I. INTRODUCTION

Many lawyers aspire to represent, or work at, institutions of higher education. For good reason: the plethora of interesting issues encountered alone is an incentive. The National Association of College and University Attorneys (“NACUA”) lists twenty-nine (29) individual categories of subject matter, ranging from accreditation to tuition and fees, handled by higher education lawyers.

As early as 1974, Professor Robert Bickel observed:

[T]he primary thrust of the attorneys’ responsibility to the university and the primary definition of his or her role within the institution is the providing of preventive advice which will save the institution from formal litigation or other challenges . . . . (The Role of College or University Legal Counsel, 3 J.L. & Educ. 73, 77 (1974) (emphasis added).)

Professor Bickel’s observation has force today, but is often misunderstood, as is the impact of counsel on campus legal issues.

There are two main aspects of the salient preventive function. One is monitoring the external legal environment to insure that appropriate administrators know about new judicial decisions, legislation, and regulatory initiatives. Besides informing and educating clients of these developments, counsel should then participate in the process that examines the applicability of the new developments to the campus. Counsel should also play a role in the revision of policies and practices necessitated by the external
developments. This endeavor, one of “getting one’s house in order,” has another aspect, that of anticipating future legal issues that will confront the campus and developing a process to address them. For example, rather than rely on costly outside counsel, several campus counsels’ offices in the 1980s developed a knowledge of environmental law. As regulatory efforts directed at higher education increased in the late 1980s and early 1990s these institutions were provided with more timely and cost-effective advice than those that relied on outside counsel. Higher education clients should expect their counsel to anticipate future issues and provide guidance in preparing to address them.

The other prong of the preventive function is providing timely and competent advice to campus clients for the resolution of their legal issues. This responsibility can range from providing rather routine contract or document review to being a major participant in delicate and difficult situations, such as the termination of a faculty member, or development of a strategy to resist an attempt by graduate students to unionize. The worth of counsel is tested in difficult and stressful situations, and the most successful counsel are those who can best understand their client’s needs, combining them with institutional goals and legal doctrines, to produce advice that is understandable, relevant, and useful. In this litigious age, no one, not even the most competent counsel, can prevent a lawsuit from being filed against an institution. But judicious use of competent and responsive counsel, as early in the process as possible, will greatly enhance the prospects of a successful defense of the suit.

Roderick Daane, former University of Michigan General Counsel, in his seminal article (The Role of University Counsel, 12 J.C. and U.L. 399 (1985)) about university counsel, describes six “basic roles” of university counsel: Advisor-Counselor, Educator-Mediator; Manager-Administrator; Draftsman; Litigator; and Spokesman. The first four roles are most directly linked to counsel’s central preventive role, with the first two (Advisor-Counselor; Educator-Mediator) the most important. Despite Daane’s attempt, drawing lines between these paramount roles is difficult. The educator role is present (or should be) whenever advice is given. Unlike dealing with other organizations, it is insufficient and counterproductive to tell higher education clients to not take a particular course of action because it lacks legal justification. Higher education, with its traditions of shared governance and freedom of inquiry, is a markedly different client. Lawyers
who fail to appreciate that, and who fail to educate their clients concerning the pitfalls of a proposed course of action, or who fail to delineate how the client’s objectives can be met, will not thrive in higher education and are not serving their clients effectively.

A campus counsel should not be just an administrator with a law degree. Independence from organizational pressure or intrigue is essential. Counsel should report to the Board or chief executive officer and not be in some other administrator’s chain of command. A counsel, in turn, must remember his or her duty as a lawyer: to provide independent advice to the client. The turnover of general counsel in higher education appears to be increasing, perhaps as a result of, in part, the reluctance, or inability, of chief executives to understand that obligation. To be sure, an institution’s leader faces numerous and intense pressures. But the appropriate response is not to figuratively follow Shakespeare’s suggestion for management of counsel: “The first thing we do, let’s kill all the lawyers.” (William Shakespeare, The Second Part of King Henry, the Sixth, act 4, sc. 2.)

II. ETHICS AND PROFESSIONALISM

We must reject Shakespeare’s explicit condemnation and recognize that lawyers, regardless of their practice setting, are subject to ethical and professional standards imposed as conditions of their licensure. These standards may differ from institutional practices and may, from time to time, prevent a lawyer from carrying out the client's wishes or directives. Awareness of significant ethical and professional issues can benefit and enhance the relationship between university counsel and their clients.

III. CLIENT RELATIONS

A. Who is the Client?

The simple and correct answer is the governing body of the institution. However, most counsel report to the president of the institution or work with that office more frequently than the Board. Under various fact situations, anyone in the campus community can be a client. But it is important for counsel to make clear
his or her institutional responsibility and representation. This is essential in situations, such as investigations, where the institutional and individual interests may diverge.

B. Must One Follow the Advice of Counsel?

No, but . . . The "but"s" abound, particularly where the advice of experienced and capable counsel is ignored. The consequences can go beyond a bad result. If this happens frequently, the relationship between counsel and client will erode and, possibly, end.

