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Inside or Outside Counsel

Presidential Management of Legal
Affairs in Higher Education

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Presidential Management of Legal Affairs in Higher Education

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College and university presidents oversee complex institutions with the fundamental mission to educate students according to the character of the institutions. At times, the very complexity of the institution becomes a challenge in the fulfillment of that mission. Issues of corporate and academic governance; compliance with a multiplicity of federal, state, and local laws and regulations; protection of the constitutional and statutory rights of students, faculty, and staff (such as student privacy rights); and the negotiation and management of relationships with vendors, partners, and other outside entities who interact with the institution all occupy the time and energy of presidents and their senior leadership. In the regulatory and litigious environment of Twenty-First Century America, the good management of an institution's legal affairs is no longer a luxury but rather an important and strategic element of a well-functioning institution.ⁱ

The thesis of this essay is that presidents can and should assess whether their access to and use of legal services is adequate to the needs of the institution, contributes to its strategic direction, and is cost-effective in the manner in which the services are accessed and used. All three of these factors—adequacy, contribution, and value—will determine whether an institution needs additional legal support and, if so, the best way to provide for it.

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Areas Where Legal Resources Can Add Value

While campus leaders may seek legal counsel in many areas of operations, the following areas commonly require this support.

1. Corporate Governance

Almost all colleges and universities are organized either as nonprofit corporations or for-profit entities that could include corporations, limited liability companies (LLCs), or some other form of business entity. We will focus on nonprofit corporations for the purposes of this essay. The organization of a nonprofit entity normally requires a certificate or articles of incorporation filed with and approved by the state; the adoption of bylaws by which the entity will function; the recognition and maintenance of tax exempt status by the Internal Revenue Service and corresponding state taxing authority; and the application to participate in federal and state funding programs available to institutes of higher learning, such as federal student grant and loan programs and state-supported programs for college construction. Once established, the institutions have an ongoing reporting relationship with these and other governmental agencies, as well as regional accrediting organizations. Additionally, the institution's desire to incur debt to expand its mission will require additional reporting to financial institutions and bond rating agencies. All of these interactions require that the incorporation documents and bylaws are followed and the Board, president, and other officers exercise their roles according to the bylaws. Who in the institution oversees the ongoing management of the formal institutional governance and interactions with governmental agencies?

2. Human Resources and Collective Bargaining

Colleges and universities are major employers and hire both exempt (generally, salaried) and nonexempt (hourly) workers. Many institutions also have collective bargaining agreements with one or more unions. Immigration law affects hiring decisions, especially with respect to foreign-born faculty members and professional staff who may be hired under numerous nonimmigrant provisions. Development and management of employment policies and guidelines; performance management; compensation and benefit programs; and the investigation and resolution of allegations of misconduct, discrimination, and other violations of employment laws may benefit from the opinion of legal counsel. And, unique to higher education, the development and execution of well-developed policies and procedures for promotion and tenure of faculty members are essential to avoid costly litigation and the creation of an adversarial relationship between faculty and the institution. Who in your institution works with the human resources department and faculty hiring officers to ensure compliance in all of these areas? And, who investigates claims that these laws and policies may have been breached?

3. Academic and Student Issues

Student discipline, the application of Title IX to athletic programs, the right to privacy enjoyed by students and staff, the application of anti-discrimination laws, and the protection of intellectual property all enter into the academic and student life of an institution. The process by which a student is disciplined, the basis for a medical withdrawal of a student, a charge of plagiarism by a faculty member or student, or the denial of access to a facility by a physically challenged student all can be the subject matter for legal action. How do the professionals who manage these areas and those who supervise them access legal resources to assist them with the development of policies and procedures and minimize legal risk to the institution?

4. Compliance

Higher education institutions are subject to multiple federal and state laws that are implemented by an ever-growing inventory of regulations. These include the Family Educational Rights and Privacy Act (or the Higher Education Reauthorization Act), multiple federal financial aid regulations, state and local crime reporting statutes, and record retention rules. Colleges and universities maintain statistics and prepare reports in order to comply with these regulations. In many cases, the president is the authorized signatory certifying the accuracy of the reports. The president, in turn, depends on the administrators, who prepare the reports to ensure compliance with the statute and regulations. Understanding legal rules and receiving legal assistance help to ensure timely and accurate compliance with reporting regulations.

5. General Business and Financial Affairs

Colleges enter into many contractual relationships with vendors, donors, contractors, foundations, and governmental agencies. Most of these relationships are governed by contracts or agreements, some of which bind the institution for many years and even into perpetuity—such as an endowed scholarship or distinguished professorship. Who has the task of reviewing and approving contracts at your institution?

All of these examples highlight the importance of analyzing the areas where legal expertise may add value to the management and operation of the institution. Attorney White, in his publication entitled *Managing Your Campus Legal Needs: An Essential Guide to Selecting Counsel*, suggests doing a legal audit. Such a review might determine: (1) what legal services are currently rendered to and for the institution's benefit; (2) who renders them; and (3) what legal services might enhance institutional effectiveness but are not currently offered.

Inside or Outside Counsel

Once the legal audit is complete, you should have a sense of where: (1) you currently make expenditures for legal services across the institution; (2) the addition of legal services might add value to a strategic or operational area of the institution; and (3) you incur indirect costs in managing legal services. As for the last point, who are the institutional managers who interact with outside counsel, and how much of their time is spent managing those relationships?

