THE PRACTICE AND PROFESSION OF HIGHER EDUCATION LAW

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Writing in 1985, a leading authority on higher education law observed: “The last quarter century has witnessed an enormous expansion in the law's presence on America's campuses. Whether one is engaged in campus disputes, planning to avoid future disputes, or charting an institution's policies and priorities, law has become an indispensable component of decision-making.” More than a decade later, the presence of law and legal issues on the campuses of this nation has not abated. In 1985, on its twenty-fifth anniversary, the National Association of College and University Attorneys (NACUA or Association), the specialty bar association for higher education lawyers, reported having approximately 2400 members. Today, the membership numbers 2762. With growth in numbers, and longevity

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2. A more complete description of NACUA and its activities follows at infra notes 69–91 and accompanying text.
4. Telephone Interview with Sheila Trice Bell, Executive Director and CEO, NACUA (May 14, 1997).
of function, has come the recognition that higher education law is a distinct professional specialty, certainly different from the substantive activities of corporate lawyers in the business community.

While considerable issue overlap exists in the representation of higher education institutions and pre-college schools, major differences in the legal issues confronted exist. In particular, faculty, student, and governance issues are often quite different in the higher education arena. The extent and intensity of governmental regulation is greater for higher education than the K-12 world. Charitable giving and taxation issues are infrequent in K-12 but common in higher education. The topic headings of NACUA's exchange of legal information service reflect the extensive (but by no means exclusive) range of the law of higher education and demonstrate both the breadth and uniqueness of this area of practice.

The recognition and maturation of higher education law as a distinct practice area is relatively recent. Until the early 1960s, the legal needs of colleges and universities were limited. Services were often provided, without charge, by lawyers who were prominent alumni or members of the Board of Trustees. Occasionally, but rarely, the contributions of lawyers to the creation of colleges were recognized: “Judge Anson Brunson assisted the Board [of Pomona College] in the preparation of the Articles of Incorporation . . . and management of property. He was the first of a long line of lawyer members to whom the Board would be greatly indebted.” Zealousness to an extent exceeding propriety was attributed to one counsel: “Judge Edward H. East, as president of the Board of Trustees, did the legal work and apparently even signed a fellow judge's name to the chancery court order of August 19, 1972, that legally established Central University (the forerunner to Vanderbilt University).” Generally, the contributions of clergy or politicians are

5. These observations are derived from the Author's recent private practice experience, in which he represented pre-school, K-12, and higher education institutions. In addition, his observations here and elsewhere in this Article are derived from his more than 23 years as a higher education lawyer.
6. See infra app. A.
7. See Roderick K. Daane, The Role of University Counsel, 12 J.C. & U.L. 399, 399 (1985). The Daane article, describing the role of the higher education lawyer, with particular emphasis on the responsibilities of in-house counsel, has survived the test of time and should be read by anyone seeking appointment as a campus counsel.
9. Paul K. Conkin, Gone with the Ivy: A Biography of Vanderbilt University
recognized, to the exclusion of lawyers, in college histories.\textsuperscript{10} Some drafting, occasional contract review, and general assurance that a course of conduct was “legal” were usually all that was required. Litigation was rare: indeed, the West Digest topic “colleges and universities” consumes only eighty-one double-columned pages in the period through the \textit{Fourth Decennial Digest}, which covers cases from 1658 to 1936.\textsuperscript{11} The triple-columned \textit{Eighth Decennial Digest}, covering reported cases decided from 1966 to 1976, devoted ninety-five pages to “colleges and universities”;\textsuperscript{12} that title grew to 124 pages in the \textit{Ninth Decennial Digest}.\textsuperscript{13} Higher education law clearly became a growth industry.

