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*Advising International Students:
The Challenges of Being Can-Do in a “Culture of No”*

Cary M. Jensen
Director of University International Relations
University of Rochester

“The fact that we educate many of the future leaders in countries around the globe is among our strongest diplomatic assets. Our efforts to spread our influence and understanding of our culture should be stepped up, not abandoned. Higher education is one of the best methods we have of spreading the word about who we are and of exposing our citizens to non-Americans. *Bringing foreign students onto our campuses is among the best favors we can do ourselves.*” (Editorial “More Than an Academic Exercise,” New York Times, September 24, 2002)

If “~~bringing foreign students onto our campuses is among the best favors we can~~ do ourselves,” then one of the best favors we can do for those foreign students is to give them the support they need to maximize their U.S. education. Acknowledging the role of international advisers in this effort is a good place to start. Overseeing the on-campus international services offices at the University of Rochester for the last seven years has helped me appreciate the complicated nature of this field and the unique and critical position that international advisers fill.

Immigration issues are challenging enough on their own, but when added to the diverse mix of individual circumstances, countries of origin and educational programs found at most higher education institutions, the variations and complexities seem endless.

Immigration practice in this country features a multi-agency system founded on laws and regulations which are glossed over by agency interpretations, political considerations and legal “lore” that often have more impact than the actual law. These secondary influences have always permeated this field and since 9/11 have nearly preempted it. This system can be confounding even to seasoned practitioners, while foreign visitors, many of whom are in this country for the first time and experiencing significant cultural and language adjustments, are often left to figure it out on their own. International advisers and their supporting staff serve as legal guides through this system and provide a cultural buffer and personal support that may well make the difference between a frustrating and a successful experience for many visiting this country.

International advisers face significant challenges in this post 9/11 environment that immigration practitioners often refer to as “the culture of no.” It is impossible to synthesize all aspects of international advising¹ here -- even the 1,000 + page Advisory Manual (an annually-updated publication of NAFSA, Association of International Educators) doesn’t presume to do that; however, there are three basic dimensions to international advising that, if understood, will help campus counsel and other administrators appreciate the significant responsibilities and challenges facing advisers -- their relationship to the federal government, their relationship to individual students, and their relationship to their institution.

¹ Acknowledging the inherent danger of generalizing when there are probably as many types of advisers as there are institutions, there are essentially three overall categories of international advisers – 1) those who have been officially selected by their institutions as Designated School Officials (DSOs) for the F-1 (educational) and M-1 (vocational) student visa programs; 2) those who have been officially selected by their institutions as Responsible Officers (ROs) and Alternate Responsible Officers (AROs) for J-1 exchange visitor visa programs; and 3) everyone else, including those who assist applicants for other nonimmigrant (work) visa statuses (e.g., H-1B, O-1 R-1, TN) that do not have specific programs with authorized representatives. While the issues and concerns addressed in this paper apply to all advisers generally, to simplify the discussion, avoid acronym overload and reduce confusion, especially with the J-1 program which has its own governmental agency, body of regulations and terminology, this paper will focus exclusively on F-1 program advisers, referred throughout as “advisers” or “DSOs.”

Relationship with federal government – Authorization

While educational institutions are used to interacting with the federal government on many fronts, the elements establishing an F-1 visa program are unique in many respects. This relationship begins with the institution filing a formal request with the Department of Homeland Security (DHS) for “blanket authorization” to issue the documents upon which consular and immigration officers will rely to identify an individual admitted to study at that institution. In exchange for the privilege of the blanket authorization, the institution confirms: its bona fide standing as an institution; its financial viability; its agreement to meet all the regulatory requirements of the F authorization; and its assurance that it will employ an adequate number of properly trained staff to oversee and administer the program. (2004 Adviser’s Manual 14-56)

Both the institution and the DSO have five identified responsibilities in the F-1 process. The institution’s responsibilities include: 1) petitioning for government approval to enroll F-1 students (and re-certifying every two years); 2) designating up to 10 regularly employed members of the school administration to be DSOs, including one Principal DSO (PDSO) to function as the principal contact between the government and the school; 3) accepting prospective students for enrollment in a “full course of study” that leads to the attainment of a “specific educational or professional objective;” 4) providing this “full course of study” to the student; and 5) complying with recordkeeping and reporting obligations. The DSO’s responsibilities include: 1) being designated by the school to represent and speak for the school in F-1 student matters; 2) ensuring institutional and individual compliance with the law, by learning and interpreting and applying laws and government policies pertaining to F-1 students; 3) issuing and signing forms I-20, updates SEVIS² and assisting in other immigration matters dealing with F-1 students; 4) ensuring that the institution keeps records that are required to be kept and that the institution complies with its reporting duties under SEVIS; and 5) approving or

²The Student and Exchange Visitor Information System, a government-sponsored, internet-based monitoring system administered by the Immigration and Customs Enforcement (ICE) division of DHS.

recommending benefits for F-1 students and their families, and educating students and the school about their rights and obligations under F regulations.

According to 8 C.F.R. 214.3(1)(1), eligibility to be a DSO requires that a person:

- Be a regularly employed member of the school administration;
- Have an office located at the school;
- Not be compensated through commissions for recruitment of foreign students;
- Not be an individual whose principal obligation to the school is to recruit foreign students for compensation; and
- Be a U.S. Citizen or a U.S. Lawful Permanent Resident.

