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An Introduction to Higher Education Counsel's Office: Ethical Issues

AN INTRODUCTION TO THE HIGHER EDUCATION COUNSEL'S OFFICE: ETHICAL ISSUES[1]

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I. Introduction[2]

College and university attorneys, whether working as in-house or law firm counsel, have the pleasure and challenge of working with complicated, mission-driven organizations on a mind-boggling range of issues which often resonate far beyond the campus boundaries. Typically straight-forward legal issues can take unexpected twists when applied, for example, in the context of shared governance, diffuse decision-making authority, or the occasionally unpredictable nature of the student body.

Not surprisingly, then, higher education law involves the application of typical concepts and rules of law in a very particular setting, resulting in some very particular outcomes. Nowhere is this more true than the ethical rules under which college and university lawyers operate. Because our intended audience largely consists of attorneys who are not new to the practice of law but are relatively new to the representation of colleges and universities, we will not attempt to broadly review applicable ethical standards. Instead, we will focus on select provisions from the Model Rules of Professional Conduct ("Rules") which apply to ethical considerations common in the higher education setting.[3] We will also take a deeper dive into the ethical issues which can arise when in-house counsel at colleges and universities assume non-legal roles

[1] Materials updated by the presenters on June 26, 2022, based on prior presentations by Christopher Holmes, General Counsel and Corporate Secretary of Baylor University, Cindy Bauer, Vice President and General Counsel of Marquette University, Jerry Blakemore, General Counsel of the University of North Carolina at Greensboro, Tom Dorer, General Counsel of Suffolk University, Traevena Byrd, General Counsel of American University, and Nancy Tribbensee, General Counsel of the Arizona Board of Regents.

[2] The information contained in this manuscript is intended as an informational report on legal issues of general interest. It is not intended to provide a complete analysis or discussion of each subject covered. Moreover, state laws and Bar ethical rules on the subjects covered can vary. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format.

[3] Rules of professional conduct can vary from jurisdiction to jurisdiction, so it is important that attorneys look to the rules of the state in which the attorney is practicing.

II. Application of Specific Rules in the Higher Education Setting

A. Competence and Expertise – Understanding the Law and Understanding the Client

Rule 1.1 is a short but foundational rule: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." As fundamental as it is, Rule 1.1 plays out in two particular ways in higher education, specifically with in-house counsel.

- First, because most legal offices are small, many in-house counsel are generalists, and as such are rarely expert in all of the areas of law in which their counsel may be sought. The official ABA Comments to Rule 1.1 clarify that particularized legal expertise often is not required to provide competent legal counsel: "[i]n many instances, the required proficiency is that of a general practitioner." (ABA Model Rules of Professional, Rule 1.1, Comment 1. See also Comment 2 to Rule 1.1.) As always, one of the critical skills which a generalist needs to have is the ability to know when to bring in the subject matter expert.

- Second, while the Comments to Rule 1.1 anticipate the need to refer certain matters to legal experts, the unique aspects of higher education may require the combined expertise of the subject-matter expert and in-house counsel. For example, outside litigators may need assistance from in-house counsel to understand shared governance, academic freedom, or institutional history or culture in a faculty termination case. A governance matter may require in-house perspectives on unique internal and external political forces and reputational sensitivities. While Rule 1.1 strictly speaking addresses competence in the knowledge of the law, in the higher education context there often is an additional layer of competence which may be required in the understanding of the institutional setting that some outside counsel may not have. (See also Comment 7 to Rule 1.1.)

The Comments to Rule 1.1 contain additional warnings which the higher education attorney – particularly in-house counsel – should heed:

- In emergency settings, an attorney may have to go outside of their competencies and provide legal advice even where "the lawyer does not have the skill ordinarily required," if there is not an opportunity to consult with qualified attorneys. Comment 3 to Rule 1.1. Attorneys transitioning to in-house higher education positions from law firms or large in-house legal offices in the corporate world, in particular, may have to make this leap in (self-) faith occasionally, under the pressures of the moment. Think of it as providing legal triage. In those moments, familiarity with the university or college client may make the difference in staying on the right side of the competency line. However, in these circumstances the legal advice should be as limited as possible to get through the emergency, until competent counsel can be brought to bear; and the advice should be reassessed by that competent counsel as soon as possible. See Comment 3.