Of course, higher education needed legal services from time to time. Has anyone not heard Daniel Webster’s paean to Dartmouth College — uttered in his defense of the sanctity of the college’s charter in the face of antagonistic government action?\textsuperscript{14} Even before the Dartmouth College case, the best known higher education case of the nineteenth century, a dispute arose not unlike that encountered by campus counsel today. In 1718, Ebenezer Pierpoint, a 1715 Harvard graduate, was denied his second degree by Harvard President John Leverett for “his condemning, reproaching and insulting the government of the college.”\textsuperscript{15} After a “long and imperti
ment” harangue, the Harvard Board upheld the denial of the degree. Pierpoint sued and, eventually, Harvard prevailed as the General Court held that Pierpoint had received a proper hearing from the College’s officials.16

Higher education law, as a distinct professional pursuit, was born in the 1960s. The contributors to a special symposium issue of The Journal of College and University Law commemorating NACUA’s first twenty-five years refer to events in that decade, and in the 1970s, as being the stimuli to the growth of higher education law and higher education lawyers as a distinct professional group.17 A need for legal services to higher education was created by campus disruptions during the Vietnam era. Occasionally, court orders were sought to quell protest.18 The Dixon v. Alabama State Board of Education19 decision confirmed the existence of due process rights for students involved in disciplinary proceedings at public universities.20 The unpopularity of the war in Southeast Asia, and the concomitant aversion to strong sanctions against anti-war demonstrators, led to the creation of disciplinary codes, at both public and private institutions, that rivaled criminal codes. The eradication of doctrines of charitable immunity exposed private colleges to tort claims for the first time.21 A cynic might suggest that since many of the early disciplinary procedures were written by lawyers, they were created in such a way as to insure full employment. Colleges, faced with significant legal expenses for the first time, began hiring counsel, often from the firms already providing legal services to the institution.22

1636–1819, at 26 (1982). Herbst’s account contains no mention of the counsel for the college, although at a meeting with the colony’s governor, President Leverett personally defended the Harvard tutor involved in the matter while the colony’s Attorney General spoke on behalf of Pierpoint. The case involved political issues more important that the award of the degree. See id. at 27.

16. See id. at 26–27.
19. 294 F.2d 150 (5th Cir. 1960).
20. See id. at 158.
22. For example, Edward “Tad” Foote became general counsel of Washington University in the early 1970s after handling several student discipline cases. Foote is now President of the University of Miami.

The complexities of the Employee Retirement Income Security Act of 1974 are mind-boggling. Regulatory initiatives that were short lived, such as price controls and energy crisis measures had an impact. Title IX dates from that era, as do a number of other measures having a particular impact on medical schools. College and university administrations realized that, in most cases, utilization of outside counsel to develop policies and procedures would be quite expensive and, because of their lack of knowledge of the institution, marginally effective. The landmark United States Supreme Court cases of Board of Regents v. Roth and Perry v. Sindermann defined faculty rights in termination situations. The need to provide due process at public institutions in faculty terminations created a need for legal guidance. The student enrollment boom of the 1950s and 1960s was waning, and institutions addressed issues of cutbacks and financial exigency, contentious situations that called for legal guidance.


30. 408 U.S. 593 (1972).
31. At private institutions, faculty rights are contractual and are usually expressed in a faculty handbook. To the extent that the institution follows procedures suggested by the American Association of University Professors (AAUP), private institutions provide ample “due process.” The current AAUP procedures are found in its AAUP Policy Documents and Reports (1995) (the Redbook).
Candid college histories document the new challenges fostering the need for campus counsel. Confronting Vanderbilt and many other colleges and universities during this period, as reported in *Gone with the Ivy*, were a variety of issues, all with legal implications: allegations of sex discrimination in a tenure decision; admission of a controversial student; insuring “good taste” in student publications; homosexuals on campus; Vietnam era protests; speakers abhorrent to many in the community; drug use; abolition of *in loco parentis* doctrines, including student demands for autonomy in alcohol use, dorm hours, and visitation opportunities; minority (African-American) unrest; and merger with an adjacent college. This delineation, not atypical for universities in the 1960s and 1970s, is an agenda of potential or actual conflict that required the frequent involvement of counsel. The uniqueness of the issues, and the context in which they arose, convinced many that persons with legal skills and an inclination to be strong advocates for institutional values, were needed on campus both to play an advisory role, and when necessary, to be a visible advocate for the university's position.

