that an appropriate balance is struck between work performed internally and matters assigned to law firms. It can take diplomacy and determination, but the general counsel must insist gently that, *if* the office is to be responsible to the president and governing board for cost-efficient engagement of outside counsel, the hiring decision *must* be centralized in an office with expertise in hiring lawyers. The general counsel's office should track and monitor total dollars spent on outside counsel. Legal expenditures should be itemized by law firm and by administrative units within the college on behalf of which costs are incurred. Many general counsel's offices record legal expenditures in a series of spreadsheets, which are used to generate reports to the president on outside counsel expenditures.

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16. Philip Burling, Peter Ruger, and Lawrence White, *The Symbiotic and Occasionally Productive Relationship between In-House Counsel and Outside Counsel*, a paper delivered at the NACUA Annual Conference, June 26, 1993.

**Changing professional relationships in the post-Sarbanes-Oxley world.** The Sarbanes-Oxley Act of 2002<sup>17</sup> (SOX) was one of many governmental reactions to the wave of large-scale scandals (Enron, WorldCom, Arthur Andersen, Tyco, Global Crossing,) that rocked the American corporate and financial sectors in the early part of this decade. For the most part, actions taken by Congress, the U.S. Securities and Exchange Commission, the nation's stock exchanges, and national professional organizations focused on perceived weaknesses in financial reporting and corporate accountability practices among the nation's *publicly traded, stock-issuing, for-profit corporations*. Most colleges and universities in this country do not issue stock, are not publicly traded, do not operate for profit – and, in short, are not directly affected by SOX or other reforms.

Nevertheless, the intense scrutiny to which stock-issuing corporations were subjected, as well as the backlash from a topically related series of scandals affecting the financial reputations of some large not-for-profit organizations, generated momentum in the higher education sector to adopt good-governing practices modeled on Sarbanes-Oxley even before colleges and universities literally were required to do so. This warning, for example, appeared in *The Sarbanes-Oxley Act and Implications for Nonprofit Organizations*, a monograph produced jointly by BoardSource (formerly the National Center for Nonprofit Boards) and Independent Sector in 2007:

While nearly all of the provisions of [SOX] apply only to publicly traded corporations, the passage of this bill should serve as a wake-up call to the entire nonprofit community. If nonprofit leaders do not ensure effective governance of their organizations, the government may step forward and also regulate nonprofit governance. Indeed, some state attorneys general are already proposing that elements of the Sarbanes-Oxley Act be applied to nonprofit organizations.

Nonprofit leaders should look carefully at the provisions of Sarbanes-Oxley and determine whether their organizations ought to voluntarily adopt particular governance practices.<sup>18</sup>

For college lawyers, the adoption of Sarbanes-Oxley-inspired governance reforms has meant subtle changes in the roles they are expected to play in institutional governance. The National Association of College and University Business Officers (NACUBO), for example, urged its institutional members to adopt “codes of ethics” for senior financial managers. Some colleges have taken the additional step of adopting written policies on reporting and investigating suspected ethical violations, including proscriptions against retaliatory punishment of whistleblowers.

Campus legal offices frequently function as early detection systems for possible acts of financial impropriety or ethical lapses by high-ranking university officers or trustees. At many colleges, the general counsel's office has developed a before-the-fact process for investigating and reporting such acts or lapses – including a Sarbanes-Oxley-inspired process by which subordinate attorneys can freely take evidence of such behavior “up the ladder” past a supervising attorney perceived to be a roadblock. Other colleges have reconfigured their governing board's audit committee, turning it into a more assiduous guardian of institutional financial integrity, and have created formal reporting links

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17. Pub. L. No. 107-204, 116 Stat. 745, 15 U.S.C. § 7201 *ff.* (2002). The text of the Act can be located in many places in cyberspace, including at: [www.sec.gov/about/laws/soa2002.pdf](http://www.sec.gov/about/laws/soa2002.pdf) (a web site maintained by the U.S. Securities and Exchange Commission).

18. See: <http://www.independentsector.org/issues/sarbanesoxley.html>; click the link following the checklist.

between the general counsel's office (in its capacity as investigator and enforcer of the institution's ethics code) and the governing board.

