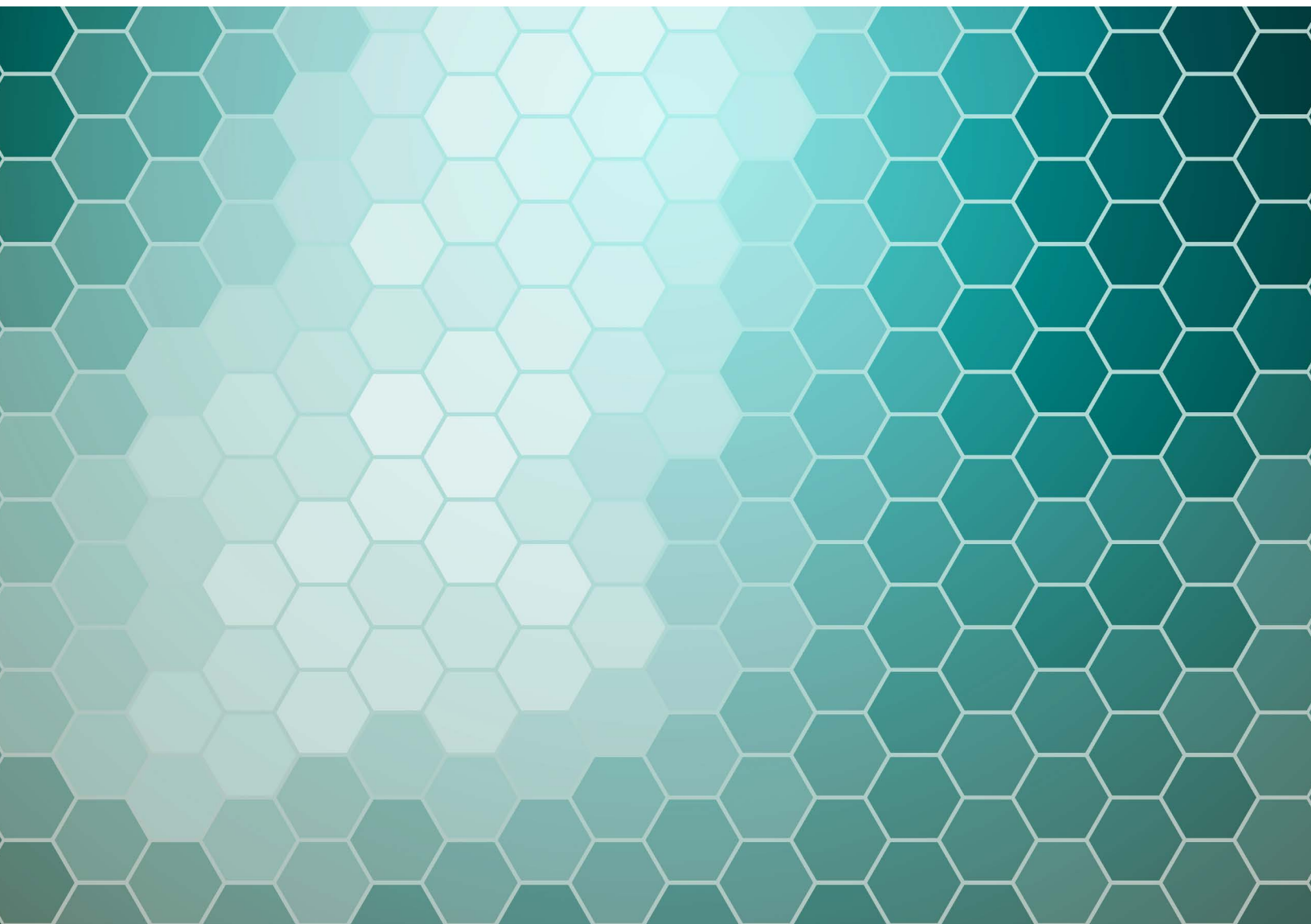


# Managing Your Campus Legal Needs:

AN ESSENTIAL GUIDE TO SELECTING COUNSEL





**Craig Parker** received a B.S. in Journalism from the William Allen White School of Journalism at the University of Kansas in 1971 and his J.D. from The Catholic University of America (CUA) in 1978. He was Assistant Dean of the law school at CUA from 1980-87 and General Counsel at CUA from 1987-2009. He then served as General Counsel at The University of the District of Columbia from 2009-2013. Between 1980 and 2009, Craig served on various legal advisory panels and committees for NAICU, the NCAA, and NACUA. He retired in 2013 and now lives in Portland, Oregon with his wife, Betsy, where they are happily engaged in babysitting for their grandchildren.

NACUA thanks Craig Parker for taking on what turned out to be far more than a simple update to the 2008 version of *Managing Your Campus Legal Needs: An Essential Guide to Selecting Counsel*, written by Larry White. Craig did yeoman's work in updating and expanding the excellent and popular first version prepared by Larry. This new version reflects the myriad changes, challenges, and opportunities that higher education institutions and their lawyers face, and provides a guide that is thoughtful, practical, and timely. Craig's expertise and many years of experience as campus counsel provided just the right touch in the development of content and articulation of processes that address the needs of a broadly diverse range of campuses as they consider the role of counsel and appropriate legal representation.

Numerous NACUA members served as reviewers and provided additional suggestions and guidance. Thanks go to: Ellen Babbitt, Partner, Franczek Radelet; Robert B. Donin, General Counsel, Dartmouth College; Daniel Porterfield, President, Franklin & Marshall College; JP Sherry, General Counsel, Los Rios Community College District; Sandhya Subramanian, General Counsel, Oberlin College; Madelyn Wessel, University Counsel, Virginia Commonwealth University; and Susan Wheeler, University Counsel and Special Assistant Attorney General, James Madison University.

**Linda Henderson**, NACUA's former Manager of Publications, was the glue that brought the publication to fruition. Her writing and editing skills, combined with her knowledge of higher education institutions and their attorneys, made her the perfect partner for Craig. Thanks to Linda for her excellent work.

NACUA's mission is to advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve.

The views expressed herein are to be attributed to the author and not to the National Association of College and University Attorneys. This publication is intended for general informational purposes only and does not constitute legal advice. An attorney should be consulted regarding the specific facts and circumstances associated with any legal matter or case.

# TABLE OF CONTENTS

---

<b>INTRODUCTION</b> .....	<b><a href="#">1</a></b>
<b>WHAT DO CAMPUS LAWYERS DO?</b> .....	<b><a href="#">3</a></b>
Counseling. ....	<a href="#">4</a>
Preventive law and compliance activities. ....	<a href="#">9</a>
Preventive law. ....	<a href="#">9</a>
Compliance activities. ....	<a href="#">10</a>
Formal dispute resolution. ....	<a href="#">11</a>
<b>IS IT TIME TO START A CAMPUS LEGAL OFFICE? IF SO, HOW?</b> .....	<b><a href="#">12</a></b>
Audit of legal costs. ....	<a href="#">12</a>
Audit of legal risks. ....	<a href="#">13</a>
The preventive law model. ....	<a href="#">14</a>
<b>ORGANIZING THE COLLEGE LEGAL OFFICE</b> .....	<b><a href="#">16</a></b>
The in-house legal office. ....	<a href="#">16</a>
Using outside counsel. ....	<a href="#">19</a>
<b>THE SEARCH FOR CAMPUS COUNSEL</b> .....	<b><a href="#">23</a></b>
Professional and personal skills and qualities of the campus lawyer. ....	<a href="#">23</a>
Essential qualities of campus lawyers. ....	<a href="#">24</a>
Conducting the search. ....	<a href="#">25</a>
<b>KEY OPERATIONAL ISSUES FOR THE CAMPUS LEGAL OFFICE</b> .....	<b><a href="#">26</a></b>
What is the role of the legal office? ....	<a href="#">26</a>
To whom should the legal office report? ....	<a href="#">26</a>
<b>RELATIONSHIPS WITH OTHER MEMBERS OF THE CAMPUS COMMUNITY</b> .....	<b><a href="#">28</a></b>
Relationship with the governing board. ....	<a href="#">28</a>
Relationship with the president. ....	<a href="#">29</a>
Relationships with institutional peers. ....	<a href="#">30</a>
Relationships with other staff members in the campus lawyer's office. ....	<a href="#">30</a>
<b>MANAGING THE COST OF LEGAL SERVICES</b> .....	<b><a href="#">31</a></b>
In-house costs. ....	<a href="#">31</a>
Outside counsel costs. ....	<a href="#">31</a>
Preventive lawyering. ....	<a href="#">32</a>
<b>WHAT PRESIDENTS AND OTHER COLLEGE CLIENTS HAVE THE RIGHT TO EXPECT OF THEIR LAWYERS</b> .....	<b><a href="#">33</a></b>
<b>WHAT CAMPUS LAWYERS HAVE THE RIGHT TO EXPECT FROM THEIR CLIENT</b> .....	<b><a href="#">35</a></b>
<b>CONCLUSION</b> .....	<b><a href="#">36</a></b>