Another university historian described conditions on his campus, the University of Iowa, during this period that made apparent the need for counsel in higher education:

The university was confronted with a situation in which both external and internal forces were seeking a share in its control. Federal and state legislatures, federal granting agencies, accrediting bodies, foundations and private donors all threatened its autonomy . . . . Each group emphasized its rights rather than the soundness of decisions arrived at. The university itself could be faulted for its educational conservatism, inefficiency, disorderliness, and indecisiveness.

32. See CONKIN, supra note 9, at 724–33.
33. See id. at 643.
34. See id. at 634–35.
35. See id. at 631–34.
36. See id. at 626–29.
37. See id. at 619–21.
38. See CONKIN, supra note 9, at 631–32.
39. See id. at 638.
40. See id. at 641–43.
41. See id. at 717.
42. STOW PERSONS, THE UNIVERSITY OF IOWA IN THE TWENTIETH CENTURY: AN INSTI-
Because of the training and the inclination of the profession, the latter three traits are repugnant to lawyers. Their analytical skills had to be employed in evaluating, and often rebutting, the claims of "right" that emerged with a vigor, and lack of civility, not previously witnessed on campus.

The first campus legal office was established at the University of Alabama in 1925. Before the 1960s, only about a dozen offices had been created. About twenty offices were created during the 1960s, with almost sixty offices being added in the 1970s. In 1983, more than one-half of all campus legal offices had been created since 1972. By 1992, fifty-five percent of NACUA institutions were represented by in-house counsel compared to forty-seven percent in 1983. By 1994, seventy-four percent of the NACUA institutions were represented primarily by in-house counsel. Colleges and universities principally relying on outside counsel for their legal needs were primarily private institutions with annual budgets of less than $100 million. In 1994, only twelve percent of the public institutions or five percent of any institutions with a budget of at least $100 million per year lacked in-house counsel. Despite the growth of campus counsel positions, average expenditures for outside counsel increased three-fold, from $127,000 in 1983 to $350,000 in 1992. Higher billing rates were paid by private institutions of higher education. Compared to rates charged to public institutions, the billing


43. See NACUA, DELIVERY OF LEGAL SERVICES TO HIGHER EDUCATION INSTITUTIONS 5 n.1 (1984).
44. See id. at 5 fig. 2.
45. See id.
46. See id.
47. See NACUA, PROVISION OF LEGAL SERVICES 2 (1992).
48. See NACUA, COMPENSATION AND BENEFITS SURVEY REPORT 2 (1995) [hereinafter COMPENSATION AND BENEFITS]. No significant event affecting the college and university community could account for this dramatic increase. Assuming the 1994 figures are accurate, one can only assume under-reporting occurred in 1992.
49. See id. at 11.
50. See PROVISION OF LEGAL SERVICES, supra note 47, at 3. Administrators often assume that hiring in-house counsel will result in a dramatic reduction in outside legal fees. This is not always a correct assumption. Counsel may discover unmet needs or unresolved issues that require the attention of outside counsel. But over time, legal costs should be reduced. More transactions and advice will be handled inside. More significantly, as campus counsel fulfills preventative responsibilities, more favorable (or at least less negative) outcomes will occur.
partner's rate for the private sector was nineteen percent higher, while the associates was fifteen percent greater. 51

NACUA's 1992 survey revealed that, for the past five years, in-house counsel identified five areas that required most of their effort: preparing or reviewing documents; addressing affirmative action and non-discrimination issues; dealing with faculty personnel actions; handling student affairs matters; and providing labor relations counsel. 52 Outside counsel's division of effort was identical, except that real estate replaced labor relations. 53 For outside counsel, specialty areas in which the greatest workload increase occurred were: affirmative action and non-discrimination; employee benefits; construction matters; faculty and staff personnel actions; and preparing and reviewing documents. 54 Areas of marked growth identified by campus counsel were: affirmative action and non-discrimination; faculty and staff personnel actions; personal injury and tort defense; federal regulation; environmental law; employee benefits; and preparing and reviewing documents. 55