Beyond the points listed above, which must be certified by the institution's chief officer,^{Deleted: ¶} the only other requirement to become a DSO (besides being able to write your own name) is to assert that you have read and are familiar with the five subsections of the Code of Federal Regulations (8 C.F.R. 214.1, 214.2(f), 248, 214.3, and 214.4) that pertain to F-1 student programs – 25 pages in all. This assertion must be made when the DSO initially signs on to the SEVIS system by clicking on “I agree” on the Compliance Agreement Screen. No other certification standards or specified training is required. DSO standards, training and working conditions are essentially unregulated.

Steven B. Kennedy, a former officer at NAFSA has observed:

“With college’s and university’s free to choose their own level of commitment to the federal student visa programs . . . it is not surprising that practices around the nation diverge widely. Many institutions, including most of those that enroll large numbers of foreign students, invest heavily in the facilities and trained personnel that allow them to make the most of international exchanges. Such institutions typically enable their employees to attend professional meetings, purchase publications, and obtain training. Others invest a moderate amount – often just enough to get by. But an unknown number seriously under invest, providing their DSOs no training or resources. The institutions that spend too little on staffing and administering their international-exchange programs incur entirely predictable results. Their international-student offices (if they have them) are under qualified and overwhelmed. Burnout and turnover are rife. Successive newcomers do their best to cope with waves of students in a sea of unintelligible regulations.”

(“Where Are the Standards for Foreign Student Advisers” Chronicle of Education, 5/24/02)

Organizations like NAFSA have done much to advance the training, ethical professionalism of this field, but compliance remains purely voluntary and institutional-

Deleted: One expert adviser and trainer once likened the recruitment of new foreign student advisers (and not just at underinvesting institutions) to a game in which the dean roams the halls, finds a likely candidate, and cries, “Tag, you’re it!”

driven. This is surprising given the DSO’s considerable responsibility for maintaining their institution’s government approval to enroll nonimmigrant students. Indeed, as the NAFSA Adviser’s Manual states, “responsible institutions should select, train, support and monitor DSOs with care” (3-203). Institutions who under-invest in this area will reap their reward in the form of careless or uninformed advising which may lead to adverse and serious consequences for students and institutions and possibly result in withdrawal of the institution’s F-1 approval. The regulations specify 18 grounds (illustrative examples of “valid and substantive reasons” which is really all the government needs to show) for having an F-1 approval withdrawn. At least 12 of these would be directly attributable to potential adviser malfeasance. The following list of these 12 includes **bolded** language from the regulations (8 C.F.R. § 214.4(a)(1)(i)-(xviii) and commentary from the NAFSA Adviser’s Manual (3.24.1.1).

- i **Failure to comply with 8 C.F.R. 214.3(g)(1) without a subpoena.** 8 C.F.R. § 214.3(g)(1) requires that schools maintain specific records and information on F-1 and M-1 students and that schools release that information to an INS (or to a DHS) officer upon request. The requirements for written notice (oral in cases of students in custody) and the time frames for schools to respond, as noted above, must be observed by both DHS and the school.
- ii **Failure to comply with 8 C.F.R. 214.3(g)(2).** 8 C.F.R. § 214.3(g)(2) refers to reporting requirements for non-SEVIS students.
- iii **Failure of a designated official to notify the Service of the attendance of an F-1 transfer student** as required by § 214.2(f)(8)(ii).
- iv **Willful issuance by a designated official of a false statement or certification in connection with a school transfer or an application for employment or practical training.** Note the inclusion of the word “willful” in this provision.
- v **Any conduct on the part of a designated school official which does not comply with the regulations.** This ground for withdrawal of school approval is distressingly vague and inclusive. Since the regulations in most circumstances are quite specific, a reasonable interpretation of this provision would be quite narrow and limited in scope.
- vi **The designation as a designated school official of an individual who does not meet the requirements of 8 C.F.R. § 214.3(l)(1).** This refers to the designation as a DSO of a person whose compensation is derived chiefly from foreign student recruitment fees, who is not regularly employed at the location of the school in the United States, and/or who otherwise does not qualify as a DSO.
- vii **Failure to update SEVIS with changes to the names and titles of its DSOs,** as required by 8 C.F.R. § 214.3 (l) (2).
- viii **Failure to submit statements of designated officials** as required by 8 C.F.R. § 214.3 (l) (3).

- ix **Issuance of Forms I-20 to students without receipt of proof that the students have met scholastic, language, or financial requirements** or with procedures set forth in 8 C.F.R. 214.3(k)
- x **Issuance of Forms I-20 to aliens who will not be enrolled in or carry full courses of study as defined in 8 C.F.R. § 214.2 (f) (6).** This refers to the intent of the school issuing the Forms I-20. The school that issues those forms must do so with the understanding that the student is admitted for the purpose of carrying a full program of study and not for a part-time (except Canadian or Mexican border commuter students) or casual program. A student is not required to intend to be a degree or certificate candidate as long as the student pursues a full course of study and has a specific educational objective. If the student subsequently fails to carry a full program of study, only the student is subject to punitive action. The school cannot be held responsible for the failure of the student to comply with the regulations. The school must, however, report certain status events through SEVIS.
- xi **Failure to employ qualified professional personnel.** Presumably this refers principally to teachers who teach the students, but it could also be applied to ~~DSOs~~ who demonstrate that they are not qualified for their positions by not complying with the immigration regulations. Deleted: Formatted: Indent: Left: 1", First line: 0"
- xii **Failure of a designated school official to notify the Service of material changes to the school's name, address, or curriculum** as required by § 214.3(e)(2). Deleted: DSs