- One of the joys and demands of in-house, generalist work is the constant exposure to new legal issues. Depending on office structure, and especially in smaller legal offices, in just one day a single attorney might be asked to move from contract reviews to personnel disputes, intellectual property puzzles, constitutional analyses, policy development, litigation oversight, legislative interpretations, and end with a real property transaction. Comment 4 to Rule 1.1 is an important reminder that attorneys can develop the necessary competency "on the go" through preparation and research. This is a frequent requirement for even the most experienced higher education attorney. To make this feasible, it's important to stay on top of relevant legal trends, and it is highly useful to develop a ready network of experienced colleagues at other institutions. NACUA is a valuable resource in achieving both of these objectives and enhancing your ability to "get smart quick" when necessary.

B. Diligence and Zealous Advocacy

Colleges and universities often factor in considerations which lead them towards different decisions than would be made at most for-profit and even many nonprofit corporations. All higher education attorneys, whether internal or external, need to understand how institutional culture and mission can affect the institution's understanding and tolerance of risk, level of comfort (or discomfort) with adversarial relations, and desired outcomes.

This can affect the application of Rule 1.3 – Diligence, in the academic context.

- The concept of "zealous advocacy" is embodied in the Comment 1 to Rule 1.3 – "[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

- The next sentence in Comment 1 has significant bearing on how best to represent many colleges and universities: "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client." While this need to understand zeal as a balanced and nuanced concept is hardly unique to higher education, colleges and universities are perhaps more attuned than other institutional clients to the importance of relationships with students and faculty, alumni and staff, vendors and competitor institutions; to the student-centric viewpoint critical to institutional success; and to public perceptions.

C. Knowing Who the Client Is

The core ethical tenet of representing organizations is set out in Rule 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This is a seemingly straightforward concept that can be tricky to apply in the higher education setting.

- On the one hand, it is easy enough to remember that the client is the institution, not the dean or director, the provost or president, or even the board chair.

- But as stated in Comment 1 to Rule 1.13, "[a]n organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents." Colleges and universities often have confusingly diffuse, decentralized or overlapping lines of authority, so it can be very difficult to identify exactly who the "duly authorized constituent" is.

Some relations and chains of authority are clear: the governing board's authority is usually well defined; most institutionss have fairly clear delegations of authority for signing contracts. Others are less clear, and the challenge in identifying the relevant authorized constituent can become complicated by misperceptions as much as by structural peculiarities. For example:

- Shared governance plays out differently from institution to institution, and the administration and faculty senate may have very different views on how broadly the faculty's authority applies; and

- Different units, such as academic affairs and student affairs may have overlapping responsibility for important functions, such as student retention; and

- Deeply ingrained institutional practice may cause department chairs or faculty to believe that they can sign contracts binding the college, even if they cannot point to any formal authority.

With an organization as your client, you have to identify who the real decision maker is. At least on a practical level, that often cannot be solved merely by looking up the organizational ladder: even where institutional policies and procedures point to the president or provost, in such complex organizations, the decision may effectively lie elsewhere, perhaps subject only to briefing higher-ups, or not even that. On the other hand, attorneys also have to watch for the individual with an exaggerated sense of authority; sometimes, you may need to kick the question up the administrative chain of command.

The question of who represents the client can be particularly important in the context of Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer. This rule grants to the client the authority to set the purposes and goals of the representation; and specifically, the decision on whether to settle a dispute; while typically the lawyer is given considerable control over what strategy to pursue.

- When Rule 1.2 is applied where the locus of authority is unclear – or where there are conflicting perceptions on where that locus lies – correctly identifying the "duly authorized constituent" becomes critical.

- In-house counsel may have particular challenges in exercising their general oversight of strategic decisions. When outside counsel are providing legal advice, the distribution of duties and responsibilities between lawyer and client is usually spelled out reasonably clearly. It can be murkier – at least in the eyes of non-legal colleagues – for the in-house attorney.