The average annual campus legal office budget grew from $177,000 in 1983 to $402,000 in 1992 to $509,277 in 1994. 56 Comparing budgets for institutions with medical schools or an affiliated foundation to colleges or universities without those entities reveals a substantial gap in budgets, with the former at $951,335 in 1994, and the latter trailing at $313,314. 57 The budgets reported by private institutions were approximately twenty percent higher than the public sector. 58

College and university counsel tend to have considerable experience in the legal profession. In 1992, about seventy percent of the campus counsel had more than ten years of legal experience. 59 Slightly more than half of campus counsel, however, had less than ten years of higher education law experience. 60 A nearly equal division of male and female members exists, with minorities comprising

51. See Compensation and Benefits, supra note 48, at 12.
52. See Provision of Legal Services, supra note 47, at 9.
53. See id. at 15.
54. See id. at 16.
55. See id. at 10.
56. See id. at 10; Compensation and Benefits, supra note 48, at 17.
57. See Compensation and Benefits, supra note 48, at 17.
58. See id.
59. See Provision of Legal Services, supra note 47, at 7.
60. See id.
fifteen percent of the membership.61

As counsel began to appear on campus in significant numbers in the late 1960s and early 1970s, commentators sought to delineate their use and functions.62 A “first law” for the proper use of counsel was “have one.”63 Another accurately described the essence of counsels’ role:

[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 . . . .64

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.65 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

61. See id. As a comparison, male ABA members outnumber women three-to-one. See id.
62. References to “early” articles can be found in footnotes 2–18 of the Daane article, supra note 7.
63. Daane, supra note 7, at 402 (quoting Norman Epstein, The Use and Misuse of College and University Counsel, 45 J. HIGHER EDUC. 635, 636 (1974)).
65. An example of this activity is the review by many colleges and universities of their admissions and financial aid policies for minorities in the wake of the Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996), and Podberesky v. Kirwan, 98 F.3d 147 (4th Cir. 1994).
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, in his seminal article about university counsel, describes six “basic roles” of university counsel: Advisor-Counselor; Educator-Mediator; Manager-Administrator; Draftsman; Litigator; and Spokesman.66 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

66. See Daane, supra note 7, at 404–07.
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 pressures more numerous and intense than those of the 1970s and 1980s. But the appropriate response is not to figuratively follow Shakespeare's suggestion for management of counsel.

The evolution of higher education law as a recognized specialty within the legal profession is paralleled, in large part, by the emergence and growth of the NACUA. NACUA was founded in 1960–61 by about a dozen lawyers representing colleges and universities. Attorneys from Northwestern University, the Universities of Alabama and Michigan, and several Ivy League institutions played major roles in NACUA's formation. The first president of NACUA, in 1961–62, was Ralph A. Lesemann of the University of Illinois.

NACUA differs from other bar associations by requiring that membership be institutional rather than individual. Today, more than 2700 lawyers, serving 662 institutions with 1400 campuses, constitute NACUA's membership. This number includes both in-house counsel and lawyers in private practice. Approximately two-thirds of NACUA's member institutions are public and private colleges and universities with enrollments exceeding 5000 students and with budgets ranging from $50 million to more than $4 billion. These institutions have a cumulative enrollment of more than seven million students. The remaining one-third of the membership are

67. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980).
68. “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.
69. See NACUA, 1996–97 DIRECTORY OF MEMBERSHIP AND SERVICES 5 [hereinafter DIRECTORY].
70. See id. at 11. Perhaps the most unique Past President was Edmund McIlhenny of Tulane University, the scion of the Tabasco sauce empire.
71. An associate membership category exists for individuals not eligible for full institutional membership who have professional interests common to those of NACUA's membership. Persons in this category often represent state departments of education or higher education, education associations, and enterprises principally serving higher education, such as TIAA/CREF and United Educators Insurance Risk Retention Group, Inc.
72. See DIRECTORY, supra note 69, at 5.
private colleges and universities with enrollments below 5000 students and annual budgets below $50 million per year. Membership dues are derived from a matrix considering the institution's budget and student enrollment. Predictably, larger and more affluent institutions pay a larger share of the dues.