Relationship with federal government -- Reporting

As the quid pro quo for delegated “blanket authorization,” approved institutions and their DSOs are required to maintain certain records, to respond to government requests for those records, and to regularly report certain information about their F-1 students to the government. Institutions must keep the following information on each F-1 student (either in the ISO files or in general student information systems):

- i. Name;
- ii. Date and place of birth;
- iii. Country of citizenship;
- iv. Current address where the student and his or her dependents physically reside;
- v. The student's current academic status;
- vi. Date of commencement of studies;
- vii. Degree program and field of study;

- viii. Whether the student has been certified for practical training, and the beginning and ends dates of certification;
- ix. Termination date and reason, if known;
- x. Documents relating to the student’s admission to the school (transcripts and application) and financial support documentation;
- xi. The number of credits completed each semester; and
- xii. A photocopy of the student’s I-20.

And the following documentation related to the admission of the student, issuance of the

I-20 form and maintenance of status;

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- i. Written application to the school;
- ii. Transcripts or other records of courses taken, and other supporting documents as part of the admissions application;
- iii. Documentation that the appropriate admissions officer accepted the student for enrollment in a full course of study;
- iv. Documents used by the student to show financial support;
- v. Photocopy of the student’s I-20; and
- vi. Medical documentation from a licensed medical doctor or other practitioner that was used by a student to substantiate an illness or medical condition for which a “medical condition” reduced course load was authorized.

DHS may request (upon written notice if requested by the institution) any of the listed information for an individual student or a class of students and the institution has 3 and 10 days respectively to respond to those requests, except when a student is being held in custody in which case the school must respond orally on the same day the request was

made with written notice provided after the fact if the school desires it.

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For many years the F-1 regulations have required institutions to keep this same information. Post-9/11 legislation and regulations did not add any additional record-keeping requirements but rather underscored the existing rules (“this time we mean it”). Much of this information is now available to the government through SEVIS, however, institutions should be aware that all of these records must still be kept and available for inspection. In addition, many institutions still receive regular requests from the FBI and

other law enforcement agencies for international student information. DSOs should be familiar with FERPA rules and exceptions, which definitely apply, with some special considerations, to international students -- see NAFSA Practice Advisory “Release of international student information to Government officials” (11/21/01) and Laura Khatcheressian’s “FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing Information About Foreign Students” in The Journal of College and University Law (Volume 29, No. 2, 2003).

The government also requires regular reporting of information on all current and incoming students, scholars and their dependents into the SEVIS system. There are basically two kinds of reporting under SEVIS – event-based reporting on individual students and periodic reporting on all students. Event-based reporting means schools must update SEVIS within 21 days of any of the following events:

- Material change to the name, address or curriculum of the school;
- Any student who has failed to maintain status or complete his or her program;
- A change of the student or dependent’s legal name;
- A change of the student or dependent’s U.S. address;
- Any disciplinary action taken by the school against the student as a result of the student being convicted of a crime; and
- “Any other notification request made by SEVIS with respect to the current status of the student.”

There are also a number of *de facto* reporting events associated with requests for immigration benefits which can only be obtained by updating a student’s SEVIS record including extension of stay, transfer, employment, practical training, reduced course loads, changing level of study, adding dependents, etc. The institution/DSO must also report the following information on all continuing F-1 students no later than 30 days after the deadline for registering classes each term or session:

- Whether the student has enrolled at the school, dropped below a full course of study without prior authorization by the DSO, or failed to enroll;
- The current address of each enrolled student; and
- The start date of the student’s next session, term, semester, trimester or quarter.

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To comply with the new SEVIS reporting rules, institutions and their DSOs have had to implement a host of ~~new~~ systems and procedures. They have also had to adjust to an entirely new agency as the work of the former Immigration and Naturalization Service (now officially referred to as “Legacy INS”) was divided among three new bureaus of the Department of Homeland Security – namely Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). The combination of this new “cast of characters” with an inflexible and difficult-to-correct SEVIS system has caused significant problems. In one incident, several students, after having had their SEVIS record updated by their institution’s DSO authorizing a reduced course load, were visited, detained, and held overnight by ICE officers, despite having properly sought and received DSO authorization for the reduced course load.

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ICE, who has been charged with monitoring SEVIS, has a clear enforcement perspective as evidenced in their vision statement from their website:

“ICE Vision: To be the nation's preeminent law enforcement agency, dedicated to detecting vulnerabilities and preventing violations that threaten national security. Established to combat the criminal and national security threats emergent in a post 9/11 environment, ICE combines a new investigative approach with new resources to provide unparalleled investigation, interdiction, and security services to the public and to our law enforcement partners in the federal and local sectors.”

This cultural shift from service to enforcement has meant a steep learning curve for the officers involved and a bumpy road for many advisers who have had to get to know, work with, and, in many cases, educate a new cadre of enforcement-minded immigration officials, many of whom have no background with international students and other higher education issues. Many improvements have been made in the SEVIS system since it was implemented; however, there are still many unanswered questions and procedures which often leave advisers unsure how to advise their students or how to correctly enter information into SEVIS which could jeopardize a student’s immigration status.