- Another problem faced by higher education attorneys is the reluctant decision-maker. While a problem in any complex organization, it seems particularly common at colleges and universities. Often in-house counsel are perceived as having a role beyond the traditional attorney-client relationship, and colleagues outside of the legal office may look to the lawyer to decide for them. To maintain the attorney-client relationship, with its attendant attorney-client privilege, higher ed lawyers may have to frequently remind others that the lawyer is giving advice, and the client has to actively decide.

Identifying who the client is for any particular issue is also important to determining how to meet the obligation of timely communication which lawyers owe to clients under Rule 1.4 – in particular, the obligations to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "keep the client reasonably informed about the status of the matter." Rule 1.4(a) (2), (3). Careful attention to these obligations avoids the troublesome perception that the attorney's office operates as a place where legal matters are presented but disappear from sight for long periods of time, without timely updates, before they are addressed and resolved.

D. Conflicts of Interest in the Higher Education Setting

Keeping a careful eye on the client's identity is also critical when applying Rule 1.7, which covers conflicts of interest amongst multifarious clients. This rule is critical to both outside and in-house counsel where, while serving a corporate entity, the attorney may work with an individual who can move into and out of the role of "duly authorized constituent" – and they can also move from a position of consistency to a position of conflict with the institution's legal interests – from issue to issue. Once again, although not a unique problem to higher education, the varying, often inconsistent allocation of and confusion over authority, and the frequent decentralization of authority on certain topics, can make this a common issue on college campuses. Today's client representative may be tomorrow's adverse party.

- It is a significant part of the in-house attorney's job to make sure that colleagues are well-informed of when they are and when they are not the "client." Higher eductional institutional structures do not lend itself to helping lawyers figure this issue out. As Jerry Blakemore, general counsel at University of North Carolina at Greensboro, has observed in prior NACUA sessions on ethics for lawyers new to higher education, "[lawyers] new to the counsel's office in higher education must quickly realize that there is often no retainer process and no prior conflict checks before the assumption of representation is made and that you could very easily find yourself in a circumstance where a board member, cabinet member, faculty member, staff member or even student believes you are their lawyer." 2017 NACUA Lawyers New to Higher Education Workshop, *An Introduction to the Higher Education Counsel's Office: Ethical Issues*, at 5.

- As with any organization, while the university or college is the client first and foremost, it is not uncommon for counsel to simultaneously represent employees who are also named in litigation. This can be done only after a careful assessment of potential conflicts. The Rules set forth a clear expectation that the attorney shall "(1) clearly

identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict … and (4) if so, consult with the clients … and obtain their informed consent, confirmed in writing." Comment 2 to Rule 1.7.

- Conflicts can sneak up under a variety of circumstances. For example, a colleague may come in seeking advice on a regulatory compliance issue; some time down the line, it may become apparent that the same person had violated those regulations in such a manner that they were not acting within the legitimate scope of their duties and the institution determines that it will not represent the individual. To minimize the risk that in-house counsel becomes conflicted out because of the prior advice, make sure that colleagues know in real time that the attorney is providing advice and counsel to "duly authorized" representatives of the institution, not to the colleague as an individual.

- Institutions frequently ask in-house counsel to conduct internal investigations. These investigations often present in-house counsel with additional conflict of interest issues. Thus, it is important that in-house counsel take precautions to protect themselves and to further protect the university or college they represent. To do this, counsel should consider providing a notice to interviewed employees of the attorney's role in the investigation. Now known as an "Upjohn Warning" after the U.S. Supreme Court case of Upjohn Co. v. The United States (1981), the attorney informs company employees of the following:

    a. that the in-house attorney conducting the investigation or interview represents the organization and not the employee; and

    b. that the attorney-client privilege belongs to the organization and not with the employee; and

    c. the organization can choose to waive the attorney-client privilege and disclose to government or other third parties what the employee said to the attorney.