Member institutions are found in every state, Puerto Rico, and the District of Columbia, and range, alphabetically, from Abilene Christian University to Youngstown State University. The diversity of member institutions is vast, ranging from large state systems (e.g., California State University, a system with twenty-two campuses), community colleges (e.g., Maricopa County Community College District, with ten campuses), technical colleges (e.g., Indiana Vocational Technical College, with thirteen campuses), religious institutions (e.g., Brigham Young University, Yeshiva University, Mid America Nazarene College) including seminaries (e.g., Episcopal Divinity School, Jewish Theological Seminary of America), numerous small private colleges (e.g., Dakota Wesleyan University, Greenville College, Williams College), and institutions with unique missions (e.g., California College of Arts and Crafts, United States Coast Guard Academy, Gallaudet University, Illinois College of Optometry, Forsyth School of Dental Hygienists, The Juilliard School, Rhode Island School of Design). International members are welcome, with Canadian institutions currently predominant. In addition, institutional members are found in Australia, Israel, and Lebanon. Lawyers serving these institutions include in-house counsel and private practitioners. At smaller institutions, an in-house counsel will often have other responsibilities, such as teaching or fundraising.

NACUA, an educational organization exempt from income taxation, states that its “purpose is to enhance legal assistance to colleges and universities by educating attorneys and administrators about the nature of campus legal issues. It has an equally important role

73. See id.
74. See id. at 61–66.
75. See id. at 61–66, 68–70.
76. See id. at 67.
77. See id. at 67. Australia: University of Queensland; University of Western Australia. Israel: Hebrew University of Jerusalem. Lebanon: American University of Beirut. See id.
to play in the continuing legal education of university counsel.\textsuperscript{78} Central to NACUA's continuing legal education activities is its annual conference. The 1997 conference held in Seattle, featured twenty-two presentation sessions and an equal number of discussion groups. Topics covered reflect the variety of legal issues confronting college counsel, such as “Aid in Dying and Medical Ethics” and “Endorsements, Athletic Apparel and Shoe Contracts.”\textsuperscript{79} In addition, NACUA's twelve specialty sections (e.g., Athletics, Museums and Collections, Student Affairs) meet at the annual conference and provide an opportunity for dialogue on common issues. In recent years, at least 600 NACUA lawyers have attended the annual meeting. In addition, several one- or two-day workshops, often held in conjunction with other higher education groups, are held during the year.\textsuperscript{80}

Another way NACUA fulfills its purpose is through publication of pertinent and timely information. A quarterly law journal, \textit{The Journal of College and University Law}, is co-published with the University of Notre Dame Law School.\textsuperscript{81} The \textit{College Law Digest}, accompanying the \textit{Education Law Reporter} thirteen times per year, provides members with timely legal information and analysis. Association matters, such as meeting announcements and job opening notices, are found in the \textit{Digest}. Since the mid-1980s, NACUA has produced a plethora of publications ranging from compendia addressing broad legal topics to pamphlets dealing with specific issues such as bankruptcy and student records.\textsuperscript{82} In conjunction with the Center for Constitutional Studies at Baylor University, NACUA produced a handbook for private college administrators.\textsuperscript{83}

NACUA maintains a legal reference service that provides research assistance, sample policies, and documents and referrals to other NACUA attorneys with experience in the subject of the inqui-

\textsuperscript{78} See \textit{Directory}, supra note 69, at 5.

\textsuperscript{79} See 1997 NACUA ANNUAL CONFERENCE PROGRAM (copy on file with Author).