Finally, many states have amended their code of legal ethics in the wake of Sarbanes-Oxley to impose explicit whistle-blowing obligations on lawyers who learn that institutional officials are engaged in "a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization."<sup>19</sup> Although a full treatment of the new ethical rules is beyond the scope of this monograph, it is important to note that lawyers (and their clients) are more sensitive than ever to the potentially ruinous consequences they face if they suppress information about serious legal or ethical lapses within their institution, which is why general counsel often are in the forefront of institutional efforts to strengthen internal compliance and conflict-of-interest policies. In addition, NACUA, NACUBO, the American Council on Education, and many other leading national higher education associations can offer a wealth of resources to institutions – and their office of general counsel – interested in adopting governance reforms inspired by Sarbanes-Oxley and related legislative and regulatory enactments at the federal and state levels.

## CONTROLLING LEGAL COSTS

It is an inescapable truism that no college believes it spends too little for legal services. Whether services are provided by in-house lawyers, outside law firms, or some combination, costs are often a source of contention. What techniques, then, can the general counsel employ to manage legal costs?

**In-house costs.** Because in-house lawyers are employees of the college and salaried, the costs associated with using their services are budgeted for and fixed in advance. Some colleges "bill back" individual academic departments or administrative units for specific legal services provided to them. In most cases, however, the costs of in-house legal services are carried on a central budget line. Whether an in-house lawyer is asked two questions or a dozen on a given day, the cost to the college is the same. Incremental costs are incurred only when counsel becomes too busy to handle the workload and additional help (inside or outside) is required.

**Outside counsel costs.** Because outside lawyers generally bill on an hourly basis, each call to an attorney results in a charge to the college. Even when a law firm is on retainer, the size of the retainer will be determined by the frequency with which the college uses the services of the firm.

Some colleges charge the costs of legal services to the departments that incur them. On the one hand, this can deter departments from seeking legal advice until there is no other choice – a decision that can be penny-wise and pound-foolish. On the other hand, clients who understand that the cost of conferring with outside lawyers will be paid out of their own department's budgets may be more amenable to accepting lawyers' advice to settle or compromise claims.

Most colleges have procedures in place that delineate who has authority to contact outside counsel. It is important for decision makers to understand that counsel should be called only when there is a real need for legal guidance, and not on every occasion where

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19. The language in quotation marks is taken from the new version of Model Rule 1.13(b) in the American Bar Association's *Model Rules of Professional Conduct*.

it would be reassuring to have support for one's decision or where consultation with one's supervisor could resolve the problem.

Inside counsel should review all bills received from outside firms, as should the college's financial officer. It may be useful to consult data collected from other colleges of similar size about the amount or portion of their budget that is spent on legal fees. Most important, the college should not hesitate to require timely and detailed legal bills showing in detail the tasks performed and the amount of time spent, and to question legal bills that intuitively seem too high.

**Preventive counseling.** Preventive law has become an essential element in the provision of legal services. It generally centers around lawyer-led educational and outreach efforts specifically designed to reduce or eliminate legal exposure through increased sensitivity to and understanding of the legal consequences of administrative decision making. As explained succinctly in an essay published in a state bar journal a decade ago, “[p]reventive law is a theory of practicing law that emphasizes using legal counseling to anticipate and prevent legal disputes.... Preventive law very simply means that attorneys actively anticipate the problems their clients will face in the future and take steps now to avoid those problems.”<sup>20</sup>

In their leading treatise on higher education law, William Kaplin and Barbara Lee explain the value of preventive counseling in the college context:

Preventive law ... focuses on initiatives that the institution can take before actual legal disputes arise. Preventive law involves administrator and counsel in a continual process of setting the legal parameters within which the institution will operate to avoid litigation or other legal disputes. Counsel identifies the legal consequences of proposed actions; pinpoints the range of alternatives for avoiding problems and the legal risks of each alternative; sensitizes administrators to legal issues and the importance of recognizing them early; and determines the impact of new or proposed laws and regulations, and new court decisions, on institutional operations.<sup>21</sup>

Preventive counseling on college campuses involves identifying high-risk or potentially high-risk areas and programs, and articulating a methodology or strategy for coping with that risk. Professors Kaplin and Lee describe several attributes of a successful preventive law program, including the following:

- Regular communication between administrators and counsel on topics of mutual interest;
- Management workshops and other training programs for administrators and faculty members, including programs designed specifically for people in a single department or operating unit as well as broader-gauged programs for college staff across the board;
- Periodic legal audits by a team of lawyers and administrators;<sup>22</sup>
- Implementation of “early warning systems” designed to alert counsel to lurking problems as early as practicable;

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20. Scott E. Isaacson, “Preventive Law: A Personal Essay,” 9 *Utah Bar Journal* 14, 15 (1996).