# INTRODUCTION

---

American colleges and universities are extraordinarily complex organizations. Now, more than ever, they serve a diverse population and function in a world of increased scrutiny and rapidly changing expectations from federal and state agencies, Congress and state legislatures, the corporate community, parents, students, and a multitude of other constituents. As a result, they have been challenged to modify their operations and adapt in every phase of campus life (with an ever changing definition of “campus”) to rapid changes in the economy, demographics, technology, student needs, and in myriad other ways that challenge traditional paradigms for higher education. During the past few decades, thousands of new legal requirements (in the form of statutes, regulations, agency guidance, and judge-made “common law” rules) have made the task of college administration ever more daunting. Adding to the challenge are recent calls for more accountability, stronger governance systems, and higher public expectations for transparency.

With these challenges in mind, 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.<sup>1</sup> It also is intended for lawyers themselves, particularly those new to the field of higher education law. It describes the responsibilities of campus lawyers, their role as part of senior leadership and important collaborators in the development and implementation of the widest range of campus initiatives, and their value as strategic thinkers about the future of the college and higher education. It details what college counsel do, including preventive law activities aimed at proactively reducing and avoiding campus legal problems; it addresses threshold questions a campus chief executive officer may wish to consider when deciding whether and how to establish a legal office; and finally, it suggests steps to take when hiring a campus lawyer.

---

<sup>1</sup> As used in this monograph, the phrase, “campus lawyer,” is intended to describe any lawyer who provides legal services to a college or university client. While many such lawyers in fact work on campus as members of in-house legal offices, others are employed in law firms, state offices of the attorney general, or centralized system offices. The term, “general counsel,” refers to the campus’s chief legal officer, and “general counsel’s office” to the organizational home of campus lawyers, although other terms are often used (e.g., “legal counsel,” “university counsel,” “legal advisor”). In addition, the term, “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”).

Given the size and complexity of the typical higher education institution and the litigious environment within the broader society, virtually every college in the United States uses the services of a lawyer; individual college characteristics usually determine how and to what extent. At most medium-size and large colleges, legal services are typically provided by employing an in-house campus lawyer who is responsible for managing the legal function internally and who may also engage outside counsel to perform some of the legal work.

Historically, many small private colleges relied on retained outside counsel for legal services, in some cases even using a member of the governing board who was a lawyer (a practice that raises potential conflict of interest questions). More commonly, they now have chosen to hire in-house counsel as the breadth and range of legal matters have increased. While the exact number of higher education legal specialists is difficult to estimate, the leading professional association in higher education law — the National Association of College and University Attorneys (“NACUA”) — has more than 4,500 attorney members who represent more than 1,800 campuses.

# WHAT DO CAMPUS LAWYERS DO?

---

As with other areas of legal specialization, higher education law requires practitioners to master a large volume of substantive law. In fact, one of the great joys of college lawyering is the tremendous diversity of issues with which one is presented on a daily basis. Every lawyer who represents a college or university develops a working knowledge of the law specific to the higher education field and that forms the foundation of the practice. And, 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?”

Campus lawyers typically organize their work effort into three broad functional categories:

- [Counseling](#) — advising clients on the interpretation and applicability of legal documents (contracts, laws, institutional policies, regulations, etc.) that relate to specific legal problems that arise on campus, and advising clients on other legally related issues that may arise, as appropriate.
- [Preventive law and compliance activities](#) — workshops, employee training programs, legal audits, advisory memoranda on broadly applicable legal issues, and development or review of compliance policies, procedures, and checklists<sup>2</sup> (the extent to which the campus lawyer should be directly involved in the management of campus compliance functions is discussed further on [page 9](#)). All these functions are important and play a significant role in creating a campus culture that reduces an institution’s overall potential liability.
- [Formal dispute resolution](#) — managing legal representation for the college in formal proceedings (lawsuits, administrative hearings, grievances, federal, state and local agency investigations, and the like).

---

<sup>2</sup> NACUA’s November 2015 publication, *Building an Effective Compliance Program: An Introductory Guide*, is a helpful tool for identifying, building, and sustaining a compliance model for a campus.

## COUNSELING.

The range of counseling assignments a campus lawyer may undertake is virtually limitless, but almost always involves making prudential judgments about legal risk, requirements, and strategies. Among the most common are:

- [Governance](#)
- [Student affairs](#)
- [Employment](#)
- [Campus security](#)
- [Crisis management](#)
- [Information technology](#)
- [Athletics](#)
- [Financial matters](#)
- [Government relations](#)
- [Contracts](#)
- [Intellectual property, research, and technology transfer](#)

**Governance.** This is in large part what is referred to in the for-profit sector as “corporate legal work,” which encompasses advising the governing board and senior managers on the internal rules of the organization (including rules on how policies are developed or changed) and how outside legal restrictions might limit or guide proposed university actions, and ensuring maintenance of the corporation’s legal status. Corporate legal work may also involve resolving questions related to the authority of trustees and officers, administrators, or other employees to take particular actions on behalf of the college, including the manner in which the board conducts its business (e.g., open meetings, records retention and disclosure, selection of auditors, compliance with institutional bylaws). Governance-related legal work can also include revising or defining the role of faculty in campus governance, fine-tuning the mechanisms through which such governance takes place, and advising faculty governing bodies on legal questions they may have. Guidance on conflict of interest issues has also grown increasingly more important, with both federal and state law regulating some aspects of trustee roles and activities, as well as the conduct of senior managers.

**Student affairs.** Legal issues abound whenever the college is involved in student conduct issues and campus lawyers may advise on such proceedings both for academic and non-academic misconduct. Common student life legal issues also include institutional responses to student health, counseling and safety, free speech, privacy and conduct problems arising from use of social media, plagiarism, processing student records and related privacy issues and regulations under the Family Educational Rights and Privacy Act (FERPA), and the activities of student organizations. Title IX coordination and education may also fall within the student affairs area. Finally, campus lawyers are often asked to assist in responding to parent questions and concerns.

**Employment.** In the last few decades, this area of campus operations perhaps more than any other has come under the coverage of new federal and state legal requirements. Areas of concern for human resources managers and their campus lawyer include a broad range of non-discrimination laws, employee benefits issues, veteran benefits, immigration compliance, privacy rights, and others. Campus lawyers are often intimately involved with college decisions about down-sizing, layoffs, employee terminations, and negotiations over severance. Faculty employment in particular includes thorny legal issues with high-stakes outcomes. All of the normal steps in any employment process — from recruiting and initial appointment through promotion, tenure, and termination — are more complicated for college instructional staff than for non-faculty employees. Special rules, usually unique to each campus and sometimes consisting of unwritten “campus custom,” apply and generally involve detailed collegial procedures. Tenure disputes are especially difficult, given the valuable employment rights at stake.

**Campus security.** State and local laws or agreements with law enforcement agencies often define the authority of campus police or security forces, while federal law (specifically the Campus Security Act) and broader federal enforcement statutes impose extensive reporting and record-keeping requirements. Campus lawyers are often asked to help interpret those laws and advise campus law enforcement units as they carry out their law enforcement responsibilities or respond to complaints of police misconduct. They also frequently participate in officer training and the development of policies for campus law enforcement units, including, in recent years, discussions about whether and under what circumstances to equip campus police with firearms. If campus security officials investigate reports of sexual misconduct, campus lawyers may also need to advise them on the requirements of Title IX and the Clery Act, as well as other criminal laws that prohibit similar conduct. Campus lawyers may also need to assist in coordinating the security officials’ response with the Title IX coordinator’s responsibilities.