\textsuperscript{80} During the 1970s, usually one workshop per year was scheduled. This activity increased during the 1980s, with three workshops becoming the norm. During the 1990s, at least three other CLE's have been the norm. Also, other higher education associations frequently contact NACUA for the names of people to address legal topics.

\textsuperscript{81} See \textit{Directory}, supra note 69, at 55.


\textsuperscript{83} LEGAL DESKBOOK FOR ADMINISTRATORS OF INDEPENDENT COLLEGES AND UNIVERSITIES (Kent M. Weeks & Dereck H. Davis eds., 2d ed. 1999).
The electronic age has not bypassed NACUA. A dedicated network (NACUA Net) is available to member attorneys. Many hundreds of NACUA lawyers use it now, primarily to seek guidance on legal issues confronting their clients. A home page, or web site, was created in 1996. It enables NACUA to store and distribute up-to-date legal and Association-related information to the membership, or anyone else visiting the site. A position registry is maintained to facilitate the announcement of positions in higher education law.

NACUA is governed by a Board of Directors elected annually by the membership at the annual conference. An elected officer, the President, serves a one-year term and provides general direction to the organization. Traditionally, this office alternates between persons representing public institutions of higher education and, in the next year, an attorney counseling a private college or university. Five members at large are elected to the Board of Directors each year. They serve three-year terms and traditionally are not re-elected. Persons elected to officer positions have served as members at large of the Board. Unlike the American Bar Association or state bar associations, NACUA members don't “run” or campaign for election to the Board or officer ranks. Sections and committees perform the bulk of NACUA's educational and professional service responsibilities. The Association maintains an office in Washington, D.C., headed by an Executive Director and CEO, Sheila Trice Bell.

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84. See DIRECTORY, supra note 69, at 54–55.
85. The home page is located at <http://www.nacua.org>.
86. Some of the site's features include: online legal documents, cases, and sample policies for use by the Board, Committees and specialty sections, and online ordering and registration for NACUA publications and meetings. The site contains useful references to other legal resources on the Internet. See id.
87. See id.
88. A “ladder” system is used by the volunteer leadership of NACUA. The first rung is reached by election to the post of Second Vice-President. Other elected officers (in addition to the President and Second Vice-President) on the “ladder” are, in ascending order, First Vice-President and President-Elect. Other elected officers are the Secretary and Treasurer.
89. See DIRECTORY, supra note 69, at 41.
90. Some individuals try to campaign from time to time. They have been uniformly unsuccessful. A Nominating Committee, comprised of a cross-section of NACUA's membership, invites nominations from the entire membership for the elected posts and, after lengthy and thorough discussion, produces a slate of nominees for consideration by those attending the annual meeting. Nominations from the attendees can occur and provision exists for contested elections. A contested election occurred in the early 1980s; the challenger lost.
manages the national office staff and generally insures that the educational and service priorities determined by the Board and membership are addressed in the most appropriate manner. Along with the current year’s President, the Executive Director is the spokesperson for the Association. Another important facet of the Executive Director’s job is enhancing relationships with the other higher education associations.91

The current fiscal and programmatic strength of NACUA, and its preeminence in the field of higher education law is a result, in no small measure, of the outstanding work of its recently retired former Executive Director, Phillip M. (Mike) Grier. During his eighteen-year tenure, from 1978 to 1996, he righted a listing, bankrupt organization, and with creative leadership and gentle persuasion, quietly and effectively moved the association along an ever ascending path.

Were one to review the profession of higher education law in a dozen years, what would one observe? Gradual but limited growth in the number of in-house counsel positions will have occurred. Public colleges and universities, still under budget constraints in all but the most affluent states, will expand their in-house staffs infrequently and probably only when the degree of campus anxiety concerning certain legal issues reaches a high degree of intensity. Private colleges attempting to remain “affordable” will become leaner administratively, except in their public relations and development areas. Institutional counsel will continue to act as “triage” officers, tending to the most serious and volatile issues. Litigation and litigation-related activities (e.g., labor relations, administrative hearings, ADR) will occupy more and more of the campus counsel’s time. Counsel will train other administrators in the fundamentals of transactional work, shifting to them much of the basic document preparation done by counsel. Likewise, student affairs professionals will, through attending conferences and workshops, become even more adept at avoiding legal problems. Counsel’s office will become