Probably the most troublesome and complicated SEVIS issue for DSOs stems from the requirement to report a student’s violations of their status. The questions raised not only include how and when a DSO “knows” that status has been violated, but an even more fundamental question of whether a DSO should even be allowed to make this quasi-

judicial determination that arguably is the government's to make. Being found "out of status" is normally an official agency determination, especially for a foreign national with "D/S" (duration of status) on their I-94 card (arrival/departure record), which virtually all

students on non-immigrant visas carry in their passports, as opposed to a fixed number Deleted: most of our student have) instead of

The combination of the uncertainty surrounding most potential status violations and the

serious and potentially permanent penalties that attach were a foreign national determined Deleted: when

a "visa overstay" or "unlawfully present" creates incredibly difficult advising situations.

Whenever possible, advisers should consult with institutional legal counsel and perhaps Deleted: usually

even independent immigration counsel for the student before taking action, assuming that

can be done within the 21-day SEVIS deadline for event-based reporting. Even when

virtually certain that a status violation has occurred, most advisers will search to find a

legal justification to avoid having to report the status violation. Federal regulations have

been disappointingly silent on this issue, despite several pointed comments requesting

clarification during the official comment period of the agency rule-making process Deleted: So before any DSO would report status violation that might trigger this, they need to be completely sure that their "knowledge" is correct and even if it is, search creatively if there is any way to avoid having to report within the parameters of the law, liberally construed. start being attached with What that means exactly has not been defined or articulated.

Another challenging issue that has been complicated by the new SEVIS rule is

what action, if any, an adviser should take when he or she becomes aware of an

undocumented alien attending their institution. In such a situation, determining the

appropriate course of action depends not only on what the regulations say, but what

do not say. The NAFSA Adviser's Manual (2004, 3-224) offers this insight:

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"The F regulations do not address the school's legal responsibility regarding

admission and enrollment of aliens who hold any other immigration status .

students who are out of status. The legal status of aliens not in F, M or J status is

between the aliens and the DHS immigration bureaus, and a school does not jeopardize

its approval to enroll F-1 students by admitting and enrolling other aliens, regardless of

their status. . . . The regulations at 8 CFR 214.3(g) cover the recordkeeping and reporting

requirements for Fs only. Statuses that allow for study, such as H-4 and L-2, do not have

any SEVIS reporting requirements. Before releasing any information on students that are

not in F, M or J status, international advisers should contact institutional legal counsel for

guidance."

Unlike the specific legal provisions prohibiting employers from hiring an undocumented alien, there is no such provision prohibiting institutions from letting them attend school.

A recent NAFSA practice advisory (2001-D) confirms this point:

“There is generally no restriction on individuals who are maintaining status in other immigration categories [other than F, M or J] from engaging in study that is incidental to their primary purpose in being here (likewise, institutions are under no legal obligation to restrict undocumented or out of status individuals from enrolling in school). Schools are not required by the immigration laws to keep additional information on such students. Although the question of whether or not a university is obligated to report the presence of undocumented or out of status individuals enrolled at the institution is a bit complicated, a review of the law supports the assertion that institutions are not required to report such a presence when the individual is simply attending school.”

One additional aspect of adviser/government relationship is the DSO’s responsibility for being a “spokesperson” for the government in disseminating updates and other information to their institutions and advisees. Advisers have experienced dramatic changes since 9/11 as they have faced the unprecedented challenge of keeping up with the almost daily onslaught of new federal regulations, policies, and directives affecting their institutions and advisees. Official information alone has been voluminous and the informal interpretations, commentary, listserv discussions, and conference presentations have increased it exponentially. The NAFSA Advisor’s Manual, which is updated annually, traditionally been the best reference for constantly changing regulations and procedures in this field. There are also issue-specific resources like the SEVIS liaison call series of NAFSA/agency conference calls and NAFSA practice advisories most of which are available on NAFSA’s website (<http://www.nafsa.org>).

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Relationship with students

Recent developments have tested, reinforced and in some cases strained the adviser/student relationship. Besides “DSO” the adviser role has also been called “counselor,” “student advocate,” “coach,” “helper,” “educator,” and “program coordinator.” SEVIS and the other post 9/11 regulations have arguably added “reporter,” “informant,” “monitor,” and “government watchdog” to the list. These new roles have not only changed the adviser’s responsibilities and daily duties, but created a difficult dynamic for many in the field, stressing individuals and offices and straining perceived loyalties to the point of driving some to leave the field. Others have voiced concern for

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the potential “chilling effect” when students find out that the international office will be reporting on them to the government, diminishing the trust necessary in a counselor relationship and discouraging full candor about cultural adjustment, personal or academic issues. An adviser should definitely disclose the reporting obligations to the student especially in advising situations where reporting is likely; this disclosure, however, be done in such a way as to assure students that the adviser’s first loyalty is to the university, not the government and that their primary role is to provide service to students and help them out of difficulties, notwithstanding legal obligations that must be met. Clearly explaining what information must be reported and when will also help alleviate potential conflicts and ethical dilemmas.