**Crisis management.** Many institutions have formally constituted crisis management teams with lawyers as members. During a crisis, campus lawyers can be particularly helpful in advising on statutory requirements and drafting media statements, as well as being part of the leadership team that provides an effective response. As strategic thinkers unencumbered with defending any particular segment of the college's operations, they also bring a broad and independent view in advising on how best to respond to a campus crisis. In the aftermath, they can help evaluate the causes and outcomes of the crisis to assist the college in better preparing and responding to a similar event in the future.

**Information technology.** Campus computing has become a pervasive and highly regulated activity. There are seemingly impenetrable federal regulations that govern electronic records, mandate the safeguarding of customer information (including related privacy rules and the obligations of colleges when a data security breach occurs), require college monitoring of student computing practices and procedures to identify and prevent computer fraud and identity theft, and address college involvement in copyright law matters. New legal issues emerge, it seems, almost daily, and campus lawyers grapple with those that involve information technology and copyrighted material both inside and outside the classroom.

**Athletics.** Any lawyer who works at a college with an intercollegiate athletic program must understand conference and National Collegiate Athletic Association (NCAA) (or, at some institutions, National Association of Intercollegiate Athletics (NAIA)) compliance rules, and also respond to the issues that arise when any students engage in activities (including intramural and recreational sports clubs) that can lead to injuries and institutional liability. The campus lawyer is often also involved in ensuring gender equity in athletics under federal law. Furthermore, at schools with large programs competing at the highest levels, campus counsel may need to provide advice on unrelated business income tax, multi-media and marketing agreements, coaching contracts, pouring rights, and licensing of merchandise, among other matters.

**Financial matters.** Campus lawyers are consulted on gift agreements, scholarships, endowments, tax aspects of proposed transactions, payroll tax issues, IRS compensation limits under "Intermediate Sanctions" rules, the management of institutional assets, and bond and other types of financing arrangements. While campus financial managers historically have overseen the general management of insurance matters, they work closely with the campus lawyer on evaluating legal risk and coordinating resolution of any claims falling under the institution's insurance coverage. In recent years, the narrow insurance-based "risk management" function has broadened to be more preventive in nature, actively working to identify potential risks and determine how to manage them. The most rigorous application of risk management techniques is Enterprise Risk Management (ERM), a formal campus-wide methodology integrating risk analysis into strategic planning,

and requiring a substantial commitment of time and effort from governing boards and senior managers. In each of these models, campus lawyers play a key role, especially to the extent they are committed to a preventive law practice.

**Government relations.** Lawyers must understand the limits on lobbying activities imposed by a college's tax-exempt status and in many instances by state or local law. Public institutions often have state-imposed limits on their authority that lawyers are called upon to help define and sometimes challenge. Both private and public institutions are authorized to operate in most states and must meet regional accreditation requirements that campus counsel must be able to understand and frequently help interpret. Campus lawyers are also often asked to analyze the potential legal consequences of legislative and regulatory proposals, and to help navigate the restrictions imposed by the United States and other countries when colleges and universities operate internationally.

Additionally, 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 (often involving student conduct in near-campus neighborhoods). Often this work involves maintaining relationships with formal and informal neighborhood associations. Disputes can arise from student housing, student misconduct (especially related to alcohol use), parking, noise, truck traffic, zoning, tax questions, and a host of other related issues. In some cases, resolving them is an absolute necessity for the college to proceed with critical major activities such as campus planning, bond financing, and construction of new buildings on campus.

**Contracts.** Campus lawyers help develop or review contracts and other agreements with vendors, suppliers, and other organizations and, when necessary, enforce the college's contract rights. 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. Academic activity also generates contracts related to faculty research and entrepreneurship, college membership in consortia, and affiliation agreements with hospitals and other non-profit and government agencies.

**Intellectual property, research, and technology transfer.** Faculty research can generate valuable intellectual property, which the campus lawyer will often help protect and, in some instances, also assist in its commercialization. Campus lawyers may handle the filing of patent and trademark applications or will oversee outside counsel's work in these areas. In addition, campus lawyers must assist in the ever-more complex world of grant and contract negotiations, including not only those with governmental agencies but also private entities and industry. They must advise on conflict of interest and research misconduct concerns, along with myriad research-related federal compliance obligations such as export controls. Finally, the campus lawyer must advise on complex emerging issues in copyright, cloud computing, online education, and development of policies that properly address intellectual property rights and responsibilities of faculty, staff, and students in a digital world.<sup>3</sup>

In addition to these numerous counseling tasks, the campus lawyer has a more sensitive and critical non-legal role — as “consigliere” or trusted advisor — particularly at the board of trustees level but also with the president and senior leadership team. Not only do lawyers bring an important set of analytical skills to any problem, they have the advantage of being big-picture thinkers who have a horizontal view of the college. They are among only a few senior managers who are routinely involved in the functions of every major area on campus, bringing a well-informed knowledge of all campus constituencies and interests to the problem-solving process. Even when those problems are not principally legal in nature, presidents and board members may seek advice from their campus lawyer. Good lawyers serve as sounding boards, wise counselors, task force organizers, and listeners, and are recognized as being able to provide valuable and thoughtful guidance on virtually any problem.

---

<sup>3</sup> Campus lawyers are valuable additions to many campus groups and conversations. However, there are limits a prudent campus lawyer should observe when asked to perform in a capacity other than legal advisor, and the lawyer should always clarify when he or she is — or is not — serving in a legal capacity. For example, issues of privilege are complicated. There are likely to be instances when the campus lawyer will need to remind trustees and administrators that communications do not meet the requirements to establish attorney-client privilege (i.e., “for the purpose of seeking, obtaining, or providing legal assistance to the client”) and will not be protected from disclosure on that basis. See Jerry Blakemore, Stephen Dunham, Lori Fox, *Basic Principles of Attorney Client Privilege Protection and Work Product Protection*, December 15, 2015, Virtual Seminar materials, page 3, quoting Lawrence White, *Common Ethical Issues Arising in Higher Education Practice*, June 26, 2010, Lawyers New to Higher Education Workshop materials, page 9. See also Jerry Blakemore, *An Introduction to the Higher Education Counselor's Office: Ethical Issues*, NACUA Annual Conference Outline, June 26, 2012. For clarity on the lawyer's role as advisor, see [Model Rules of Professional Conduct, Rule 2.1](#).

## PREVENTIVE LAW AND COMPLIANCE ACTIVITIES.

### **Preventive law.**

Preventive law focuses on both regulatory compliance and specific steps aimed at proactively counseling senior leadership, faculty, and staff to identify and resolve potential legal disputes before they occur or escalate into litigation. It also aids in creating and sustaining a campus culture that encourages internal resolution of conflicts as a part of the larger process of building community and encouraging fairness, collegiality, civility and inclusiveness. On a continuum that represents the range of possible institutional responses to complaints from students, employees, or others, a strategic, preventive law culture is the antithesis of a crisis-mode approach to problem solving.

Preventive law further includes all of the activities outlined by Professors William Kaplin and Barbara Lee in their treatise, *The Law of Higher Education*, that foster the development of a close working relationship among the campus legal staff, campus managers, and the governing board. It may also involve:

- Participating with faculty in workshops aimed at increasing awareness of pitfalls in the appointment, supervision, evaluation, and tenure and promotion processes. Such workshops are especially desirable for faculty department chairs, who are the first-line managers in academic programs and most often the “first responders” to questions regarding faculty or student employment, academic conduct, administration of grants, student records privacy, and complaints about faculty-student conflicts.
- Leading training programs for employees on topics mandated by the federal government, such as sexual harassment, mandated reporting, and equal opportunity.
- Participating in the development and effective use of a variety of internal dispute resolution mechanisms for students and employees to reduce the chance a complainant will resort to an external legal process.
- Performing in-depth legal audits to determine potential violations of law, for example in areas such as immigration compliance, human subjects research, and environmental safety.
- Initiating activities for managers and all trustees that illustrate the importance of strong leadership at the highest levels to develop a culture that ensures compliance with state and federal regulations.
- Creating the momentum to build a regulatory compliance team within the college.<sup>4</sup>

---

<sup>4</sup> A more detailed discussion of preventive law follows on [page 14](#).