21. William A. Kaplin and Barbara A. Lee, *The Law of Higher Education, Fourth Edition* (2006), Section 2.4.2., page 144.

22. A legal audit, as the term suggests, is a comprehensive, structured review of institutional legal risks and exposures. “A complete audit would include a survey of every office and function in the institution. For each office and function, the lawyer-administrator team would develop the information and analysis necessary to determine whether that office or function is in compliance with the full range of legal constraints to which it is subject.” Craig Parker and Margaret O'Donnell, *Establishing a Campus Climate of Compliance*, a paper delivered at the NACUA One-Day CLE Workshop, April 1, 2005, page 3.

- Internal grievance mechanisms and other forms of alternative dispute resolution specifically designed to resolve problems as speedily as possible and with a minimum of fallout.<sup>23</sup>

A well managed preventive counseling program often can reduce legal expenditures in the same manner that a preventive health care program often can spare patients the cost of surgery and hospitalization.<sup>24</sup> Preventive counseling serves the secondary purpose of providing a regular opportunity for the college lawyer and client to meet on a more informal basis, without the burden or pressure of a crisis, thereby facilitating a better understanding of the lawyer's job.

## WHAT PRESIDENTS AND OTHER COLLEGE CLIENTS ALWAYS HAVE THE RIGHT TO EXPECT OF THEIR LAWYERS

Lawyers are in the service business. They provide services to clients who in turn pay for those services. When a client entrusts a legal problem to a campus lawyer, the client has the right to expect that the lawyer will respond diligently, competently, and in a timely manner. Whether the lawyer is employed in-house or works for a law firm, whether the lawyer is experienced or just starting out, the duty to manage a client's problems professionally encompasses the following obligations.

1. **Be Responsive.** Nothing tarnishes a lawyer's reputation quicker than not returning telephone calls or taking too long to route work from in-box to out-box. A client always has the right to expect promptness and responsiveness from anyone the college is paying to provide legal services. One of the most important jobs a lawyer performs is establishing priorities when there is more work than time to perform it all. A skillful lawyer knows that priorities are for internal discussion only and are not shared with clients. Every problem is important to the person suffering from it, and clients should not be privy to information that somebody else's problem or case takes precedence.
2. **Speak in plain English.** Communications to and with clients should be lucid, understandable, and as brief as possible. Clients are genuinely appreciative when a lawyer can explain technical matters in comprehensible terms that are not replete with legal jargon or acronyms.
3. **Focus on solving problems.** Clients come to lawyers when they have problems and they need the lawyer's help in resolving them. They want solutions, usually quickly and neatly. Campus lawyers owe it to their clients to explain why a particular course of action is wise or unwise and, as appropriate, offer options.
4. **Provide clear explanations; no secrets.** By virtue of their positions and the roles they play, lawyers occasionally are called upon to communicate unwelcome news.

23. Kaplin and Lee, *supra*, Section 2.4.2., pages 145-149.

24. "Preventive law has much in common with the concept of preventive medicine.... Preventive medicine is premised on the concept that keeping people healthy is better and more cost effective than providing treatment for them once they become ill. Analogously, preventive law is based on the idea that avoiding legal disputes is inevitably better for the client than costly, time-consuming, and stressful litigation. Just as physicians and other health care professionals can prevent future illness through periodic health checkups, testing and screening, inoculations against infectious disease, and the provision of counseling about nutrition and exercise, attorneys can use a variety of mechanisms to identify and avoid future legal difficulties." Bruce J. Winick and David B. Wexler, "The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic," 13 *Clinical Law Review* 605, 608-9 (2006).



Although not always easy, it is just as important for lawyers to explain the bad news as it is to explain the good. Diligent campus lawyers meet frequently with clients when matters are active, and they use the full array of communications media – e-mail messages, voice-mails, face-to-face sessions – to ensure that clients understand every new development and have ample opportunity to ask questions. Clients do not necessarily appreciate surprises, and they do not want to hear from their lawyers only when there is negative news to convey.