  Attorneys may wish to further provide written notice of the Upjohn warning to each employee, should record when each warning is given, and have employees sign a written acknowledgement of the warning. Although these safeguards do not entirely guarantee confidentiality, they further ensure the protection of in-house counsel and counsel's relationship with the institution they represent.

  The determination of whether a warning should be provided in a given situation is a matter of discussion. Some are of the opinion that these warnings should always be provided in order to minimize the risks of potential lawsuits, while others believe these warnings are warranted only when absolutely necessary. It is clear that in-house counsel is not expected to provide employees an Upjohn warning every time an employee approaches their office. As a best practice, counsel should consider providing the Upjohn warning whenever it appears that an employee subjectively or objectively lacks clarity regarding the role of the attorney in the communication.

E. Attorney as Advisor

Institutions, like most complex organizations, are looking for their legal counsel to act as strategic partners; to render advice on legal issues not in a vacuum but in what is usually a complex layering of often conflicting factors; and to manage risk, not seek to avoid it. Rule 2.1 gives attorneys an important tool to achieve that goal: "… In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." This rule will be discussed further in Section III, below, but here are a few additional thoughts:

- A lawyer cannot effectively act as a strategic partner without broadening their advice beyond strictly legal analysis. A straight technical read of the law can be competently provided by most lawyers: the real value to clients comes with the nuance informed by the lawyer's seasoned take on the multiple other factors which the client will be weighing into the balance, such as business considerations, political risk, reputational risk and fidelity to the institution's mission.

- It is important to always remember that advice on those other, non-law considerations is being offered through a legal lens, and that an attorney's specific expertise about, for example, business considerations, is likely less than the expertise that someone else is bringing to the discussion. Often it is not the business or ethical advice, for example, from an attorney that is valuable so much as making sure that the legal advice is informed by a careful consideration of the business and ethical considerations. The lawyer is one voice at the table, collaborating with other colleagues who bring their own expertise, experience and perspective to the conversation.

III. Ethical Issues Arising When Attorneys Assume Non-Legal Roles[4]

Attorneys working in a college or university general counsel's office may find themselves asked to step outside a strictly legal role more frequently than they have experienced in other employment. Institutions are very collaborative and consultative places where people from throughout the institution are brought together regularly on a wide variety of issues, and legal counsel are often part of that mix. In such a setting, unlike a law firm or even a corporate legal office, counsel are often expected to wear an institutional hat as opposed to a strictly legal one.

This blurring of lines is often intentional and not just situational. Often these "non-legal" roles are unofficial or temporary, such as serving on a search committee or task force, offering business advice, or participating in discussions at the cabinet level. At other times, in-house

[4] This section of the presentation borrows heavily, with permission from the authors, from *Wearing Multiple Hats: Tips for Handling Ethical and Practical Problems*, Ellen M. Babbitt, Deborah C. Brown, Thomas Dorer and Kathleen A. Rinehart (2013 NACUA Annual Conference). Additional material was adapted from *Hat Trick: Can a Chief Legal Officer Manage Nonlegal Functions*, Ellen M. Babbitt, Thomas Dorer, Elise Traynum and Paul J. Ward (2012 NACUA Annual Conference).

counsel are asked to take on discrete institutional functions as part of their job. It is not uncommon for the general counsel to serve as corporate secretary, chief of staff, compliance officer or FOIA officer. In-house counsel may also be asked to supervise units which may include internal audit, risk management, government relations, human resources, Title IX, public safety and athletics, to name some real-life examples.

There are a variety of reasons lawyers are asked to take on these multiple roles:

- Given the delicate nature of much of the advice that in-house lawyers provide, the president and colleagues can come to rely on in-house counsel for a wider range of sensitive situations.
- Attorneys frequently give advice which goes beyond a narrow "legal" interpretation. This is explicitly recognized under Rule 2.1, "Advisor," of the ABA Model Rule of Professional Conduct, which reads: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Given this permissible flexibility within the Model Rule, it can be natural, and perhaps not even noticed, to cross over from legal to non-legal advisor, particularly where the additional responsibilities require similar analytical skills.
- In-house counsel are exposed to almost the full range of institutional operations and develop considerable institutional knowledge and memory. That information places them in an unusual, often unique position which gives them valuable insight into other, non-legal roles.
- It may be organizationally efficient to place certain functions within the general counsel's office. Various compliance functions are closely related to work already being performed by attorneys, so it's natural to charge the general counsel with responsibility for these additional responsibilities.
- As many institutions face increasingly lean budgets, many departments are asked to take on additional tasks, and legal offices are not immune from those demands.