**Compliance activities.**

One reason for the increased focus on compliance (apart from the particular legal requirements of federal, state, and local law) is the United States Sentencing Commission, *Guidelines Manual, Section 3E1.1* (Nov. 2014) on the need for organizations (including non-profit organizations) to have a compliance program. While it is rare for colleges and universities to be prosecuted under federal law for criminal activity, in such cases the federal government gives preferential treatment in any sentencing under federal criminal laws to those institutions that have an effective compliance and ethics program in place. Compliance requirements are clearly grounded in the law — issued by the government, legally binding, and enforced through legal action and penalties. Campuses are as highly regulated as many for-profit business activities, and college trustees and presidents often expect their legal counsel to ensure that managers on campus are properly attending to the details of regulatory compliance.

Although everyone on campus is responsible for working toward compliance, and many institutions have a designated compliance officer, the campus lawyer is often charged with helping college leaders understand their specific tasks in that work and making certain the overall compliance process is functioning properly.

The essential elements of any campus compliance program should include:

- Due diligence, along with standards and procedures integrated into existing organizational policies to prevent and detect criminal conduct;
- Promoting an organizational culture that encourages ethical conduct and legal compliance, including publicizing a system in which employees can report potential or actual criminal conduct and be assured of an appropriate response by the employer without fear of retaliation;
- Reasonable oversight by a college's governing board of the ethics and compliance program;
- High-level personnel with overall responsibility for ensuring the successful implementation of the program;
- Conducting periodic risk evaluations and audits of internal compliance controls and reporting on the program to the governing authority;
- Appropriate incentives and disciplinary measures to ensure compliance;
- Periodic communication of standards and procedures to the organization and effective training programs and other dissemination of information.

Although there are differing views among campus lawyers about what a general counsel's precise role should be in overseeing campus legal compliance, a spring 2013 NACUA survey of chief legal officers with more than 200 respondents found that 98% of chief legal officers rated compliance as either the biggest challenge facing their office, among the top three challenges, or just as challenging as any other legal issue. It is more com-

mon among colleges than in the corporate sector for a general counsel to be either the designated chief compliance officer or the official who most commonly assumes responsibility for compliance. Ultimately, even if the campus lawyer is removed from direct line responsibility for overseeing the college's compliance program, just as with all other legal obligations of the institution, he or she is likely to be perceived as being responsible for ensuring that the college is operating in accordance with the law. In fact, one-third of responding chief legal officers in the most recent NACUA survey on compliance indicated they have responsibility for or oversight of a formal compliance program for their institution. But, even among those who do not, nearly all (virtually 100%) provide support for their institution's compliance program.

## FORMAL DISPUTE RESOLUTION.

The campus lawyer is responsible for managing legal representation for the college in formal proceedings, including 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 (e.g., an employee, a student, vendor, 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 a variety of ways.

- **Court litigation.** Campus lawyers interview witnesses with knowledge of relevant events, engage in discovery of documents and evidence, prepare witnesses, and represent the college in court.
- **Arbitration and mediation.** College lawyers resolve disputes through alternative dispute resolution (ADR) rather than litigation. ADR is often used to adjudicate employment-related grievances, as well as construction and labor disputes. It is less formal than litigation and generally proceeds to resolution more quickly. The role of the campus lawyer in a specific ADR matter is similar to his or her role in litigation. Outside of any specific problem, the college lawyer has a broader and more long-term role in encouraging the creation and use of internal dispute-resolution processes. A culture that encourages such processes is a natural part of building community on campus.
- **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.

# IS IT TIME TO START A CAMPUS LEGAL OFFICE? IF SO, HOW?

---

With some understanding of the multiple roles of a campus lawyer, there are some additional questions that college presidents and governing boards need to ask as they consider whether to employ in-house campus counsel or use outside counsel. First, what factors should the board or a president take into account in gauging whether it is time to establish a campus legal office? Second, if the decision is to hire in-house counsel, how should the college conduct the search for a new chief legal officer, and what characteristics should the college consider?

## AUDIT OF LEGAL COSTS.

The process should begin with an audit of the college's current legal services and expenses. Accurate knowledge of spending patterns is one of two important factors in deciding whether to create a campus legal office (the other factor being an audit of legal risks; see [page 13](#)). This task can be assigned to the chief financial officer, an internal auditor, a senior member of the president's staff, or an outside expert.

The financial data on the use of legal services should include billing records received from all of the institution's outside counsel for a representative period of time, such as the past one or two years (or longer if necessary to get a balanced picture of college expenses). The patterns and details of these records will allow the categorization of legal costs to show who uses such services, for what reason, and at what cost. The information will be a helpful guide in predicting future legal expenses.

The breakdown of legal costs will typically reflect the major areas of law in which most campus lawyers work ([see pages 4-8](#)). Such costs are often heaviest (depending on institutional characteristics such as size, programs, location, and frequency and expense of litigation) in the areas of:

- **Academic affairs**, especially faculty employment issues, academic freedom, free speech, research contracts, international campuses and programs, and admissions and student records;
- **Business and financial affairs**, including purchasing and contracts, physical plant, investments, and tax compliance and accounting practices;
- **Student affairs**, often focused on disciplinary matters, Title IX compliance, disability services, and campus security problems; and
- **General administration**, including human resources, fundraising, public affairs, and corporate governance issues involving the governing board, ethics, and conflicts of interest.

## AUDIT OF LEGAL RISKS.

The information-gathering process should also include a separate “legal audit,” i.e., an audit of legal risk — a gap analysis to determine the extent to which the college is in compliance with federal and state regulatory and common law requirements. As first defined several decades ago by Kaplin and Lee,<sup>5</sup> a legal audit is a survey of all of the units of a college to determine whether they comply with all applicable legal rules. In some cases, important institutional legal needs with potentially large financial and public relations exposures may not have received adequate attention over the years. The size and nature of any deferred legal projects and other legal risks will be another important factor in deciding whether to establish a campus legal office.

The audit of known and potential legal risks should be carried out by a lawyer with knowledge of higher education law or regulatory compliance.<sup>6</sup> Even a superficial legal audit may suggest the need for legal services to correct any compliance deficiencies. The audit should also provide insights into likely future legal expenses, such as those related to planned physical plant growth, forthcoming collective bargaining needs, and possible academic program expansion.

---

5 William A. Kaplin and Barbara A. Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*, 5th Ed., Vol. 1, 166 (2013).

6 Such an audit will be aided by reference to helpful compliance checklists, such as the [Higher Education Compliance Alliance Compliance Matrix](#); the listing of compliance requirements under the [Federal Sentencing Guidelines](#); the most current governance checklist found on the [IRS website](#); and, specifically for private colleges, the [Form 990 Checklist from the American Council on Education](#) (which, although developed in 2009, is still applicable and relevant).



Synthesizing the information from both the audit of current legal costs and known and potential legal risks will provide a more complete picture of how legal expenses are regularly incurred and how they are likely to evolve in the future. This enables the president to proceed to address the operational question raised above: is it time to centralize the management of the legal function by hiring a campus lawyer?

## THE PREVENTIVE LAW MODEL.

Kaplin and Lee<sup>7</sup> analogize campus legal services to the medical profession and define two models for delivering those services: treatment law or preventive law. Most campus legal services were provided using a treatment model until the 1980s. The model focuses primarily on responding to real and present legal challenges to the college as they arise and on protecting its interests only when they are actually threatened. While necessary to college operations, treating only full-blown legal problems stops far short of the benefits that come from thoughtful and proactive legal counsel.

Given the legal obligations institutions now face, preventive law has become a necessity. Some campus legal offices, however, may be so thinly staffed that they are not able to undertake sufficient (or any) preventive law activities. In such a case, the college might encourage non-lawyer employees to attend webinars, workshops, or other outside programs aimed at developing a preventive law culture, and employ consultants or outside counsel “as necessary” to ensure it has at least some preventive measures in place. Preventive law also enables administrators to recognize embryonic legal matters and obtain assistance in addressing these problems in their earliest stages. It further helps the college maintain timely compliance with new laws, regulations, and court decisions. According to Kaplin and Lee:

“Today preventive law [within postsecondary education] is as indispensable as treatment law and provides the more constructive posture from which to conduct institutional legal affairs.”<sup>8</sup>

If a legal audit of costs and risks shows high current legal costs and/or high legal risk, a prudent president might arrange for more centralized control over the management of legal affairs. The old treatment model would have suggested that, if legal expenditures are acceptably low, the college might adequately protect against legal risk simply by relying on specially trained outside lawyers on a case-by-case basis as the need arises, with no purpose served in hiring a campus general counsel. In contrast, the preventive model suggests that, even with fairly low average legal costs, the college will be

<sup>7</sup> William A. Kaplin and Barbara A. Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*, 5th Ed., Vol. 1, 162 (2013).