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91. While NACUA is the principal national group serving higher education attorneys, higher education law practitioners often belong to other groups as well. Of course, many members also belong to the American Bar Association and find particular value in section activity. University health law practitioners find meetings and publications of the American Academy of Healthcare Attorneys (AAHA) and the National Health Lawyers Association (NHLA) to be rewarding. These organizations merged on July 1, 1997. The National Organization on Legal Problems of Education (NOLPE) counts among its members a number of practitioners and academicians.
even more wedded to electronic technology, with Internet access, CD-ROMs, and dedicated services largely replacing paper libraries.

The broadly defined areas of law that occupied campus counsel in the 1990s will still be major components of their work, but the specifics will differ. Although regulatory initiatives from the federal government will not have increased, audit and compliance activities will have. The passage of the balanced budget amendment in 1999, while limiting programs and new initiatives, will trigger a dramatic increase in governmental enforcement activity, including audits and compliance reviews. Substantial fines and penalties, as well as audit charges, will be levied against many institutions. Higher education will prove to be a particularly vulnerable and lucrative target. State and local taxing authorities will challenge the tax exemptions of higher education and other charities with greater frequency. Of course, given the economic impact of these issues on the college or university, counsel will be very much involved.

Student affairs professionals, and their campus counsel, will continue to address several problems encountered in the 1980s through the mid-1990s. A perennial was alcohol abuse. Concurrently, drug use became increasingly rare on campus. Sexual relationships between students and student claims of hostile environment sexual harassment against faculty and other students created difficult social/legal problems. Large-scale student demonstrations returned to campus after a thirty-year absence. Now, rather than a war in Southeast Asia, the precipitating events were the insistence by many Boards of Trustees that, for economic reasons, certain academic, social and athletic programs be cut.

Restructuring will accelerate in higher education. Related program closures and faculty and staff layoffs will keep counsel fully occupied. Collective bargaining and benefits disputes will multiply as a product of restructuring. The Supreme Court’s reversal of the NLRB v. Yeshiva University decision will lead to widespread un


93. 444 U.S. 672 (1980). The Supreme Court held that the Yeshiva faculty were managerial employees. See id. at 682. The Court’s definition of “managerial” is expressed at 444 U.S. 682–83. My prediction is based on the discongruity between the Supreme
ion organizing at private colleges and universities. The uncapping of the mandatory retirement age for faculty will lead many institutions to implement post-tenure review procedures, which will in turn lead to salary reductions and termination for certain senior faculty. Salary reductions and terminations will generate claims joining age discrimination with disability allegations. Particularly troublesome will be claims by faculty members asserting a need for reasonable accommodation for perceived or actual psychiatric conditions.

Health law specialists in the university legal community will be busy, too. In addition to the faculty and staff personnel issues common to all of higher education, they will continue to deal with a plethora of managed care plans and their effects. Medical centers will be caught in the middle between assertive plan patients, empowered by pro-consumer legislation, and limitations on available treatment options and reimbursement from third-party payers. Medicare and Medicaid will not operate in the current fashion. Direct reimbursement to providers will be discontinued. In their stead, new managed care entities will be created with an accompanying increase in both the complexity and paucity of reimbursement. The PATH (Physicians at Teaching Hospitals) audit program, begun in the mid-1990s, will have affected all medical schools. The extent of recoupment by the government will be the subject of congressional hearings not unlike those in the early 1990s involving indirect costs. Several medical schools, no longer economically viable, will cease operations.

