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## **The In-House Two-Year College Legal Counsel**

Michael W. Simpson M.Ed., J.D.

### **Abstract**

Two-year colleges have many options in obtaining legal services. This study examined one such option: the in-house legal counsel. College boards and administrators need to understand who the in-house counsel are, what role they play, and what they do in order to use and manage college legal affairs.

### **Introduction**

Many studies have been conducted on the role and characteristics of the college attorney (Pfeifer, 1973; Geary 1975; Thompson, 1977; Ripps, 1980; Barrow, 1987; Gregory, 1987; and Ingels, 1987). Only three of these included two-year colleges (Pfeifer; Geary, and Ingels). None focused on the two-year in-house legal counselor or provided insights separate from senior institutions. Studies of the in-house college attorney really only began in the 1970's. A change had occurred for colleges in general. Traditionally, few colleges had in-house counsel (Barrow, 14, citing Daane). Legal services were often provided 'pro bono' by alumni or board members or other volunteers such as law professors or by the state attorney general office. When such services were not available, contracts for hire were used (Geary, citing Bealle, 15-18). Many an academic has been heard to complain about a litigation explosion and references *Dixon v. Alabama* (1961) as the start of the fall of the ivory tower. Many of the same academics fail to see this case as part of the larger civil rights movement which academics seem to favor and fail to recognize that the civil rights movement largely used lawsuits and legislation as its tool for change. Recall that the students in *Dixon* were expelled during intense civil rights activity and were supported by the NAACP (Kaplin & Lee, 1995, 485). Enrollments were increasing greatly after World War II and different types of students were on campus thanks to the G.I Bill and other federal aid programs. Reported cases involving colleges increased from an average of 15 per year prior 1959 to 100 per year during the 1970's (Ripps, 3 citing McCarty and Thompson; Barrow, 20 citing Thompson). Researchers have been quick to blame everyone but the colleges (Gregory, 7-8, citing Likens; Gregory, 8-9, citing Howard). What is clear is that for many reasons, possibly including the arrogance and resistance to change of colleges, higher education has become a more regulated industry (Barrow, 8-38). We must not simply accept the reactionary claims of a litigation explosion without an intellectual excursion into reality. This reality includes the political and business reasons one may claim an explosion as well as social concerns. Sociologist Donald Black proposes that increased income differentiation and stratification can increase law application and that those most likely to pursue legal means are not the poor and marginalized but the rich and dominant (Black, 1976, 11-13, 16-18).

## **Issues**

In light of these historical developments and prior studies, this study wanted to find out how common is in-house counsel in the two-year college, who these attorneys are, what they do, how they stay current on issues, and which two-year colleges employ them.

Process

Using the American Association of Community Colleges online Community College Finder, I randomly selected 746 colleges with a stratified sampling to insure each state representation. I examined their web site for directory and organizational information. There are 1,655 community colleges in the United States (Office of Vocational and Adult Education). I emailed legal counsel directly if such position was indicated or the president otherwise. This was intended to confirm the name, address, contact information, and to ask about other in-house counsel. Thirty-seven colleges out of 746 had in-house legal counsel (4.96%). These thirty-seven colleges had 42 lawyers.

The survey, designed to address issues discussed above, was mailed in January 2004 to 42 attorneys at 37 colleges. Re-mailings occurred in February and March of 2004. Twenty-five surveys were returned and useable (59.5% return rate).

### **The Average In-house Two-year College Legal Counselor**

Survey results show the average in-house two-year college legal counselor is a white (91.7%) female (60%) in her forties (52%) with twenty-one years of legal experience. In 1975, 84% were males and most were in their thirties (Geary, 50, 52). Pfeifer found the average age in 1973 of 44.5 years (33). Current survey showed she works full-time, earns over \$100,000 per year, and receives benefits of paid bar fees, paid professional dues, paid continuing legal education seminars including travel and lodging, and paid health, dental, and life insurance. She has a bachelor degree and a Juris Doctor. This is consistent with Geary's finding (1975, 51). She has practiced education law for 13 years and has been legal counsel at her institution for 9 years. She has a secretary but not a paralegal or law clerk. Her primary membership and source of information is in and through the National Association of College and University Attorneys (NACUA). She is not licensed in any specialties. She does not hold faculty rank of any kind. Her title is General Counsel and often includes a Vice-President designation. Her title reflects her policy-making and administration role. She was not a college employee prior to being hired in her current position and came to this position primarily from private legal practice and secondarily from legal counsel employment at another college or other governmental agency. She spends over 41 hours per week in dealing with legal issues for her college. These hours do not include hours spent in administrative and policy roles. She serves as a regular member of institutional committees. These are often as part of the president's cabinet or on human resources and student services related committees.