<sup>8</sup> William A. Kaplin and Barbara A. Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*, 5th Ed., Vol. 1, 163 (2013).

best served in the long term by regularizing ongoing access to legal services and allowing its senior administrators to obtain the clear benefits of a preventive law system, identifying potential legal disputes before they arise, creating a campus culture that emphasizes internal resolution of conflicts, and using legal audits to resolve possible violations of compliance regulations and enhance campus policies and procedures.

Such a system requires a teamwork relationship between administrators and counsel, workshops for administrators on the legal implications of their responsibilities and ramifications of their decisions, regular legal updates particular to the circumstances of the college, periodic legal audits across the full range of college operations, and an understanding by administrators of potential legal problems in their earliest stages that will trigger consultation with legal counsel.<sup>9</sup>

In short, whether the audit of costs and risks reveals a substantial and predictable volume of legal work from year to year or a somewhat lower level of current costs and risks, there may be significant benefits, both managerial and financial, in entrusting supervision of that work to a full-time lawyer, whether working within an inside- or outside-counsel model, as described in the next section below

---

<sup>9</sup> William A. Kaplin and Barbara A. Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*, 5th Ed., Vol. 1, 163-168 (2013).

# ORGANIZING THE COLLEGE LEGAL OFFICE

---

College and university legal counsel are 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, although fewer continue to work with only outside counsel.

Inasmuch as a college desires to have a relationship with legal counsel that best achieves the benefits of a proactive, preventive approach, the next logical question is what form should that relationship take? While virtually all colleges use the services of attorneys, the structures they have adopted for employing their lawyers vary significantly and depend 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.

## THE IN-HOUSE LEGAL OFFICE.

The in-house lawyer typically works for the college, much the same as other salaried employees. He or she may also have other responsibilities within the college, such as secretary to the governing board or secretary of the college. Occasionally, some have more idiosyncratic roles (usually evolved over a period of service at one college), such as oversight of government and community relations, human resources, campus security, or facilities.

The size of a college often dictates how many (if any) other attorneys are employed by the legal counsel’s office. Generally, the larger and more complex the institution, 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 or that has medical or veterinary school faculty who are practicing physicians or veterinarians under the auspices of the university will almost always find it has enough legal work related to health care issues to justify employing one or more full-time health care attorneys.

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 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. Such solo practitioners sometimes also have to assume multiple roles on campus (for example, participating in dispute resolution processes or compliance activities, among many others). While these roles require careful attention to ethical and conflict-of-interest issues, they also create unique opportunities for in-house counsel to engage with and get to know faculty and senior managers on campus.

Colleges with larger in-house offices tend to hire lawyers who specialize in a specific area of the law: litigation, intellectual property, academic (faculty and student) matters, health law, compliance, labor and employment, 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"); 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 — a combination of the two (the lawyers for the medical school, for example, might be responsible for most of that school's 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 in most ways are the mirror image of the outside-counsel model. Typically, the in-house model is thought to offer six primary advantages:

- [Availability on campus](#)
- [Familiarity with legal issues and the culture on campus](#)
- [Knowledge of institutional strategic directions and policies](#)
- [Direct cost savings](#)
- [Indirect cost savings](#)
- [Pre-payment](#)

**Availability on campus.** Successful prevention of campus legal problems by in-house counsel flows from close working relationships with other top administrators on formal leadership teams (such as the president's cabinet) and as part of informal problem-solving teams of all kinds. In-house lawyers are also physically proximate to their principal clients and available for face-to-face consultations. Easy access to campus events and social activities also works to promote cohesion and collegiality between counsel and managers. Finally, some managers and staff might be more comfortable and forthcoming with someone with whom they interact as a colleague on a regular basis.

**Familiarity with legal issues and the culture on campus.** As with in-house counsel anywhere, a lawyer who provides services for only one client develops a deeper, more sophisticated knowledge of how the pertinent law is likely to apply to that client than might a practitioner in private practice whose exposure to the client is perhaps more limited. Immersed constantly in campus life and its wide array of legal issues, in-house counsel has the advantage of developing a broad understanding of both the campus legal requirements and the unique campus culture.

**Knowledge of institutional strategic direction and politics.** Working closely with the college's senior leadership team, an in-house college lawyer inevitably develops sensitivity to the client's idiosyncrasies — its personalities, organizational quirks, history, and culture — to an extent that an occasional or even regular visitor could never achieve. In addition to this institutional memory, the in-house lawyer's perceptiveness extends to understanding the college's business structure and plans, its strategic direction, and institutional priorities.

**Direct cost savings.** These can be substantial. One type of direct cost savings is derived from in-house counsel handling litigation tasks that were traditionally done by outside counsel. One example is litigation "discovery," a major part of which is often the production of paper and electronic documents in response to legally binding requests from the opposing side in litigation. "E-discovery" in particular has become especially daunting for colleges and universities. Applicable to electronic records of all kinds (i.e., correspondence, email, data bases, landline and cell phone records, etc.), compliance with the complex requirements of e-discovery involves a significant amount of legal work. As soon as a college can reasonably anticipate that a legal action will be filed, it has a legal duty to preserve all potentially relevant evidence. In-house counsel has the advantage of an ongoing working relationship with information technology colleagues to ensure that such electronic evidence is properly identified and preserved.

Aside from litigation activities, the cost of virtually all the work done by in-house counsel is at a lower cost than using a private law firm. In addition, some high-level campus administrator must manage outside counsel; having in-house counsel do this saves the time of the other senior manager. Lastly, a reduction in formal legal claims against a college ordinarily

improves a college's insurance "claims history," which can result (all other factors being equal) in reduced insurance premiums. In some cases, the annual savings in premiums might be a significant offset to the cost of in-house counsel, although in other cases a new campus counsel may discover hidden problems that could create unexpected corrective and compliance costs, at least in the first year or two.

**Indirect cost savings.** Effective counseling by the in-house college lawyer can help prevent potential legal problems from escalating, thereby avoiding the associated costs of settling complaints or litigation altogether. Further, easy access to legal counsel helps managers achieve good governance and more readily avoid litigation, thereby producing potentially significant indirect and, in some cases intangible, cost savings. One example is the valuable time of senior managers, all the way up to the president, that otherwise would be spent answering court-ordered questions in the discovery process, reviewing voluminous documents, preparing for and then undergoing depositions, and preparing for and providing testimony at trial. A typical faculty employment lawsuit at a minimum might involve the department chair, dean, provost, all college faculty on relevant appointment and tenure committees, the human resources director, and the president in all of these stages of litigation. These are major costs, although they are often not tallied in any detailed way. Avoiding the damage to faculty and staff morale that usually results from litigation (one divisive personnel lawsuit can tear apart a department for years) is another indirect savings.

**Pre-payment.** 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 advance. 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 college lawyers sooner rather than later, promoting a valuable preventive law component in the work of the in-house legal staff. The "pre-paid time" of in-house counsel working with managers to ensure compliance with hundreds of complex legal regulations is an investment unto itself with many returns.

## USING OUTSIDE COUNSEL.

Outside counsel arrangements vary substantially, depending on whether a college is public or private. Some colleges (most often private institutions) have a relationship with a particular attorney in a private law firm who, in a small number of cases, may carry the title of general counsel for the college, but is not physically located on campus and usually is not full-time. The private attorney is an independently employed lawyer, engaged on a contractual or flat-fee basis to provide legal services. It is not uncommon for such a person to direct the work of one or more other attorneys in the firm in response to the complex legal issues facing colleges today.

State colleges and universities and state systems of higher education may receive legal services from the state attorney general's office, either by choice or mandate. The nature and level of services vary — in some instances, the attorney general's office may provide virtually all of a college's legal services and even designate a particular attorney as a college's legal counsel; in others, the state institution is able to use attorneys employed by the state attorney general on certain matters or as it otherwise chooses. Lawyers employed by the state attorney general may be difficult to categorize as either in-house or outside counsel. At some state universities, the campus lawyer is hired by the institution and reports to the president or another senior administrator, but also has a parallel appointment as an assistant attorney general with a parallel reporting obligation to the state attorney general. Similarly, the relationship between campus leadership and the assistant attorneys general providing legal services varies. In some instances, it is much like the relationship with in-house counsel; more frequently, however, it is akin to the relationship between institution leadership and outside counsel at campuses that have a long-term association with a single law firm.