A. Factors to Consider When Assuming Non-Legal Functions

Though there are many understandable and even compelling reasons for lawyers to take on non-legal responsibilities, it is not always advisable to do so. In-house counsel and their institutions may find these factors useful to consider in assigning roles to counsel.

2. What is the nature of the function: advisory, compliance-oriented, operational, or investigative?

a. Advisory:

i. Roles that are more advisory in nature, such as many risk management offices, are similar to legal roles. Consequently, they are less likely to result in potential legal conflicts between the functions.

ii. When the additional role is advisory, colleagues are less likely to see the legal office as "politically" conflicted or in competition with other units, whether for resources, institutional attention or mission emphasis.

iii. Under ABA Model Rule 2.1, an attorney, in rendering advice, may go beyond strict legal considerations to incorporate, for example, "moral, economic, social and political factors." Therefore, some advisory responsibilities can likely complement or even fit within the traditional attorney role.

b. Compliance:

i. Compliance roles often require a strong legal background, so there can be synergies between the functions.

ii. Some compliance functions can be a good fit, such as serving as a public institution's public records officer or as a corporate secretary. However, alternative counsel will have to be identified for those situations in which the institution is accused of violating the underlying statute or regulations, and that alternative counsel should not be another attorney on the general counsel staff.

iii. Other compliance functions may be more likely to raise questions, such as those that carry with them the significant potential for later adjudication or when the non-legal function is more likely to present complications stemming from the attorney's obligation to defend the client, e.g., Title IX or NCAA compliance. The general counsel staff likely cannot represent the institution under such circumstances.

c. Operational:

i. Combining the legal function with operational roles, such as oversight of an athletics department, raises more potential for conflicts and other complications.

a. If an in-house counsel supervises an operational unit, the attorney must prepare to make alternative arrangements for the unit to receive legal advice from another attorney.

ii. The weight given by colleagues to legal advice can be compromised if the attorney is perceived as having a "dog in the fight," i.e., if others view the attorney's legal advice as influenced by those separate operational duties or unit loyalties.

iii. Not all operational functions present the same level of risk. For example, when the general counsel also serves as corporate secretary,

the often very focused operational and compliance responsibilities of a corporate secretary raise fewer issues than, say, oversight of the human resources department.

d. Investigative:

i. Functions with significant formal investigative responsibilities, such as offices charged with responding to allegations of discrimination, usually need to be seen as independent to be effective. That perception may be compromised if the function is conducted or overseen by an attorney who is simultaneously charged with defending the institution against ongoing or potential legal claims.

ii. Informal investigations designed to aid in the provision of legal advice rarely present problems. However, care must be taken to not relegate an investigation to "informal" status unless a "formal" process is not required or appropriate.

3. Is the non-legal role temporary or permanent?

a. Almost any potential problem can be managed if the non-legal function is limited in duration and if the counsel can be removed from the role promptly should a conflict arise. Similarly, colleagues are less likely to call into question the unbiased nature of the attorney's judgment if the additional assignment is temporary. For example, chairing a task force or search committee may create complications for that role, but it is unlikely to lead to broader or systematic problems.