5. **Identify the delegee.** If the lawyer to whom the client is speaking is unable or does not plan to handle a matter herself or himself, then that lawyer owes it to the client to disclose the name of the lawyer to whom the matter will be delegated and explain why.
6. **Estimate the time required.** While this can be difficult in some cases, it can aid greatly in fostering realistic client expectations. An externally imposed deadline (for example, a court order) should be divulged to the client. If a lawyer expects to have problems meeting a client's deadline, he or she should inform the client and explain why.
7. **Follow through.** Campus lawyers, like all administrators, juggle many matters at once, and there is a tendency to relegate a matter to the inactive pile once it no longer is a priority. Clients have the right to expect that their lawyer will see matters through to a conclusion, and will even call weeks or months later to see whether the situation is under control. Follow through includes reviewing cases that were caused or aggravated by preventable error.

## **AND THE REVERSE – WHAT CAMPUS LAWYERS HAVE THE RIGHT TO EXPECT OF PRESIDENTS AND OTHER CLIENTS**

Just as clients expect their campus lawyer to be diligent and competent, they should appreciate that their lawyers have expectations of them, as well.

1. **Be responsive.** Nothing tarnishes a *client's* reputation quicker than not returning telephone calls or taking too long to route work from in-box to out-box. A lawyer has the right to expect the same level of promptness and responsiveness from a client that the client expects from the lawyer.
2. **Be candid.** People seek out the advice of a lawyer because they have a legal problem. The temptation can be strong to present the lawyer with facts that shed only the best light on what the client has done. Clients should resist the urge to pick and choose what they disclose to their lawyers. Rather, they should trust the lawyer and let him or her determine what is relevant or not. A lawyer should be told everything. The client, in return, has the right to expect the lawyer's discretion and confidence.
3. **Make an effort when requested.** Lawyers invariably give their clients assignments. For example, if the president asks the campus lawyer for help in resolving a personnel matter in the president's office, the lawyer may ask the president or the president's staff to locate and then share the complainant's personnel file and related correspondence files. Clients should exhibit the same diligence in responding to requests for assistance as they expect in return from their lawyers.
4. **Take the long view.** The lifetime of most legal projects is long, often much longer than clients would prefer. Problem solving takes time and can follow a bumpy path

with many ups and downs. A client may mistake an inconsequential setback for a catastrophic lawyering failure. Just as lawyers offer patience as one of their most important professional attributes, clients need to understand the ebb and flow of a legal problem and take the long view. This is particularly important when the client is paying the lawyer on an hourly fee-for-service basis. There may be a temptation to exclude the lawyer from important meetings to save legal fees. But there are times when legal fees, prudently invested, pay significant dividends over the long haul by enabling the lawyer to understand the full dimensions of a problem.

## REVIEWING THE GENERAL COUNSEL'S PERFORMANCE

Many colleges have codified – with varying degrees of precision – the process for conducting periodic evaluations of senior administrators. As the periodic evaluation process has become more common, so too has it become more common for colleges to evaluate the performance of the general counsel on an annual or biennial basis.

In general terms, the process consists of (1) establishing at the beginning of the fiscal or calendar year mutually agreed upon performance targets, (2) preparation by the general counsel of a year-end report summarizing achievements and reporting item-by-item on whether the year's targets were attained, (3) a meeting between the general counsel and the president (or other supervisor) to review the report, and (4) completion by the president (or other supervisor) of an evaluation form containing a narrative assessment (sometimes accompanied by a grade or score) of the general counsel's performance. The assessment may or may not be the determining factor in setting the general counsel's compensation for the ensuing fiscal or calendar year.

The following excerpt from a memorandum written by the general counsel of a large university to the president includes some suggested performance measures by which to evaluate the general counsel's job performance.