### **The Work of Two-year In-house Legal Counsel**

The current survey shows the in-house two-year college legal counselor spends more time on faculty and staff employment issues in both policy-making and operational modes than any other

area (15.6 hours per week). Gregory found these issues to be most time consuming for senior college counsel (1987, iv). These issues ranked 5th and 6th in Pfeifer's 1973 study (35). This area of focus involves employment contracts, collective bargaining and union matters, pension and retirement concerns, civil rights, tenure, hiring and firing, and related litigation. Student issues, the traditional rationale used to justify the growth of in-house legal counsel in colleges uses almost two-thirds less time (5.4 hours per week). Risk management is the handling of insurance, tort claims, liability issues, litigation, and preventive law and takes 7.6 hours per week. Issues of legislation, lobbying, taxes, government contracts, autonomy, and regulation take up 8.4 hours per week. Financial matters take up 3.6 hours per week and intellectual property issues take 1.8 hours per week. The college attorney now is involved with law enforcement requests under the Patriot Act and other post-911 legislation (90% of respondents).

This survey asked counsel to list the three most frequent legal issues regardless of time spent, faculty and staff employment issues clearly remained the most prevalent matter for legal counsel. This is consistent with the chapters and pages in the recently published *Legal Issues in the Community College* (Cloud, 2004). Three of the eight substantive chapters deal with employment and faculty/staff and almost 40% of the substantive pages in the book. By far, the most covered issue. Contract/business concerns, risk management, student discipline, and policy/governance issues followed employment matters in order of frequency reported in the survey.

This survey found that the two-year in-house college legal counselor reports to the president (89%) and the board (77%). Pfeifer found that of full-time counsel, 64% reported to the board and 38% to the president (1973, 28-29). Dual reporting is the rule rather than an exception. Geary found that 76% reported to the president and 22.22% reported to the board among others in the colleges (1975, 66). This has been a traditional conflict and potential battle ground. One college reported that they used to have in-house counsel but that a dispute developed over whether the attorney represented the board or the president and so the person was fired and the position eliminated. The attorney consults with the president (100% of general counsel), vice-president (92%), business officers (74%), deans (83%) and EEO officers (65%) most frequently. Faculty and students are rarely consulted. Geary found consultation with the president as most frequent also (1975, 67). Ingels asked full-time counsel who should be able to ask them for an opinion. The president and the board were almost 100% with less support for top administrators and deans (1987, 100).

This survey indicates the two-year college in-house legal counsel believes that the affairs of the college are complex and that many areas exist in management decisions to which law comes into play (100% agree or strongly agree). Ripps found that 87.6% of college administrators agreed or strongly agreed with the statement on complexity and the law (Ripps, 1980, 70). Ripps found that 77% of college administrators agreed or strongly agreed that attorneys are effective members of the management team because they identify legal aspects of policy decisions and help prevent legal problems where this survey found 100% agreement among legal counsel (71). All in-house legal counsel agreed that litigation can often be avoided because the attorney is involved early on in the process. Ripps found that over 90% of college administrators also agreed or strongly agreed that counsel can help solve problems short of litigation (72). A majority of college counsel in 1973 felt that having legal representation available reduced legal problems (Pfeifer, 1973, 37). The in-house two-year college attorney recognizes the risk of attorney

involvement leading to domination of the process by counsel. Almost 42% of the counsel answered neutral on the issue of attorney domination. No one strongly agreed that attorney would dominate and only one strongly disagreed that the attorney would dominate. Ripps found similar disagreement among college administrators on the issue of attorney domination with 29% neutral, about 28% on the side that domination was likely, and about 43% on the disagree side (73). The two-year college has sufficient legal business to justify the use of resident counsel according to 96% of such counsel. Ripps found that about 58% of college administrators thought so (78).

The two-year college in-house legal counsel stays informed through seminars and conferences, journals, listserves, and informal contacts and groups. Classes, whether for credit or not, are not a means of continuing education. The NACUA plays a vital role in continuing education. Geary also found the importance of NACUA and the unimportance of formal courses (1975, 46, 54).

Currently, outside counsel is still retained to mostly handle litigation, labor /employment related matters, and various unspecified specialty areas where expertise is needed. Ingels found that outside counsel was used for litigation (1987, 93). Geary found that outside counsel would be used in litigation, labor, and technical issues like bonds and intellectual property (1975, 69). In the present study, outside retained counsel in at least two instances was the governing board's attorney. The in-house counsel was involved in selecting and monitoring retained counsel about 95% of the time. Geary found that in-house counsel serves as liaison with outside counsel about 94% of the time (68).