4. Is the non-legal function formal or informal?

a. As a senior administrator, the institution's general counsel is frequently expected to participate in policy development and difficult decisions. Often in-house counsel may be asked, for example, to participate in a business decision or sit on a task force charged with setting policy. In these situations, it is not always possible or desirable to maintain a narrow, strictly legal focus. By becoming part of the decision-making group, however, in-house attorneys can and almost always will step out of their legal roles at some point, putting the attorney-client relationship into question.

b. "Informal" non-legal roles that are limited in scope and duration offer some of the same advantages as temporary roles and therefore have limited impact on the overall attorney-client relationship. On the other hand, when the role is informal, both in-house counsel and their colleagues may not even realize that they have moved outside of the attorney-client relationship.

c. Awareness and communication about the role of counsel thus become critical. If everyone involved is clear about when in- house counsel has stepped out of the legal role, this can be a manageable situation. However, remember that if you're usually perceived in a "legal" role, people may incorrectly assume that you're "their lawyer" in all circumstances and incorrectly proceed as if all communications in which counsel is a party are "privileged."

5. Is the role relatively major and central to the institution, or relatively minor and peripheral?

a. It may be easier to assume responsibility for a small, secondary non-legal function, such as trademark licensing at most institutions, as compared to a larger unit or an operation more core to the institution's mission, such as human resources or an academic unit.

6. Is the non-legal role likely to lead to confusion over when the attorney is acting in another capacity?

a. Some mixtures of roles are inherently difficult to manage. For example, if a general counsel serves simultaneously as the president's chief of staff, it may be difficult for colleagues to recognize the difference between strong legal advice and a directive or message from the president.

b. Carefully and diligently managed, a dual role can work. Clearly identifying which role is in "play" at a particular moment, for example, will be critical. However, use caution, as this clarification may be muddied in crisis situations or when circumstances require moving up-and-back between roles.

7. How will the assignment of non-legal functions to in-house counsel affect organizational efficiencies?

a. When weighing the value vs. risks associated with various "multiple hat" assignments, it may be useful for counsel and client to consider these basic questions:

i. Will enhanced knowledge of and experience with the non-legal function enhance the attorney's understanding of the client's needs?

ii. Will the combination of duties lead to administrative streamlining?

iii. Does the non-legal function require a command of (versus familiarity with) legal concepts, such as a body of regulations?

iv. Particularly for smaller institutions, is the legal office the best alternative for covering certain functions which do not warrant a full-time position? If, for example, the institution simply has no budget for a full-time

compliance officer, assigning the task to in-house counsel may prove to be the best available alternative.

B. Legal Advice v. Business Advice

Under Rule 2.1, attorneys may provide advice within the "attorney role" that goes beyond strictly legal issues, enriching the advice with other considerations, including economic, ethical, and political recommendations. As the official commentary to Rule 2.1 states, "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant." The official commentary allows that, even when a client specifically asks for a technical, narrowly legal answer, it may be appropriate to include other factors "[w]hen such a request is made by a client inexperienced in legal matters."

However, while the Rule 2.1 offers flexibility that can be valuable to the client, there are limits to how expansively an attorney can advise on non-legal matters while still maintaining the attorney-client relationship. These questions may be useful in identifying those boundaries:

1. Is the primary purpose of the communication to provide legal advice, on the one hand, or business advice, on the other?

    a. In-house counsel has to be very careful if the goal is to keep the advisory communication within the attorney-client privilege. If the primary purpose of the communication is not clearly legal, the privilege may be placed at risk.

    b. For a good discussion of the attorney-client privilege, given the multiplicity of roles for in- house counsel, see *The Trusted Advisor's Dilemma – Maintaining the Attorney-Client Privilege as In-House Counsel*, by Linda Walton and Chelsea Dwyer Peterson of Perkins Coie, included in the list of resources below.

2. Is the attorney acting within counsel's professional competency or is the advice more appropriately left to another professional?

    a. The official commentary to Rule 2.1 specifically warns that "[m]atters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists." An attorney should not venture beyond his or her capabilities.

        i. "In all professional functions a lawyer should be competent, prompt and diligent."
        Preamble to the Model Rules of Professional Conduct.

ii. Note that the very act of recommending consultation with another competent professional can be appropriate legal advice.

C. Protecting the Attorney-Client Relationship and the Privilege

The attorney-client privilege can be compromised when in-house counsel too closely approaches (or even crosses) the line between legal and business or other forms of advice. Similar concerns appear when in-house counsel formally assumes non-legal functions. Many resources noted below examine in greater depth the concept and limits of privilege.