- (1) When I provide counsel to you, other senior officers, and the governing boards, I have four goals:
  - 1.1. To be trusted with sensitive assignments and heeded when I render advice – in other words, to be respected and sought out;
  - 1.2. To give advice succinctly, understandably, and in a useful manner;
  - 1.3. To prevent the University from incurring unnecessary or unanticipated legal risks, while at the same time avoiding the temptation to be too cautious and too risk-averse; and
  - 1.4. To be right.
- (2) When I am engaged in general in-house counseling, I have, in addition to the goals already enumerated, two additional goals:
  - 2.1. To be responsive – in other words, to answer questions quickly and helpfully; and
  - 2.2. To gauge correctly when work can most effectively be performed in-house, avoiding the expense of outside counsel.
- (3) When I engage outside firms to do the University's legal work, my goals are:
  - 3.1. To be sure that the "client" – by which I mean the office that will pay the resulting legal bill – is part of the selection process and is satisfied with the choice;

- 3.2. To save the University money by negotiating the most economical deal I can and making the best possible use of in-house resources to keep costs down; and
  - 3.3. To make sure that the quality of work performed by outside counsel meets my expectations.
- (4) Finally, when making supervisory decisions in the office, my goals are:
- 4.1. To tend assiduously to the morale and professional development of all staff members;
  - 4.2. To be a prudent steward of University resources;
  - 4.3. To ensure that our staff, particularly our lawyers, are deployed in the manner best suited to meet the legal needs of our clients; and
  - 4.4. To save the University money by reducing reliance, whenever possible, on outside counsel and promoting greater utilization of in-house legal services.

## CONCLUSION

The underlying message throughout this monograph is the importance of understanding the often diverse, occasionally stressful, sometimes difficult, but always rewarding task of serving as the legal advisor to an institution of higher education. Like the president, the campus lawyer occupies a position offering a panoramic perspective on campus life. And also like the president, the lawyer performs a demanding job – a job one higher education lawyer once described as trying to paint a delicate still life on an easel bolted to the deck of a heaving ship. A strong working relationship between a college or university president and the institution’s lawyer can add greatly to the success and professional satisfaction of each member of the partnership and redound enormously to the benefit of the campus community in general.

## Appendix A

### The Practice of Higher Education Law

The following information highlights selected characteristics regarding the office of the general counsel, as presented in NACUA's *2006 Joint Compensation and Benefits and Provision of Legal Services Survey*. The data is from U.S. colleges and universities that were NACUA member institutions in Fall 2005, all of which had formally designated campus counsel.

- The average operating budget of an in-house legal office across all institutional types and sizes was \$680,947 in 2005.
- The average general counsel had practiced law for 23 years, and had spent 14 years as a higher education legal specialist. The average general counsel was 51 years old; had been employed at his or her institution for 10 years; and had served as chief legal officer for eight years. Fifty-six percent were men, and 44 percent were women.
- The average general counsel's office employed 3.4 full-time attorneys and about three additional full-time-equivalent employees (clerical assistants, law clerks, paralegals, and part-time attorneys).
- A majority of general counsel – 53 percent – performed duties in addition to their duties as chief legal officer. The most common additional duties were part-time service as board secretary, presidential assistant, affirmative action officer, and adjunct faculty member.
- Eighty-three percent of general counsels served as members of the president's "cabinet" or senior policy council at their institution.
- The average college with an in-house legal office spent slightly over \$1 million in outside counsel fees in 2005 (\$407,355 for litigation-related services and \$638,762 for non-litigation services). The average college had 32 open litigation files, about half of which were handled by in-house counsel and half by outside law firms.

## NACUA Publications

NACUA publishes a variety of pamphlets, monographs, compendia, and other resources of interest to both higher education attorneys and administrators. The publication series offers more than 50 publications of different types and categories, and new titles are added regularly. For the most up-to-date listing of publications offerings and more detailed descriptions of any of the publications listed below, please go to:

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### Pamphlets/Monographs

Access to Institutions of Higher Education for Students with Disabilities  
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Defamation Issues in Higher Education  
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The Family Educational Rights and Privacy Act: A General Overview  
The Family Medical Leave Act of 1993: Applications in Higher Education  
FERPA, GLBA & HIPAA: The Alphabet Soup of Privacy  
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The HIPAA Privacy Regulations and Student Health Centers  
How to Conduct a Sexual Harassment Investigation, 2006 Update  
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Race-Conscious Admissions and Financial Aid Programs  
Should I Stay or Should I Go: Early Retirement Incentive Programs in Higher Education  
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Tax-Exempt Bonds: Considerations for College and University In-House Counsel  
Understanding Attorney-Client Privilege Issues in the College and University Setting  
What to Do When OSHA Comes Calling  
What to Do When the EEOC Comes Knocking on Your Campus Door  
What to Do When the NCAA Comes Calling  
What to Do When the U.S. Department of Education, Office for Civil Rights  
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