### **The Colleges that Employ In-house Legal Counsel**

All survey respondents worked in public colleges. The respondents worked mostly in urban (six of ten responses), single institutions with multiple campuses (ten of eighteen responses), and with full time equivalent enrollments above 15,000 (65.2%). This is consistent with Pfiefer where 54% of full-time in-house counsel in all colleges were in colleges with enrollment over 15,000 and 62% of institutions with over 15,000 enrollment had full-time in-house legal counsel (1973, 31). In the present study, seventy-eight percent (78%) of attorneys worked in institutions with intercollegiate athletics; seventeen percent (17%) had student housing; and only four percent (4%) were considered primarily residential. Of the 18 schools reporting in-house legal counsel and athletics, 12 had full-time enrollments over 15,000, 3 had full-time enrollments of 10,000 to 15,000 and 3 had full-time enrollments of 2,500 to 4,900. More research is needed to determine if intercollegiate athletics is a significant reason for the hiring of in-house counsel in the two-year college.

### **When Did Two-year Colleges First Hire In-house Legal Counsel**

A recent publication notes that two year colleges “are being sued with increasing frequency over a wide range of issues” and “are defendants in lawsuits of all types, including the frivolous and the ridiculous.” In addition, some presidents “spend as much time on potentially volatile legal issues as they do on more traditional administrative functions like program development

and fundraising” (Cloud, 2004, 1). Brett Sokolow, who makes money as an attorney and risk manager for colleges through the National Center for Higher Education Risk Management, writes that students are “suing – on baseless grievances” (Cloud, 2004, 92). Observers would expect that two-year colleges would rationally see the need to hire full-time legal counsel as an employee given such dire trends. However, of the 22 institutions responding to the question of when the institution first hired in-house legal counsel, only 4 (18.2%) started within the last five years and only 6 (27.3%) were first started in the last 14 years. The Reagan years saw 8 (36.4%) of colleges hire their first in-house counsel. The same number was hired in all years before 1979. If two-year colleges are being barraged with increasing legal issues, claims, and litigation, they are not responding by hiring in-house counsel. Board members and presidents need to examine the use of outside counsel to determine the economics and management factors of hiring in-house counsel verse paying independent contract rates. They may wish to consider the remarks of Peterson about the advantages of in-house counsel beyond mere expense as well as the Ripps (1980) study. (Barrow, 1987, 60 citing Peterson, 1961). Senior colleges did hire in-house legal counsel as college became a more externally regulated enterprise in the 1960’s and 1970’s (Barrow, 1987, 41 citing Thompson; Geary, 1975, 60; Ripps, 1980, 16 citing Beale).

### **Differences with Four-year/Future Issues**

The two-year in-house counsel indicated in this survey that the biggest difference between senior college legal counseling and their jobs has to do primarily with no residential hall issues (8), no research issues (5), no athletics (3), and either no tenure or less tenure issues (3). Some indicated that there was little difference and it is simply the size of the institution that matters (4). Two respondents indicated that they had worked in a senior college legal office and that their current position requires a more varied, broader range legal practice due to less staff.

This survey asked legal counsel about educational-legal issues of the future; six indicated employment issues will remain important, including outsourcing issues. Interestingly, Geary found two of the top three issues counsel saw as important in the future were unionization and collective bargaining and pressures from retrenchment and collective bargaining with the third issue, regulation, including EEOC, affirmative action, and equal pay (1975, 72). The internet and changed course delivery mean intellectual property is more important (5) as well as privacy and first amendment issues. Student disability issues are a concern. The blurring of traditional lines between business and education institutions was mentioned by four respondents. Community colleges may fall under consumer protection laws as they partner with business/ industry/ hospitals to produce goods and services and as they themselves become entrepreneurial. One respondent mentioned the need to serve an aging student body while another noted that students are getting younger as tuition increases at senior institutions. This younger group of students has more parental involvement and has caused different disciplinary issues.

### **Conclusion**

The in-house legal counsel is a rarity in the two-year college. These rare people are likely to be white, female, and in their forties. She works full-time and receives good pay and benefits. She uses seminars and conferences and many other informal means to stay current. She does strict legal work for 41 hours and also has administrative and policy duties. Faculty and staff

employment issues take up the most time. She reports dually to the president and the board and consults with top administrators as well. She works in colleges with full-time equivalent enrollments above 15,000 and with intercollegiate athletics.

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