However, consider the following simple, general measures that counsel can take to alleviate confusion, uncertainty, as well as risk that the client will lose the benefit of the attorney-client privilege when an attorney who has assumed multiple roles is acting in a legal capacity:

1. Many people assume that a conversation is privileged whenever an attorney is in the room. In-house counsel should educate colleagues on the scope and limitations of the privilege when counsel is performing non-legal or mixed roles, especially those colleagues who most frequently work with in-house counsel.

2. When there is any potential for doubt, in-house attorneys should clearly note when they are not providing legal advice and point out that the conversation is not privileged.

3. In some settings, it may be safe to assume that everyone in the room understands that the attorney generally is not present to provide legal advice, for example, where the general counsel attends a routine weekly cabinet meeting as a fellow officer. Under these circumstances, starting each meeting with a warning on the absence of privilege could be overkill. The more practical approach might be for counsel to specifically note those instances in the meetings when she or he is shifting into (and subsequently out of) "attorney mode."

4. When taking on additional non-legal roles, especially formal functions, as compared to informal advice, in-house counsel should ensure there is no ambiguity over which roles are legal, and which roles are not.

    a. Avoid functions that are inherently ambiguous. For example, an attorney should not function in the role of investigator in a formal investigative proceeding if he or she is expected to provide legal advice later on in the same case.

5. Likewise, it is problematic to perform the role of investigator when the investigator might later be needed or required to serve as a key witness for the institution (i.e., where the investigation would support a *Faragher/Ellerth* harassment defense or be used in a Title IX proceeding to prove the institution did not act with "deliberate indifference"). In-house attorneys with non-legal responsibilities should identify alternative legal counsel to support those functions whenever possible, taking care to structure this relationship in a manner that protects privileged communications. *See, e.g., Doe, et al. v. Baylor University,* 6:16-CV-173-RP (Mar. 7, 2019)

(compelling production of a full investigative report prepared by outside counsel in a sexual misconduct investigation). It is important to have a plan to obtain uncompromised legal services for the client.

D. Managing Relationships – Conflicts Between Roles

Assuming additional non-legal duties can reflect the unique place that in-house counsel often occupies within colleges and universities. As noted above, there are attributes of the legal profession that encourage clients to assign multiple roles to attorneys. However, those same duties can present special challenges for the attorney's relationships with colleagues. Some considerations:

1. Part of legal training involves advising on potential pitfalls. In a dynamic business setting, colleagues – and some attorneys – may conflate risk identification with risk aversion, a trait that many view as imposing unnecessary barriers to progress. In-house counsel should be careful to demonstrate to colleagues that they understand the difference between risk awareness and risk management, on the one hand, and risk avoidance, on the other, particularly in the context in which counsel provide legal advice.

2. Time management may be a significant challenge for in-house counsel responsible for both legal and non-legal functions. Deadlines imposed by courts or regulatory schedules, for example, may collide with deadlines imposed by business necessity. To the extent possible, determine in advance how these competing time demands will be reconciled, and communicate time constraints to clients and colleagues.

3. If the additional duties assigned to in-house counsel are too closely aligned with the president, other constituents around campus may view legal advice as message-carrying instead of objective analysis and recommendations.

4. The assumption of multiple roles can also compromise the perception of unbiased judgment that is so critical to in-house counsel's ability to effectively render advice.

    a. If the attorney is viewed by colleagues as having an operational stake in the outcome, they may question whether the advice is objective.

    b. In-house counsel with additional duties need to be mindful of this risk, to acknowledge the potential for conflict, and to explain how they are managing that risk to provide the best legal advice. If the client does not trust the attorney, the relationship is compromised.

5. In-house counsel also should know the risk that operational responsibilities might compromise the unbiased nature of the advice. This can be a substantive issue, not simply a matter of adjusting client expectations.

a. Counsel can avoid considerable trouble down the line by taking the time to "nip in the bud" any misperceptions about the objectivity of legal advice, and by being sufficiently self-aware to watch for and correct any actual compromise of independent judgment and unbiased advice.

b. Even more important, in-house counsel should be prepared to step out of a role, decline a non-legal function, or arrange for alternative coverage when a non-legal function places the effectiveness of legal advice at risk.