Multi-campus state university or community college systems also often use in-house counsel while still receiving legal services from the state attorney general's office. In some states, rather than being located in the attorney general's office, lawyers are in the central university system office and will serve most or all campuses in the state, but develop expertise in only a few selected areas, such as student affairs, academic affairs, compliance, and the like. In other systems, while some lawyers may work in a central office, others may be assigned full time to a campus — another form of the hybrid model.

Outside lawyers traditionally bill on a retainer or hourly basis, or some combination of the two. Hourly billing has the advantage of precision. It has the disadvantage of unpredictable costs and is thought by some to discourage clients from calling their lawyers, which ultimately may not be in the best interest of the college.

The outside counsel model is thought to offer certain advantages that, as previously noted, might be viewed as mirror images of the perceived advantages of in-house counsel. These include:

- [Access to expertise in many areas of the law](#)
- [Cross-institutional experience](#)
- [Greater capacity to handle litigation or specialized projects](#)
- [Specialized business transactions](#)

**Access to expertise in many areas of the law.** Outside counsel, particularly at a large firm, generally has more expertise in a given subject area than does an in-house counsel (especially on a smaller campus). This is particularly true in complex areas such as taxation, intellectual property, and certain business transactions. A 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 institutions may enhance the services provided to each.

**Greater capacity to handle litigation or specialized projects.** Lawyers who specialize in litigation can take advantage of support and cost-saving short cuts that can save their clients time, expense, and unnecessary angst. The litigation departments of law firms have paralegal support, storage-discovery capabilities, 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 both courtroom procedure and the expectations of particular judges than a college attorney who only occasionally goes to court.

**Specialized business transactions.** Some college business transactions also warrant using specialized counsel for expertise and their capacity to handle certain transactions such as real estate sales and leasing, bond financing, and building construction.

In general, the outside general counsel model works most effectively when the lawyer meets regularly with the president and other senior administrators, attends board meetings, and spends dedicated time on campus. The best outside counsel relationships build in frequent opportunities for counsel and client to assess, “off the billing clock,” the status of the relationship and whether all of the college’s legal needs and concerns are being adequately addressed and met. It is imperative that the parties develop (and adhere to) rules on how work is referred and who has the authority to incur legal expenses. This entails identifying a gatekeeper through whom work is channeled. The gatekeeper might be the president, provost, chief financial officer, or other member of the senior leadership team tasked with managing the work of outside counsel and reviewing and approving payment of bills. Administrators must understand that, in addition to the president, only the gatekeeper can engage a lawyer or refer discrete matters to him/her. Likewise, outside counsel must be cognizant of who the gatekeeper is and check with that person if requests for legal advice and services come from a college office other than the president’s.



As the trend has evolved from using strictly outside counsel to establishing an in-house legal office, outside counsel are less likely to be engaged as “general counsel” and more likely as “specialized counsel” addressing a particular legal threat or issue. Likewise, colleges have become more sophisticated purchasers of legal services and the structural relationship between them and their outside law firms has changed. Outside attorneys who used to work directly with the president now interact more frequently with the campus lawyer, who oversees their work, and is more apt to question tactical decisions and scrutinize costs.

Finally, it is important to understand how the decision of whether to hire an in-house lawyer or use outside counsel exclusively is made. A president may want to consider involving a standing or an ad hoc board committee, which can look at the legal problems facing the college and determine whether current outside counsel has the capabilities to address them. Such a committee will indeed be necessary if the lawyer or law firm selected will also become the new primary counsel to the board. The committee can also look at best practices of peer institutions and the issues they considered in establishing an in-house counsel position. The board might also be involved in defining any separate mission statement for the campus legal office. If it becomes apparent that the college is going to establish an in-house counsel position, engaging faculty in a parallel informal discussion about the benefits can help build campus-wide support for its creation.

## THE SEARCH FOR CAMPUS COUNSEL

---

If an institution decides to hire an in-house counsel and create a legal office, the next step is to fill that position. The search for a campus lawyer begins with an understanding of both the characteristics that the successful candidate should possess and the fact that the client is the institution; not any one individual. What are those desired professional and personal skills and qualities? The audit of costs and risks should help highlight the range and sensitivity of projects that will be entrusted to the lawyer and thereby help identify the skill set and personal characteristics that he or she should possess; this information, in turn, informs the search for a campus lawyer.

### **Professional and personal skills and qualities of the campus lawyer.**

The requisite personal skills and qualities of the ideal campus lawyer are detailed below. Overall, the president should focus on the long-range needs of the institution and the particular experience the candidate can bring to the campus lawyer position, especially the ability to provide advice and counsel on a wide-variety of issues, gain the trust of the institution community, and build the counsel's office. Narrowly focused, short-term legal needs are not likely to be a good basis for selecting a campus lawyer who can successfully identify and manage the diverse legal problems that are inevitably part of campus life. The college lawyer needs a broad perspective most often derived from a broad legal work background. Extensive experience and some knowledge of higher education law, or at least the capacity to manage a wide variety of campus legal issues, are key to having a campus lawyer who can be a successful collaborative strategic partner with other senior campus leaders. The more immediate problems are likely better addressed by outside counsel or an in-house legal specialist working short term under the direction of an experienced campus lawyer.

Increasingly, campus lawyers are expected to be strategic thinkers on the leadership team. In this role, they go beyond providing legal advice. Assisted by their legal training and drawing on their knowledge of campus operations and internal and external environments, campus lawyers can contribute a reasoned and informed perspective. At the same time, they need to maintain their knowledge of current trends in higher education and approach problem solving creatively. They must understand how to lead, manage, and collaborate with their colleagues in ways that help the president and the board accomplish the university's mission and goals. As Ben W. Heineman, Jr.

described, "...(a) lawyer as leader...not just to be wise counselors but wise leaders; not just to dispense "practical wisdom" but to be "practical visionaries..."<sup>10</sup>

### **Essential qualities of campus lawyers.**

Every college is different, and the chemistry between a particular college president and campus lawyer 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>11</sup>

- Excellent judgment, clear and critical thinking, strong writing and reasoning skills, persuasiveness, the ability to command respect, and unquestioned integrity and discretion.
- A positive, approachable can-do attitude and problem-solving skills. 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 interpose obstacles and constantly say no.
- Sensitivity to legal ethics, because ethical considerations proliferate when a lawyer represents a corporate entity as complicated as a college.
- Skill at interpersonal relations, particularly the ability to forge consensus out of the discordant views of many different constituents on campus without losing their trust and confidence. Such skill includes an appreciation of diversity in the campus community, a high level of respect for human dignity, and the temperament to work with a wide variety of personalities.
- Decisiveness, and its cousin — the willingness to accept risks — that reflects the institution's appetite for risk.
- The ability to manage time effectively, which in turn supports the ability to handle many matters simultaneously.
- Confidence without arrogance and the ability to react calmly in a crisis.
- Professional and thoughtful demeanor, including objectivity and detachment when needed.
- A strong commitment to the college's interests without undue attention to personal promotion.

---

<sup>10</sup> Adapted from Ben W. Heineman, Jr.'s lecture, "Law and Leadership," delivered at Yale Law School on November 27, 2006 as part of The Robert H. Prieskel and Leon Silverman Program on the Practicing Lawyer and the Public Interest.

<sup>11</sup> This list is derived in large measure from *The College and University Legal Department*, a 1989 memorandum prepared by Martin Michaelson of Hogan & Hartson (now Hogan Lovells) and Paul M. Shapiro, former head of the legal office at the University of Connecticut, for NACUA's *Ad Hoc* Committee on Professional Relations. Although some of the items have been rephrased and combined with other items, the list is as relevant today as it was when it first was developed.

**Conducting the search.**

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>12</sup> Unlike searches for presidents, provosts, and top-ranking finance officers, where search firms are the national norm, only recently have executive search firms started offering attorney searches.

Nevertheless, because the campus lawyer should be viewed as a significant and critical part of the institution's senior management team, if the college ordinarily constitutes a search committee for the most senior-level management positions, it should do so in its search for an in-house campus lawyer. Accordingly, the search committee should include senior-level officers and managers who will be the administrative peers of the lawyer.