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DSOs regularly face conflicting responsibilities and must make subjective judgment calls on a daily basis about not only what and when to report to the government but how to advise the student of potential trouble. For example, a student who makes statements or takes actions that confirm his or her intent to seek permanent residency is clearly at odds with “non-immigrant intent,” a condition of F-1 status. While probably not a reportable status violation under SEVIS, the student should be advised either reconsider this intention or at least not announce it anywhere near a US consulate of entry. When issues like this come up, the student needs to be advised carefully the legal parameters of what they should and shouldn’t say – sometimes a delicate balance between advising and “coaching.”

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Another example arises from the new requirement that a student reducing his or her course load for medical reasons must obtain DSO permission *before* dropping the class. If the student has dropped the class even one day before seeing the DSO, regardless of the reason (be it an honest misunderstanding or a compelling medical situation), the adviser is faced with the dilemma of either reporting the incident as a technical status violation and thus subjecting the student to potentially serious consequences or ignoring it as a harmless error, under the traditional “no harm, no foul” justification.

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How an adviser reacts to situations like these may depend on how they ultimately define their position – which label best fits their role and which should predominate when their interests collide. The Adviser’s Manual defines the adviser’s role as “educator, counselor, and helper of foreign students” while acknowledging the need to “care

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balance their duties to their institutions, to the government, to their profession, and to the students they advise.” (2004 Adviser’s Manual 3-212). To truly “balance their duties,” advisers need carefully consider, test, weigh, and ultimately prioritize these roles.

There are potential problems with some of the roles, especially “counselor” or “student advocate” if they are pursued too zealously and to the exclusion of other interests and concerns. “Counselor” can cause trouble if advisers (many of whom come from counseling backgrounds) allow what they might perceive as a need for absolute confidentiality to interfere with their regulatory duties to report certain information.

While many advisers rightly see themselves as “student advocates” providing an empathetic buffer between the student and governmental, institutional and societal interests, this role can be carried to inappropriate extremes if not tempered with other guiding

principles, such as institutional loyalty. The job title of “advocate” more properly belongs to legal counsel in a representative relationship with a client. Advisers should also be wary of the “advocate” label since many of them, depending on the specific jurisdiction, may already be skirting the line of “practicing law without a license.”

Identifying that particular line depends on individual state law, professional ethics codes and statutory definitions of key terms like “represent,” “advise,” and “practice.”

Recently many states have begun regulating non-lawyer “Notario” practice, which is seen by some as an effort to reign in an encroachment on the legitimate practice of law field. Advisers and those who supervise them would do well to review the status laws and developments with legal counsel.

While NAFSA prefers “educator, counselor and helper,” the most fitting functional title may simply be “adviser,” which puts appropriate emphasis on their role as a communicator, one who gives advice, as opposed to the advisee who receives it. It is important for DSOs to set boundaries and identify when lines need to be drawn and when they are getting close to being crossed. Drawing the line as an adviser is not unlike an in-house legal counselor, who, in advising an institutional decision-maker must often delineate where that counselor’s advisory role ends and where the decision-maker’s begins. The same pattern applies for advisers who must constantly remind students that these immigration matters are ultimately the student’s responsibility and that they must decide if and how they will comply. This is easier said than done, especially when the

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foreign student is often completely relying on the adviser's knowledge of the system and his or her recommendation carries enormous weight.

Regardless of the specific label assigned to the adviser/student relationship, its foundation is essentially educational in nature. The Adviser's Manual (3-224) cautions.

"Violations of confidences and unauthorized releases of information are sure to destroy the educational relationship between the institution and its students, undermine the learning environment and the very purpose of international educational exchange. With the exception of specific legal requirements, school officials must be vigilant in maintaining the students' confidence in their roles as counselor-educators."

The final paragraph in the F-1 section of the Adviser's Manual offers this telling reminder, "In dealing with DHS and individual immigration officers, school officials should continually emphasize the importance of the educational process and encourage immigration officers to observe and respect it." While acknowledging that "most immigration officers are reasonable and will not demand actions by a school official that will erode or destroy the official's educational role," the Adviser's Manual goes on to suggest specific steps to take for encounters with an immigration official "who is not so inclined."

Another facet of the adviser/student relationship that often raises ethical dilemmas is the concept of actual vs. constructive knowledge. As they meet with students, advisers often walk a fine line between looking the other way ("I didn't just hear that") and cutting off a conversation when a suspicion of status violation is still just a suspicion and has not been confirmed. A carefully worded and well-timed "hypothetical" from the adviser ("If you have worked without authorization then your options are abc, if not, your options are xyz") often leaves the disclosure and decision up the student, who ultimately bears this responsibility. This is frequently challenging to do, especially with language barriers and unclear legal standards that are not always easily explained. In a section dealing with Institutional topics, including "institutional knowledge" the Adviser's Manual offers this perspective:

"In legal language attorneys talk about "constructive knowledge" and the absence or "deniability." Did you know? Could you have known? Should you know? Should you have taken or refrained from some action as a result of the knowledge? With immigration issues the foci of risk tend to collect around employment. DHS generally takes the position that if one part of the institution knows a thing, then the institution as a whole knows or has "constructive knowledge" about that thing. Further,

the institution cannot generally hide behind technical ignorance or “deniability.” If the institution knows or has reason to believe that an individual status or not permitted to work, the institution cannot rely on a defense if documents ‘appeared’ to be in order.” (Adviser’s Manual 14.7.3.1)

The Advisers Manual also provides the following explanation, Authority and Practice Note on this challenging topic:

14.1.2.6 Knowledge and constructive knowledge

IRCA [The Immigration Reform Control Act] prohibits an employer from hiring an unauthorized alien for employment in the United States if the employer *knows* that the alien is unauthorized. IRCA also prohibits an employer from continuing to employ an alien when it *knows* that the alien is unauthorized. Since *knows* is an essential element of the offense, it is very important to understand when an employer will be seen to *know* about the employment eligibility of an alien.