While, for cost reasons, more campus counsel's offices will be handling litigation, the volume of traditional litigation will decrease, mostly as a result of the widespread use of alternative dispute resolution mechanisms. Of course, counsel will be involved in shaping that process for their clients. When confronted with additional litigation that can't be staffed internally, many campus counsel, instead of using private firms, will employ on a project basis attorneys from temporary services or from the substantial pool of unemployed or under-employed attorneys created by the glut of law school gradu-
Campus legal offices will be forced to “do more with less.” NACUA will play a major role in increasing the productivity of campus offices through conferences and enhanced electronic communications. Frequent teleconferences will supplement face-to-face sessions. Facilitating the exchange of information and consultation between counsel will enhance the knowledge base of higher education law practitioners. Indeed, higher education law will become, and be recognized, as more of a specialty. An effect of this will be to generally limit entry to campus jobs to beginning positions. Campus jobs will generally not be open to novice attorneys, but instead will generally be filled by lawyers with three to four years of experience, often in employment law. Senior positions, particularly that of general counsel, will almost always be filled by persons with substantial experience in higher education law. Vacancies will attract more than 100 applicants, and competition for these positions will be intense.

Like the chancellors and presidents they serve, general counsel will change positions with greater frequency than in the 1980s and 1990s. Terms of four or five years will not be uncommon. Counsel will, of necessity, participate in decisions that will prove unpopular. Their support of the incumbent chief executive, who often hired them, can jeopardize their longevity when that person departs. NACUA will attempt, through programming with the Association of Governing Boards and the American Council on Education, to make trustees and chief executives better aware of counsel's role so as to deter premature replacement of campus counsel, often by lawyers with no higher education experience.

Relationships between outside counsel and colleges and universities will change, as well. Campus counsel will select individual attorneys from a number of firms to handle particular specialized projects. While hourly billing will continue as the norm for litigation, non-litigation projects will increasingly be handled on a fixed-fee basis. A handful of law firms, often employing former general

95. Interview with Sheila Trice Bell, supra note 4.
96. Private colleges and universities appeared to lag behind their public counterparts in the 1980s and 1990s in varying their choice of counsel. Frequently, one firm, often with a member on the institutions governing board, received the bulk of the legal work from the institution. A heightened sense of public accountability, and admonitions to avoid the appearance of conflict of interest, led private colleges and universities to select counsel best able to assist the institution with specific matters.
higher education. The most successful will be small (fifteen to twenty) person firms, with modest rates, that can successfully address unique and complex problems confronting higher education. Legal business directed to local firms will consist primarily of litigation. Small private and public colleges will continue to utilize private practitioners as their outside “general counsel,” although a growing number will employ lawyers in dual capacities, especially as counsel and development officers. Despite their lesser utilization by campus clients, private practitioners will continue their membership in NACUA in high numbers. Indeed, the specialization of the profession will make membership essential to access the Association’s resources.

As before, higher education lawyers will welcome the challenges encountered by their clients. One of the primary reasons that the practice of higher education law is so rewarding is that it is interesting! The variety and complexity of problems is virtually endless, often creating a bit of frustration among counsel because time and workload demands often prevent them from giving issues all the attention they deserve. Another source of satisfaction for higher education lawyers is that the nature of the practice is collaborative rather than combative or competitive. NACUA has done much to foster a sense of community among institutional counsel and that spirit of cooperation and mutual respect imbues most campus legal offices. Given the importance of higher education to society, one can always derive satisfaction from serving the client well. There is an ultimate purpose and benefit to what higher education lawyers do. Civility still reigns on campus to a greater extent than in other arenas. Campuses are often physically attractive and, more importantly, populated by interesting, intelligent, and decent people. Argument and persuasion, tools of the lawyer's trade, often find a receptive environment on campus. Finally, the job is more fun and entertaining than almost any other legal job. Most campus counsel regard themselves fortunate to occupy this niche in the profession.

Without doubt, higher education law will continue to be a significant professional sub-specialty. The role of campus counsel will be even more significant, particularly as institutions restructure. The anticipated contributions by lawyers to the support of the essential function of higher education will be numerous and varied. Counsel to colleges and universities will continue to be a much
aspired-to, and highly rewarding, pursuit.