There are several advantages to using a search committee, particularly at colleges that are hiring a campus lawyer 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 or at all. The search committee process allows senior managers and other representatives (e.g., constituents from the board, faculty, and staff) to develop a better understanding of the president's decision, and can assuage concerns by providing affected groups a voice in the selection process.

At the same time, the relationship between the president and the general counsel differs from other high-level relationships in large part because of the highly sensitive work the campus lawyer 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 who can best meet the institution's needs.

Finally, an important decision that needs to be made at the time of hiring is the chief campus lawyer's title. Some presidents may see a benefit in establishing the title of General Counsel as a distinctive position, but titles can convey a sense of management stature. While the answer will be based in part on the institution's structure and its aspirations for the legal office, notwithstanding other factors, the title should be comparable to the titles of other senior leaders of the college. If they have the title of "vice president," so should the campus lawyer. It is critical for the campus lawyer to be deemed an equal to all other senior administrators.

---

<sup>12</sup> Among other places, an advertisement should be posted in the National Association of College and University Attorneys' Career Center, an online service that circulates job announcements to several thousand campus lawyers nationally. Information on NACUA's Career Center is available at: <http://www.nacua.org/careercenter/index.asp>.

# KEY OPERATIONAL ISSUES FOR THE CAMPUS LEGAL OFFICE

---

As the newly hired in-house lawyer takes responsibility for the campus legal office, there are several key issues that often arise: what is the legal office's role and to whom should the legal office report?

## WHAT IS THE ROLE OF THE LEGAL OFFICE?

If the college is establishing an in-house office for the first time, it needs to give careful thought to the role it wants the office to serve. All in-house legal offices are responsible for the day-to-day management of institutional legal issues. Campus lawyers are expected to be true counselors and are called upon for advice on business matters, political relationships, strategic planning, compliance issues, and all the other top priorities of the college's leaders. Thus, the college must organize the office and hire lawyers with these and any additional functions in mind. As discussed below, whether the campus lawyer will also have a role as primary counsel to the board needs to be determined up front.

## TO WHOM SHOULD THE LEGAL OFFICE REPORT?

This publication has assumed that, more often than not, campus lawyers report to, and serve at the pleasure of, the president.<sup>13</sup> At some colleges, the campus lawyer may report to one of the president's other direct reports. However, reporting to someone other than the president can pose potentially difficult ethical and practical issues for the campus lawyer, who may be told by his or her supervisor not to disclose or discuss particular projects with the president or board. While the direct reporting line to the president is by no means the only structure colleges use, the campus lawyer will have greater visibility and credibility internally, and is more likely to be included in the college's decision-making processes — along with all the other senior administrators — if he or she reports to the president rather than one of the president's direct reports. Finally, under the code governing legal ethics in

---

<sup>13</sup> The 2013 *Joint Compensation and Benefits and Provision of Legal Services Survey*, conducted by NACUA, revealed that, among member institutions, 54% report to the president or chancellor. Twenty-eight percent report to both the board of trustees and the president. In addition, nearly 87% of legal counsel across all institution types are members of the senior executive leadership team. For single institutions, the number is 84%; for institutions within a system, it is 88%; and for systems, it is 94%.

most states, the campus lawyer is professionally obligated to represent the institution as a whole (i.e., as the client), and not any particular individual, office, or department. With this in mind, reporting to the president — as the chief institutional representative to the board — is the most logical choice since the president is the officer whose fiduciary and professional obligations are most aligned with the campus lawyer's professional and legal responsibilities.

It is also not unusual for a campus lawyer to have some obligation to report directly to the board from time to time. Such an obligation is not for day-to-day operational purposes, but may be requested by the board on occasion, mandated by the board on a regular basis, or required if the campus lawyer is primary counsel to the board.

# RELATIONSHIPS WITH OTHER MEMBERS OF THE CAMPUS COMMUNITY

---

The lawyer maintains relationships at every administrative and operational level within the college; indeed, one of the attractive things about being a campus lawyer is performing distinctive duties at each level. The role played by the campus lawyer 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. These different relationships include:

- [The governing board](#)
- [The president](#)
- [Institutional peers](#)
- [Other attorneys in the legal counsel's office](#)

## Relationship with the governing board.

The responsibilities of the governing board are defined by principles of fiduciary duty, the organization's bylaws, and the statutory law on nonprofit corporations in the college's state of residence.<sup>14</sup> The campus lawyer 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 campus lawyer also serves as secretary to the board or has other explicit board-related duties, at a minimum, he or she should:

- **Review the agenda in advance** and be thoroughly familiar with the college bylaws and therefore prepared for any governance issue or parliamentary problem that might arise before or during the board meeting.
- **Review well in advance every resolution** to be considered formally by the board and any of its committees.
- **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 campus lawyer should be familiar with those requirements to prevent the board from adopting a proposed amendment to the bylaws that would violate the act.

---

<sup>14</sup> For private institutions, IRS requirements for certain policies also create legal duties for boards.

The campus lawyer will understand that the president has a unique relationship with trustees and the president should clarify his or her expectations for counsel communicating directly with them. Concomitantly, the president should be aware 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). Such communication might be necessary because of the lawyer's binding legal obligation to represent the college as a whole, not just the president or another administrator. In the work lives of most campus lawyers, this rarely or never happens but, when it does, the lawyer frequently has no choice. Thus, the president and campus lawyer should have a candid conversation early on in their relationship that delineates the campus lawyer's professional and legal obligations before any problem arises. Similarly, if the board has decided that campus counsel will also report to it on a regular basis, it is important to delineate the matters and related details at the start of the search process so that the president, board, and prospective campus counsel all understand the specific issues on which counsel will report directly to the board.

### **Relationship 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, respect, and understanding. At most colleges, the campus lawyer has a natural tendency to identify him- or herself — or is identified in the minds of others — as the president's lawyer. In fact, as already noted, the rules of professional conduct in all states make it clear that the entity itself is the general counsel's client.<sup>15</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 challenging for the general counsel to decide which set of potentially contradictory instructions to follow.

---

<sup>15</sup> 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."



**Relationships with institutional peers.**

Lawyers are service-providers who help their clients solve problems. They aid in identifying solutions; they are not themselves the causes of problems. They should not, and likely will not, be naysayers or obstacles to be overcome. A service orientation and a certain amount of transparency are essential in addressing the wide variety of clients a college lawyer serves. “Early access to decisions in progress” — a wonderful aphorism coined by Michael Weston, former General Counsel at Northwestern University — captures the relationship good lawyers must cultivate and preserve with the president and other institutional decision makers. Such decision makers can include faculty serving on committees deciding personnel or student academic matters, department chairs and deans, mid-level managers in many roles, and of course all senior managers, both academic and non-academic.

**Relationships with other staff members in the campus lawyer’s office.**

The in-house campus lawyer is expected not only to practice law but also to manage an office. He/she needs management skills — being a good lawyer does not necessarily mean one is a good manager. All offices, whether large or small, merit attention to both human and capital assets. The amount of time and effort devoted to this task usually varies with the size of the office. The two primary managerial tasks to which the general counsel should be paying attention are:

- **Managing personnel** (recruiting, orienting, setting professional standards for and evaluating staff members) and ensuring their professional growth and development. A well-managed legal office will include opportunities for staff members to at least occasionally have a task outside of what might be their more narrow areas of legal specialty on campus; get some “exposure” with senior managers and campus leaders by serving on a campus-wide committee or task force; and attend professional continuing education conferences on a regular basis.
- **Managing office workload**, reflecting standard law office practices (including benchmarking the high performance characteristics of the best peer college law offices) and adjusting to changing institutional priorities while ensuring that the legal needs of the college and its administrators are met with timely and competent service;

# MANAGING THE COST OF LEGAL SERVICES

---

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 concern and consideration. What techniques, then, can be used to manage legal services?