Regulations define when DHS will consider an employer to *know* about an alien’s lack of proper authorization for employment in the United States. The regulatory definition covers not only actual knowledge, but also constructive knowledge that an employer *should have had* under certain circumstances.

Authority cite

8 C.F.R. §
274a.1 (1) (1)

The term “knowing” includes not only actual knowledge but also constructive knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, the following situations where an employer:

- (i) *Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;*
- (ii) *Has information available to it that would indicate an alien is not authorized to work, such as Labor Certificate and/or Application for Prospective Employer;*
- (iii) *Acts with reckless and wanton disregard for the legal consequences of permitting another individual to employ an unauthorized alien into its work force or to act on its behalf.*

Deleted: Potential problems with all of the roles, especially “advocate,” “counselor” and “coach” if they are carried to extreme lengths or too zealously protected to the exclusion of other interests and concerns. “Counselor” can cause trouble if advisers (many of whom come from counseling background) allow what they might perceive as a need for absolute confidentiality to interfere with their regulatory duties to report certain information to the government. “Student advocate” seems an appropriate label in terms of the DSO’s empathy and concern for the individual as well as the “buffer” they can be between the student and both the government and the institutions, but “advocate” is a potentially loaded term that can be carried to inappropriate extremes if not tempered with other guiding principles, such as institutional loyalty. Furthermore, the job title of “advocate” belongs to legal counsel who represent their clients. DSOs should avoid the “advocate” label since many of them (depending on the specific jurisdiction) may already be skirting the line of practicing law without a license. [1]

Deleted: offers this reminder, “In dealing with DHS and individual immigration officers, school officials should continually emphasize the importance of the educational process and encourage immigration officers to observe and respect it.”

Deleted: Another facet of the adviser/student relationship that often raises ethical dilemmas is the concept of actual vs. constructive knowledge. As they meet with students DSOs often walk a fine line between looking the other way (“I didn’t just hear that”) and cutting off a conversation when a suspicion of status violation is still just a suspicion and has not been confirmed. A carefully worded and well-timed “hypothetical” situation often leaves the disclosure and decision up to the student, whose responsibility this ultimately is. Easier said than done, especially with language barriers and when legal standards are not always clear. [2]

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Practice Note

Constructive knowledge and on-campus employment

The list of what constitutes constructive knowledge is not limited to the examples given in the regulation. Knowledge can be inferred from different sets of facts in different situations. Consider, for example, the question of eligibility for on-campus employment. If a school has information available in its databases that an F-1 student is registered for less than a full course of study, and the student file in the International Office does not indicate that the student has been approved for a reduced course load by the DSO, will the institution as an employer be seen to have constructive knowledge that the student is no longer eligible for on-campus employment, since he or she may be out of status? What if a DSO sees one of her F-1 students, who is working on campus in the International Office during the day, working at a restaurant after business hours? When does the institution as employer *know* that an individual is not or is no longer authorized for employment? Advisors should discuss these issues with institutions counsel. There is no easy answer.

Advisers on campuses are faced with balancing their counseling and advising responsibilities as university administrators with the reporting requirements of new legal and regulations. That is not easy when government rules and instructions are not clear and subject to varying interpretations. Reported information, if entered incorrectly, could cause students trouble at ports of entry to the U.S., delays in getting visas, visa denials, and even arrests and deportations. Institutions must support well-trained, conscientious advisors who are able to handle these complex duties and legal responsibilities. Flexibility and creativity are essential characteristics of a successful "can-do" adviser, but they also need to be able to draw the line and communicate that clearly to others, especially student advisees. Some lines, such as making a misrepresentation to the government (or even hinting that a student advisee should do so), should never be crossed or even approached. As is the case for the foreign nation "unpardonable sin" for DSOs is misrepresentation to the government. Questionable or aggressive advising situations can always have the "sting" taken out of them with full disclosure to the parties involved, including the applicable government agency, to avoid subsequent charges of misrepresentation. Special care should be taken when applications

or other official documents are being endorsed or certified – even the routine signing of an I-20 form involves serious and comprehensive representations to the government.³

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In addition to the official liabilities and accountabilities to the government, there are growing concerns among DSOs over potential institutional and individual liability for harm resulting to students or scholars from faulty advising or administrative errors.

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the volume of student data passing through institutional databases and flowing back and forth between the school and the government, such errors seem not only likely but inevitable for even the most cautious DSO. With tighter regulations from many agencies,

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increased monitoring by DHS, the FBI and the IRS, and stiff and sometimes irreversible penalties and consequences for international students who fall out of status, overstay visas or are unlawfully present, a multi-million dollar, your-negligence-ruined-my-life lawsuit from a disgruntled student seems more a question of *when* than *if*. While this scenario may be an adviser’s worst nightmare and signal the total failure of the

adviser/student relationship, the remedy, ironically, lies not in that relationship, but in the adviser’s relationship with his or her own institution.