Colleges and universities must decide whether to employ an attorney on staff who acts as general counsel or director of legal affairs or contract with an outside attorney or law firm to provide legal services as needed. Depending on the size and expertise of the firm, these attorneys may be able to provide legal services to support some or all of the areas outlined above. In both cases, there may be certain areas where counsel with expertise in the field might be retained. No single attorney (and, increasingly, no single firm) has the depth of expertise in all of the areas of law that institutions of higher learning might need.

When comparing the relative advantages of each alternative, let's begin with assessment of cost. The chart below lays out a scenario where relative costs are compared.

	Outside Counsel	General Counsel (In-house)
Hours Per Year	600	1,800
Rate Per Hour	\$300	\$97.22 (assumes \$175,000 for salary and benefits)
Cost Per Year	\$180,000	\$175,000
Additional Inst. Cost	???	De minimis

While firm rates may differ depending on the region of the country, the chart highlights the fact that in-house counsel can provide you with more hours of service for the same cost. And since the general counsel would manage legal affairs for the institution, it reduces the indirect cost of having institutional gatekeepers who interact with outside counsel on a regular basis and manage the relationship.

Additionally, because the general counsel's position is budgeted, there is more predictability in cost. While 600 hours may seem like a lot of hours to use outside counsel on an annual basis, circumstances (litigation, many construction projects, governance revision) might dictate a need for additional legal resources. And, remember, good risk analysis dictates that it is less costly to avoid litigation than enter into it because operational policies and procedures were not in place or followed.

Also, a general counsel on the scene every day gains familiarity with the culture and legal issues specific to an institution. Because counsel can develop a working relationship with the finance, advancement, and human resources teams, they can facilitate collaboration in the development of policies and procedures, which will lessen the chance of future legal claims. They can work with academic and student affairs leaders to provide counsel on many of the issues mentioned above. And they can organize specialized training so that, for example, all hiring personnel—including faculty—may receive training in interview techniques, document requirements, and the institution's hiring procedures. Indeed, counsel can contribute to the development of best practices in many areas of college administration.

For the president, a general counsel can provide counsel and support to interactions with the Board and other external agencies. There has to be a good relationship between the president and the general counsel because, even though the general counsel represents the institution (and not any of its officers or trustees individually), it is the president as the chief executive officer who normally speaks for and manages the institution.ⁱⁱ Also, when there are allegations of wrongdoing at any level of the institution, an investigation by college counsel will allow the information discovered to be protected by the attorney-client privilege, an advantage not held if the investigation is conducted by non-attorneys or attorneys not acting as counsel to the institution. And, most importantly, I have found that having an attorney available to the staff and faculty allows for a quick and cost-effective response to routine legal questions.

There are certainly advantages to contracting with outside counsel. Because they are not on the scene on a daily basis, outside counsel may bring a bit more objectivity to the analysis of legal issues. Depending on legal practice size, this counsel may have expertise in numerous areas of the law. With time, they can also familiarize themselves with the culture of the institution. And while they can be available to the president for consultation, normally the gatekeeper managing the relationship with the firm is someone other than the president. In this relationship, it is important that the president develop a rapport with the partner in charge of managing the relationship with the institution. There will be times when there will be need for one-on-one consultations and the president has to have confidence in his/her counsel.

Conclusion

The decision to hire or retain legal counsel is based on a calculus of institutional need and the ability to deliver quality legal services at a reasonable cost. Like many other areas, the president must take the long view and determine whether the value added justifies the incremental cost. Entering into a process as outlined above allows the president to conduct due diligence around the institution's need for legal services and then execute to provide the services understanding the costs and benefits of the decision. Like all other areas, administering the college's legal affairs must serve the institutional mission. And, in the end, the value added by an integrated approach to legal affairs will provide cost savings and enhance the quality of the institution as it lives out its mission and identity.

Footnotes

ⁱ Two resources that would be helpful to presidents in thinking about these issues are (1) Lawrence White, *Managing Your Campus Legal Needs: An Essential Guide to Selecting Counsel*, NACUA Publication Series, 2008 (This pamphlet invites presidents to analyze whether their institutions would be served better by legal counsel who are employed by the institution or contracted by the institution.) and (2) the treatise Judith Areen, Esq., *Higher Education and the Law*, Foundation Press & Thomson/West, 2009 (Professor Areen addresses the intersection of the law and higher education from many perspectives, providing a more detailed treatment of the intersection of law and higher education.)

ⁱⁱ There is an exception when there may be suspected wrongdoing by the president. Under ethics rules for attorneys, the general counsel may have the duty to reveal such wrongdoing to the Chairperson of the Board, for example. In my experience, these situations are few and far between.



About the Author

A member of the College's Board of Trustees since 1995, Fr. Cregan was inaugurated as Stonehill's ninth president in 2000. Fr. Cregan has enhanced the College's strong academic profile and engaged the faculty in this initiative. He has modernized the governance structure, making it more responsive and effective.

Fr. Cregan serves on the Board of Directors for the Council of Independent Colleges, an association of 540 liberal arts colleges and universities working to strengthen educational leadership. Governor Mitt Romney recently appointed Fr. Cregan as a Massachusetts delegate to the New England Board of Higher Education. Additionally, he continues to serve on an advisory and advise various non-profit boards in the Northeast.

Prior to his appointment at Stonehill, he was pastor of the Sacred Heart Parish. He also has maintained a general practice law office, serving low-income clients.

Fr. Cregan received a B.A. from Stonehill in 1978, a master of divinity degree from the University of St. Michael's College, Toronto School of Theology in 1984, and a juris doctor degree from Brooklyn Law School in 1990. He received an honorary doctor of law degree from New England School of Law in 2005.

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