## **In-house costs.**

With in-house counsel, the lawyers are employees of the college and salaried; the costs associated with using their services are carried on a central budget line and fixed in advance. Whether an in-house lawyer is asked 20 questions or 40 in a given day, the compensation to the attorney is the same. Incremental costs are incurred only when the campus lawyer becomes too busy to handle the workload and additional help (inside or out) 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 may be determined by the frequency with which the college uses the services of the firm. While these billing methods traditionally may have been the two most common, many campuses and law firms have worked together to develop alternative billing systems in an effort to keep outside counsel costs within campus budgets. Such approaches include discounted hourly rates (either across the board or based on the matter being handled or the volume of work expected); blended hourly rates (most often used in litigation where a wide variety of skill levels, from paralegals to partners, are working on a matter); and fixed fees (agreed upon up front for an entire project or matter) or fee caps (an upper cost limit beyond which the college no longer pays fees, thus minimizing runaway costs and encouraging efficiency).<sup>16</sup>

---

<sup>16</sup> See Miles J. Postema, *How To Do More With Less: Cutting Your Budget, Controlling Your Costs and Reducing Outside Counsel Fees*, June 2009 NACUA Annual Conference Outline.

Some colleges charge the costs of outside legal services to the departments that incur them. However, this can deter departments from seeking legal advice until there is no other choice — a decision that can be penny-wise and pound-foolish. “Charging back” to a department can also work an unfair hardship, since there is sometimes no reason but only random chance that causes a particular department to end up as the target of litigation. On the positive side, charging back to departments may encourage early settlement of claims and reduce actual litigation.

Most colleges have procedures in place that delineate who has authority to contact outside counsel and when. It is important for those authorized to seek legal advice to understand that outside counsel should be called when there is in fact a real need for legal guidance and, for budgetary considerations, not when it would otherwise 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. It may be useful to consult data collected from other colleges of similar size about the amount or portion of their budgets they spend on outside legal fees. Most important, the college should not hesitate to require timely and detailed legal bills from outside counsel delineating the tasks performed and the amount of time spent, and to question legal bills that intuitively seem too high.

### **Preventive lawyering.**

As noted earlier, preventive law has become one of the most essential elements in the provision of legal services and in controlling legal costs in the long term. It centers on lawyer-led education 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. It also means anticipating future problems and taking deliberate steps now in hopes of avoiding or mitigating them before they occur. Preventive practices help control legal costs through reduced litigation, lower insurance costs, and a reduction of management time spent on litigation activities.

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

---

Lawyers are in the service business. When a client (e.g., a trustee, authorized administrator, faculty or staff member of a college) 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:

- **Responsiveness.** A client always has the right to expect promptness and responsiveness from anyone providing legal services to the college. This obligation includes the need for early and effective evaluation of legal risks, aided by counsel's ever-deepening understanding of the mission, strategy, culture, and structure of the college.
- **Communications in plain language.** Communications from the campus lawyer should be lucid, understandable, and as brief as possible. Technical matters should be explained in comprehensible terms that are not replete with legal jargon or acronyms.
- **Solving problems.** Clients who come to campus lawyers when they have problems want solutions, usually quickly. Campus lawyers owe it to their clients to explain why a particular course of action is wise or unwise and, as appropriate, offer options that allow them to reach their stated goal.
- **Thorough explanations.** Campus lawyers must provide thorough and clear advice so that clients understand the consequences of their actions. By virtue of their position and the roles they play, lawyers occasionally are called upon to communicate unwelcome news. 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 use the full array of communications tools to ensure that clients understand every new development and have ample opportunity to ask questions and seek solutions.
- **Identification of the delegee.** If the lawyer to whom the client is speaking is unable or does not plan to handle a matter him- or herself, then that lawyer owes it to the client to disclose the name of the lawyer to whom the matter will be delegated.

- ***An estimate of the time required.*** While this can be difficult in some cases, it can aid greatly in fostering realistic expectations about costs. Any externally imposed deadline (for example, a court order) should be divulged and if a lawyer expects to have difficulty meeting that deadline, he or she should inform the client.
- ***Follow-through.*** Clients should expect that their lawyer will initiate communications throughout the process as it develops, see matters through to a conclusion, and ensure that any potential problems they were assigned are being addressed. Follow-through usually includes doing an “after-action review” of some kind to determine whether the issue was caused or aggravated by preventable error, and to make recommendations to prevent a recurrence.

## WHAT CAMPUS LAWYERS HAVE THE RIGHT TO EXPECT FROM THEIR CLIENT

---

Finally, just as presidents and other college clients expect their campus lawyer to be diligent and competent, they should appreciate that their lawyers have a few key expectations of them, as well. Most important:

- Clients should resist the urge to pick and choose what they disclose to their campus lawyer. Rather, they should trust the lawyer and let him or her determine what is relevant or not. A lawyer should be told everything, with the understanding it is done with the promise of the lawyer's discretion and confidence. Also, clients should tell their lawyer what they wish to accomplish. The lawyer may be able to suggest multiple ways to achieve that goal that are legal, efficient, and effective.
- Clients should exhibit the same diligence in responding to the campus lawyer's requests for assistance and information as they expect in return from their lawyers.
- Clients need to take the long view. The lifetime of most legal projects is often much longer than clients would prefer. Problem solving takes time and can follow a bumpy path with many ups and downs.
- Clients need to understand that legal advice rarely leads to a "yes" or "no" answer but, instead, involves explaining the risks and benefits of various courses of action. Clients also need to understand when the campus lawyer is serving as counsel and when he or she is taking on a role more akin to decision maker — a step that can create a gray area in the lawyer-client relationship. When a client slides, unwittingly or otherwise, into a position of essentially asking the lawyer to choose the course of action to take, that decision fundamentally becomes a non-legal one, even when based on legal advice. Recognizing that reliance on purely technical legal rules might sometimes constitute inadequate advice to a client, the rules of professional conduct permit a lawyer to refer to non-legal factors (economic, social, or political, for example) when advising a client. However, the lawyer may need to be explicitly clear with a client not experienced in legal matters that his/her advice involves more than strictly legal considerations. Experienced clients will likely be familiar with this gray area and the slippery slope it can present for both the lawyer and themselves.
- Clients need to own their decisions. Once the campus lawyer has given advice and the client has reached a decision, the client should take responsibility for the decision he or she has made.

## CONCLUSION

---

During the past three decades, the role of college legal counsel has evolved significantly in several important ways. First and foremost is the recognition of the central role of campus lawyers and the breadth and scope of their responsibilities. College counsel handle an astounding variety of legal problems, ranging from predictable employment lawsuits and “slip and fall” claims to unpredictable issues involving student conduct. Partly in response to the continued flood of federal regulation and agency guidance,<sup>17</sup> campus lawyers in recent years have focused more consistently on preventive law activities — building relationships with senior managers and other college employees, and undertaking a variety of interactions with those employees to help them prevent legal problems from occurring in the first place or, if they do occur, to recognize them quickly and minimize the adverse impact on the college. This focus on prevention is especially noticeable regarding federal regulatory compliance obligations, including for example the Campus Security Act, the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 and sexual misconduct issues on campus, the Family Educational Rights and Privacy Act, and the Americans with Disabilities Act.

Second, the growth in counsel positions across the country continues, especially among in-house lawyers at smaller private colleges. The perceived advantages of in-house positions have resulted in a trend that has changed the role of outside campus counsel, focusing it more on providing the unique resources of an outside law firm and less on filling the role of “general counsel” for campus legal affairs. Finally, college chief executives have widely recognized the value added to college management by including campus lawyers at the most senior management level. As strategic thinkers, with a broad and unencumbered view of all campus operations and activities, they bring unique skills, training, and knowledge to the college senior leadership team for the benefit of the entire campus community.

---

<sup>17</sup> In 2013, a bipartisan group of U.S. Senators established a Task Force on Federal Regulation of Higher Education. In February 2015, the Task Force issued a *Report of the U.S. Senate’s Task Force on Federal Regulation of Higher Education*, in which it notes that the Department of Education alone “...issues official guidance to amend or clarify its rules at a rate of more than one document per work day.” According to the *Report*, this volume of regulation does not even take into account the hundreds of regulations from other federal agencies such as the Department of Justice, the Environmental Protection Agency, the Federal Trade Commission, the Department of Labor, the Department of Defense, the Department of Homeland Security, the Department of Health and Human Services and many others. Quoting the *Task Force Report*, an article in the *Chronicle of Higher Education* on February 13, 2015 stated that: “The nation’s colleges are “enmeshed in a jungle of red tape,” faced with federal regulations that are “unnecessarily voluminous and too often ambiguous,” with “unreasonable” compliance costs.”



**National Association of College  
and University Attorneys**

One Dupont Circle, NW, Suite 620  
Washington, DC 20036

202-833-8390

[www.nacua.org](http://www.nacua.org)