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Relationship with Institution

Ultimately the best way for any employee to avoid liability is to do the job they’ve been hired to do to the best of their ability. The gray areas surrounding the potentially competing roles and interests that advisers face will be clarified by

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³ In signing the Form I-20 at item 10, the designated school official certifies under penalty of perjury, that:

“All information provided above in items 1 through 8 was completed before I signed this form and is true and correct. I executed this form in the United States after review and evaluation in the United States by me or other officials of this school of the student’s application, transcripts, or other records of courses taken and proof of financial responsibility, which were received at the school prior to the execution of this form; the school has determined that the above-named student’s qualifications meet all standards for admission to the school; the student will be required to pursue a full course of study as defined by 8 C.F.R. 214.2 (f) (6); I am designated official of the above-named school and I am authorized to issue this form.”

Successful prosecution for perjury would require the government to prove that the school official willfully and knowingly certified to false information with the intent to deceive. Unintentional omissions and misinterpretations do not constitute perjury. U.S. law provides severe penalties for willfully making a false statement to a government official. School officials should be aware of the importance the government attaches to the proper certification and signing of Forms I-20. ([2004 Adviser’s Manual](#) 3.25.8.3)

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recognizing preeminent loyalty to the institution and its educational mission. A recent NAFSA newsletter article “Individual Liability for Advisers: Protecting Yourself When ‘SEVIS Happens’” (March/April 2003) highlighted agency and indemnification issues relevant to DSOs concerned about personal liability. The key to DSO peace of mind on liability issues is staying within the scope of employment and acting reasonably and responsibly. The article suggested the following six actions to reinforce institutional agency relationships and to increase the chances of indemnification:

- Make sure you have a clear understanding of what matters fall within the scope of your responsibility as a DSO, both in terms of official delegation of duties from INS as well as any institutional expectations. Ask yourself: Does my institution expect me to be giving this advice or making these representations on its behalf?
- Do not get pressured into advising students and scholars in academic or institutional areas that are outside the scope of your professional knowledge and responsibilities, but instead point students and scholars in the right direction – whether it be to their academic advisor, payroll, your institution’s housing office, etc.
- If a student’s immigration status is in jeopardy – or if advising the student personally may conflict with your institutional and SEVIS-related responsibilities as a DSO, advise the student to consult with his or her own immigration lawyer outside the institution.
- For more complex matters, put your advice in writing and make a note to your records of whom you consulted, what you decided to do and why you did it. If a question of indemnification arises, this will assist you in showing the institution that you acted carefully and to the best of your professional judgment.
- Be familiar with the *NAFSA Code of Ethics* and take full advantage of the vast array of NAFSA resources (*NAFSA Adviser’s Manual*, conferences, workshops, Web site, etc.). Benchmarking with other institutions, especially on tough cases, will help prove the legitimacy and reasonableness of your decisions and actions should they be challenged or questioned down the road.
- When necessary, consult with and act on the advice of supervisors and other administrators, including your institution’s legal counsel. Help these individuals and other policy- and decision-makers at your institution appreciate the full extent of your DSO responsibilities, the significant “judgment calls” you face on a daily basis, and the critical need for adequate training and support.

Understanding and articulating the true nature of advisers' positions, and an aspects of their institutional agency, would be a worthwhile effort for any institution. NAFSA manual has useful guidance on this point, drawing a distinction between representatives who have been officially designated and authorized and *de facto* representatives whose positions within the institution determine the scope of their authority. DSOs are some of the most common and compelling examples of the first type (formal) in higher education, but depending on the institution and the specific duties, they may have many elements of *de facto* representatives as well.

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Formally designated representatives

Designated representatives identified by the institution have the right and authority only to speak for the institution, but also to speak for the agency that has authority in the institution. For example, when a DSO issues and signs a document to allow an admitted student to apply for a visa and enter the United States, the DSO confirms both that the institution has admitted the student and that the DHS or DOS, in principle, recognizes the individual as a *bona fide* student eligible for a visa and admission. Designated representatives have multiple responsibilities in such an action: 1) To understand the depth and breadth of their authority; 2) To understand the factors that influence whether they issue the documents and what information those documents should or must contain; and 3) To ensure that they issue the documents within the guidelines and expectations of the institution and within the regulations and guidance of the federal agency.

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De facto advisers and representatives

In large institutions immigration advisors often acquire or receive representative authority attendant to their positions within the institution. These may include, but are not limited to: human resources authority to recruit, hire, promote, discipline, or terminate employees; academic authority to admit or accept students or scholars and manage or influence their relationship with the institution; and administrative authority to sign immigration related documents such as H-1B petitions or employment-based immigrant petitions.