C. Communications to and from Counsel

Breakdowns in attorney/client communication cause more client complaints to bar disciplinary bodies than any other issue. The gist of the problem is the failure of communication, not issues of attorney/client confidentiality (see section V). You should normally expect a response to a call or e-mail within 24 hours; sooner if the matter is urgent. Written responses and projects usually take longer. To facilitate timely completion, make counsel aware of your deadline.

D. Expectations of Counsel by Clients

1. Access: Access to in-house counsel should be available to all in the university. Do not "filter" or limit access by requiring approval by supervisors. Limitations on access prevent counsel from addressing issues at an early, non-crisis stage. Involvement of counsel is necessary to "shape" matters to insure the best possible outcome.

   Access can be facilitated by e-mail, voice mail, arranging times for calls and by having counsel be a visible member of the campus community. If you are served by outside counsel, limitations on access are needed for cost control purposes.
2. Responsiveness: Calls and e-mails should receive prompt replies. Projects, opinions, etc. should be completed within a reasonable time.

3. Helpfulness: Counsel should be "client centered." Fundamentally, this involves counsel trying to understand the problem from the client's perspective and involving the client in the decision making process. In short, it is an interactive, non-authoritarian approach.

   Your issue should be addressed in an understandable way, without the need of translation. And counsel should be consistent in their responses to comparable questions.

4. Competence: Higher education law is a specialty. No longer is it sufficient for institutions of higher education to rely on a "good old boy" on the board, or a prominent lawyer/politician. An easy litmus test for potential outside counsel is to determine whether they are members of NACUA (National Association of College and University Attorneys) or regular attendees at the Stetson Conference.

5. Discretion and Civility: Your institution is a prominent and respected part of your community. You deserve to have your image enhanced by the professionalism of your counsel. Choose, and employ, wisely.

6. A Sense of Humor.

E. Expectations of Outside Counsel by Campus Counsel

1. Early analysis of litigation or significant issues.

2. No surprises.

3. Consultation on staffing.

4. Appropriate staffing.
5. Appropriate communication.
   a. to counsel
   b. with campus personnel

6. Appropriate timeliness.

7. Reasonable billing rates and efficient task management.

8. Recognition of responsibility to preserve and enhance the institution’s reputation.

9. Good results.

10. Inclusion in CLE opportunities.

F. Expectations of Clients by Counsel

1. Candor and Honesty: Tell us the truth, and the whole truth. We are trained to know what is relevant. Let us make that decision.

2. Avoidance of "Political" Entanglement: Don't embroil or engage us in office politics.

3. Cooperation.

4. Realism.

5. Your Best Efforts to do Your Job.

6. A Non-Blaming Attitude: Let's work together to address a problem. Don't personalize bad news.

7. Have a Very Good Reason for Not Following our Advice.

8. Recognition that your issue is not the only one confronting counsel.
9. Support for Professional Activities: Continuing education enhances competence and is required for licensure in many states.

10. Thanks: A kind word once in a while is most appreciated.

IV. POSSIBLE COST CONTROL TECHNIQUES.

A. RFP’s for legal services.

B. Discounted rates

C. “Blended” rates.

D. Fixed fees for transactional matters.

E. Early mediation.

F. Periodic policy review.

G. Responsiveness to new legal developments.

H. Dividing responsibilities between campus and outside counsel and, if possible, use campus resources for tasks.

I. Employ several law firms.

J. Develop relationships of trust and respect.

V. Confidentiality.

A. The Ethical Obligation

shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation..."

2. The comment to Rule 1.13 (The Entity as Client) provides, in part: When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6 ... The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

B. Its Application to a University Setting.

1. In dealing with "constituents" of a university client, it is often difficult to determine when confidentiality is owed to one of the university's "constituents" or when disclosure is impliedly permitted. The preamble to the Model Rules provides some help (paragraph 8): "...Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."

2. In general, "sensitive professional and moral judgment" would probably determine that a university attorney should say as little as possible about any matter in the legal office to anyone not directly involved in that matter.

3. Reputation is critical to any attorney, but especially to one in a university. It is imperative to be seen as a person who is impartial, who can be trusted and who will keep confidences.
VI. DUTY OF COMPETENT AND TIMELY REPRESENTATION V. EXCESSIVE WORKLOAD

A. The Obligations

1. Model 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.


B. The Problem

1. The work, both legal and non-legal, on the desk of almost any university attorney at any one time is probably enough to keep the attorney in the office at least 24 hours a day. In addition, most university attorneys are involved in community activities and have family obligations. In order to function effectively as attorneys and as human beings, most also need time for leisure activities.

2. There is also an incredible diversity of subject matter in the work on the university attorney's desk. Even in those offices where there is some division of responsibility by subject matter, the attorney still needs to provide advice on a broad range of topics.

3. Although the rules of ethics quoted above contain the words "reasonably" and "reasonable", there is often a conflict between the duty to provide competent and timely advice and the demands of what is usually a very large workload.

4. Frequent communication between in-house counsel, their presidents, and financial administrators should occur to insure that appropriate resources,
internally or externally, are deployed to meet the legal needs of the institution in a timely and competent way.