IV. RESOURCE LIST

The following list of resources includes some NACUA and non-NACUA materials that practitioners also may find useful on this topic. NACUA materials are available to members on the NACUA website, while links and/or URLs are provided for other resources.

1. NACUA materials

- *Navigating Pandemic and Pan-institutional Responsibilities: Ethical Issues and Obligations for College and University Counsel*, Stacy Giwa, Christopher Holmes, and Felicia Washington (2020 NACUA Virtual Annual Conference)

- You Can't Waive a Hat You Never Wore: Ethical Choices and Checklists Around Operational Roles for In-House Counsel, Laurence Pendleton, Doajo D. Hicks, and Paula Victor (2021 NACUA Virtual Annual Conference)

- The Value-Added Counsel: Being a Strategic Partner and Institutional Guardian, while Minding Ethical Obligations, Robert B. Farrell and Becca Gose (2021 NACUA Virtual Annual Conference)

- Ethics in Social Media, Alexander (Sandy) R. Bilus, Tricia M. Kazinetz, Rebecca J. Reist, Michael E. Lackey, Jr., and Roger V. Abbott (2019 NACUA Annual Conference)

- *Managing the Interface Between Legal, Compliance, Internal Audit, and Risk Management from the General Counsel's Ethical and Practice Perspective,* Janine DuMontelle, Patrick O'Rourke, and Jerry Blakemore (2019 General Counsel Institute)

- *The General Counsel and Lawyers in Campus Positions Outside of the General Counsel's Office: Managing Expectations and Relationships and Avoiding Ethical Issues,* Craig Cook, Doajo D. Hicks, and Laurence Pendleton (2019 General Counsel Institute)

- *Navigating Internal Investigations: Ethics, Politics, Communications, and Other Issues Present in Internal Investigations,* Lisa Karen Atkins, Janine P. Dumontelle, and Gloria A. Hage (2018 NACUA Annual Conference)

- *Crisis Communication: Ethical and Practical Concerns,* Donna Davis, Michael P. Downey, and Jerry Blakemore (2018 NACUA Annual Conference)

2. Other Materials

- *Ethical Conflicts Facing In-House Counsel: E-Discovery, The Attorney-Client Privilege, and the "Manager" Role* (November 10, 2010), W. Mark Bennett, Strasburger, available at http://www.strasburger.com/calendar/presentations/Corporate_Counsel_Series_Presentation-1111010.pdf

- *Ethical Issues of Concern to In-House Counsel*, Steven J. Fram, New Jersey Lawyer (October 2011), available at http://www.archerlaw.com/files/Fram.pdf

- *Ethical Obligations of Corporate In-House Counsel in an Internal Investigation* (September 2007), BNA Corporate Practice Series, Steven M. Salky, et al., Zuckerman Spaeder, available at http://www.zuckerman.com/media/site_files/169_BNA_Ethical%20Obligations%20o f%20Corporate%20In-House%20Counsel_Salky%20and%20Davis_0907.pdf*Ethics: Ethical Morasses Facing In-House Counsel Managing Litigation*, David Spector and Ashleigh Bholé, Akerman Senterfitt, available at http://www.trial.com/cle/materials/2012- ch/spector.pdf

- *The Trusted Advisor's Dilemma – Maintaining the Attorney-Client Privilege as In- House Counsel* (June 9, 2011), Linda Walton and Chelsea Dwyer Peterson, Perkins Coie, available at http://www.perkinscoie.com/files/upload/LA_11_06InHouseCounsel.pdf

V. RELEVANT PROVISIONS FROM THE A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT

Attorneys are always advised to check the state Bar rules of their specific jurisdiction, but the following list of relevant rules from the ABA Model Rules of Professional Conduct may be relevant to the topics discussed above. We have included some key provisions below. In addition, the ABA Model Rules together with their often illuminating official comments are available online at

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

Text of Select Model Rules

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph b. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(b) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.