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The immigration adviser has the right and authority, as an employee or designee of the institution, to represent the institution in all of these capacities. The immigration adviser has the responsibility to know and understand the relationship of each kind of authority to all the others, to practice due diligence to ensure that the objectives of the institution are met within the law, and to advise appropriate administrators and other authorities of areas of conflict or concern so the institution can make necessary policy decisions. In addition, many institutions elect to provide a broad range of advising and counseling services for academic and personal concerns. Frequently the immigration adviser becomes part of this team as well, and must incorporate these rights and responsibilities with the others. (2004 Adviser's Manual, 14-53)

With all the varied responsibilities of advisers, there are many possible offices on campus where they might reside and report, with as many variations as there are institutions. Where this function resides at a particular institution may depend on whether international student and international scholar (post-doc, researcher, faculty) services are combined and where other related functions such as employee service processing, tax compliance and student insurance are housed. Whatever your institution's history and structure, with the changing landscape, this is an opportunity to reevaluate not only where this function resides and reports on your campus, but whether it is adequately staffed and supported.

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Regardless of organization and reporting structure, there should definitely be a close working relationship between university legal counsel and the international office, which includes advisers with no legal background who are interpreting immigration and regulations, authorizing employment, and performing other legal-type functions on a daily basis in their roles as DSOs. These advisers take seriously the responsibility to inform, counsel, and assist their students, scholars and the rest of the campus community in dealing with the many confusing new rules and procedures affecting them. To properly perform their multi-faceted duties, advisers need adequate staffing, training, association with professional organizations, professional development opportunities, and ready access to both university legal counsel and experienced immigration attorneys.

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Like university counsel, the primary focus of many international advisers, especially since 9/11, may be compliance, security and avoiding liability, but both also are in positions to help those they serve to see a bigger picture. Both can help find creative ways of complying with the law but at the same time keeping our doors open and inviting for international guests. Both are in unique positions to help their institutions rise above the bureaucratic road blocks and ongoing efforts to use 9/11 to advance immigration agendas. The critical role that international advisers play of supporting advising and guiding our international students through this complicated system should be acknowledged and appreciated. During this incredibly challenging time, they keep our institutions performing their mission of educating the best and the brightest from all over the world.

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Potential problems with all of the roles, especially “advocate,” “counselor” and “coach” if they are carried to extreme lengths or too zealously protected to the exclusion of other interests and concerns. “Counselor” can cause trouble if advisers (many of whom come from counseling background) allow what they might perceive as a need for absolute confidentiality to interfere with their regulatory duties to report certain information to the government. “Student advocate” seems an appropriate label in terms of the DSO’s empathy and concern for the individual as well as the “buffer” they can be between the student and both the government and the institutions, but “advocate” is a potentially loaded term that can be carried to inappropriate extremes if not tempered with other guiding principles, such as institutional loyalty. Furthermore, the job title of “advocate” belongs to legal counsel who represent their clients. DSOs should avoid the “advocate” label since many of them (depending on the specific jurisdiction) may already be skirting the line of practicing law without a license. Determining if you’ve crossed (or are getting close to) that line depends on individual state law, professional ethics codes and statutory definitions of several key terms such as “represent” “advise” “practice.” Recently many states have began regulating Notorio practice, which is seen by some as an effort by state governments to reign in an encroachment on the legitimate practice of law in this field.

While NAFSA seems to prefer “educator, counselor and helper,” my preferred functional title would simply be “Adviser” which seems to put the appropriate emphasis as a communicator and giver of advice (Adviser would be even better because it further emphasizes the “or” as one who gives the advise, as opposed to the advisee who receives it), Important for DSOs to set boundaries and identify when lines need to be drawn and when they are getting close to being crossed. Drawing line as an adviser is not unlike an in-house legal counselor/advisor advising an institutional decision-maker makes it clear where the counselor’s advisory role ends and where the decision-maker’s begins. The same pattern applies for adviser who must constantly remind students that these immigration matters are ultimately their concern and they must decide if and how they will comply. This is easier said than done, especially when the foreign national is often completely relying on the DSO’s knowledge of the system and his or her recommendation carries enormous weight.

Regardless of the specific label we assign DSOs, it is most important to emphasize the educational nature that should underlie all of their relationships. The final paragraph in F-1 section of

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looking the other way (“I didn’t just hear that”) and cutting off a conversation when a suspicion of status violation is still just a suspicion and has not been confirmed. A carefully worded and well-timed “hypothetical” situation often leaves the disclosure and decision up to the student, whose responsibility this ultimately is. Easier said than done, especially with language barriers and when legal standards are not always clear. In a section dealing with Institutional topics, including “institutional knowledge” the NAFSA Adviser’s Manual offers this perspective:

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Cary Jensen

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In legal language attorneys talk about “constructive knowledge” and the absence or presence or “deniability.” Did you know? Could you have known? Should you have known? Should you have taken or refrained from some action as a result of the knowledge? With immigration issues the foci of risk tend to collect around employment. DHS generally takes the position that if one part of the institution knows a thing, then the institution as a whole knows or has “constructive knowledge” about that thing. Further, the institution cannot generally hide behind technical ignorance or technical “deniability.” If the institution knows or has reason to believe that an individual is out of status or not permitted to work, the institution cannot rely on a defense that “the documents ‘appeared’ to be in order.”

F and J status permits students and scholars to work on or off the premises of the institution subject to a host of regulations and limiting factors. If the institution issues the visa document for the F or J student or scholar and employs that student or scholar at the institution, immigration law assumes that the institution knows whether and in what capacities the institution can legally employ that alien. (2004 Adviser’s Manual 14.7.3.1)

The NAFSA Advisers Manual also provides the following detailed explanation, Authority cite and Practice Note: