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The Role of College and University Legal Counsel with Regard to Operational or Policy Making Responsibilities for Student Issues on Campus

Dennis E. Gregory

During the past two decades, legal counsel has become an integral part of most institutions. This article examines the impact counsel has had on student affairs practice.

Introduction

The student affairs profession has undergone many significant changes during the last quarter century. A large number of these changes have resulted from the maturing of the research base upon which the profession is founded, and many of the changes have resulted from the development of the climate in the institutions within which the profession has also been greatly influenced by changes in society at large.

Many of the changes have had a positive impact upon the student affairs profession and the students whom its practitioners hope to serve. One of the changes during the last quarter century has been the increased involvement of legal counsel in the life of institutions of higher education generally and the student affairs profession specifically (Bealle, 1974; Bealle, 1984; Field, 1985). Although many groups may cite major advantages that this involvement has brought, others have indicated that it is problematic and unnecessary. The litigious nature of higher education and the duties for which the student affairs professional is responsible have become increasingly evident both within the profession and to all of the constituencies impacted by these duties (Remley, 1979; Gehring, 1984). In any case, few persons could disagree that the role of legal counsel and the courts has become increasingly important since the 1960's.

Perhaps no single development has done more to increase the litigious nature of higher education than the student activist movement developed in the 1960's. As early as 1961 in *Dixon v. Alabama State Board of Education* (1961), the Fifth Circuit Court began the course of change and indicated the role future courts would play in operations of colleges and universities in the United States. In this case, the court indicated that in connection with disciplinary action taken against them by college officials, college students had

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minimal constitutional due process rights to notice and hearing (Gregory, 1987).

The *Dixon* decision reportedly sounded the death knell to the legal doctrine of *in loco parentis*. This doctrine, which was first stated as a legal doctrine in the *Gott v. Berea College* (1913) decision, indicated that college administrators stood in place of parents with regard to the welfare and discipline of students. It implied that college administrators might make any decision they felt to be in the best interest of the student and implement it with no questions asked by the courts or any other outside agency.

As noted, however, events in the 1960's changed this and increased the willingness of the courts to intervene. Bickel and Brechner (1978) concluded that:

Indeed, the law developed so quickly in this area that many college and university administrators found themselves in court prior to the time that they could reasonably identify the legal problems involved in regulating student conduct and adjust their rules and regulations to bring them into compliance. Moreover, even when the procedures were adjusted to provide for clarity in regulatory codes and for due process in procedural aspects of student discipline, many individual students and student organizations continued to challenge the authority of the college or university to regulate student conduct. (Bickel and Brechner, 1978 p. 19)

Some authors have indicated, however, that this trend has begun to reverse itself and that a new quasi-paternalistic, but legally benign, role for student affairs has begun to develop (Parr and Buchanan, 1979; Pitts, 1980; Gregory and Ballou, 1986). How this factor will influence the future of the profession has not yet been determined.

Student activism with regard to procedural safeguards in disciplinary cases was not the only direction marked by cases launched during the 1960's. Students began to press issues related to a number of First Amendment concerns, including freedom of speech (*Papish v. Board of Curators of the University of Missouri*, 1973), press (*Dickey v. Alabama State Board of Education*, 1967) and association (*Healy v. James*, 1972), some of which ultimately reached the Supreme Court and had major impact upon higher education. In addition, students challenged search and seizure regulations of colleges and universities (*Piazzola v. Watkins*, 1977) and more recently have begun to raise issues dealing with educational malpractice (*Beamons v. Des Moines Community College*, 1977), the right of institutions to control the sale of goods in college residence halls (*American Future Systems v. Pennsylvania State University*, 1985), the responsibility of the institution with regard to the off-campus drinking behaviors of students (*Whitlock v. the University of Denver*, 1987).

There of course, have been other factors influencing the direction and amount of litigation, and other legal implications of student affairs (Likens, 1979). According to Howard (as quoted in Gregory 8-9, 1987), much of the litigiousness within society as a whole, and the litigation aimed at higher

education, have come as a result of several institutional and social factors. Institutional factors include:

1. the growing size, scale and magnitude of government on all levels;
2. the activism and willingness of the courts to solve social problems in a positive, as opposed to non-prescriptive manner;
3. the sloppy and inadequate drafting of statutes by Congress and other legislative bodies;
4. the failure of all of the political branches (President, Congress, state legislatures, local bodies, etc.) to attempt to solve social problems.

Social factors include:

1. the desire of people to go to someone who will give them an answer and whom they can identify as a decision source (as opposed to a nameless, faceless bureaucracy);
2. the willingness of Americans to take claim on some act and call it a right;
3. the changing notions of the nature and function of law;
4. shifting American attitudes toward authority;
5. the decline of the American sense of community.

As described above, with this increase in the litigious nature of society has come a corresponding increase in the legal problems in higher education and student affairs. One of the responses has been the employment of legal counsel by institutions in order to prevent legal problems whenever possible and to deal appropriately with litigation when it is unavoidable. As a result of the situations and difficulties described above, the role of the attorneys who represent and advise institutions of higher education likewise has expanded, with regard to both the types of policy issues included as factors for consideration by attorneys and the amount of time spent on the various functional process operations involved.

Prior to the 1960's few administrators or faculty had reason to contact an attorney; now, many are in contact with institutional counsel on a daily basis. Bickel (1974) cited a need for the institutional counsel to be a vital member of the institutional management team and to be involved in all major decisions. He maintained that "only where the involvement of counsel is intimate can he or she most effectively and consistently anticipate legal implications of decisions contemplated by the university and prevent critical legal problems from arising" (Bickel, 1974 p. 76).

Sensenbrenner (1974), while agreeing that legal counsel are of growing importance to colleges and universities, indicated that externally retained counsel offered better service to their institutions. He cited several ways in which this was true.

Research Findings

Although much of the literature indicates that the role of counsel is growing at colleges and universities, little systematic research has been done with regard to the variety of work by counsel at various types of institutions and how this work fits together to determine their role. Several studies have investigated the demographics regarding institutional counsel (Bealle, 1974; Bealle, 1984; Pfeifer, 1973), and others have investigated how the role is carried out within specific groups of counsel (Geary, 1975; Ripps, 1980; Thompson, 1977). Daane (1985) has also written an article in which he posits a new paradigm for the role of institutional counsel.

A study conducted by Gregory (1987), from which the data for this article are taken, began to change the focus of the investigation of the role of legal counsel at colleges and universities. In this study, taken from a national sample of institutional counsel, Gregory investigated the role of counsel at four-year colleges and universities in the United States, in order to define that role in terms of the relationship between the duties of counsel that are primarily operational in nature and those that affect institutional policy making.

Within the study, Gregory examined six categories of legal duties, including Student Issues, Faculty and Staff Employment Issues, Risk Management, Governmental Relations, Financial Affairs, and Intellectual Property in order to determine the perceptions of counsel as to how they spent their time. The investigation was carried out within four institutional categories: Institutional Type (Modified Carnegie Council types) (Carnegie Council on Policy Studies in Higher Education, 1976), Management Form (Public or Private), Institutional Size (Less than 5000 ETE or 5000 or More ETE students), and Counsel Hiring Pattern (Full-time or Part-time Counsel).

This article will describe the data derived as part of the 1987 Gregory study, with particular focus upon the manner in which counsel performed duties related to student issues. It will also describe the conclusions drawn from the study affecting institutional legal practice as it relates to issues regarding students. For the purpose of this article, the definition of student issues drawn from the Gregory study will be used. According to Gregory, student issues included discipline, academic integrity, club and organization management, Greek affairs, entertainment contract negotiation, and litigation which sprang from one or more of these issues.

INSTITUTIONAL TYPE CATEGORY

As noted above, the perception of council as to whether time spent within their institutional legal practice was primarily operational in nature or primarily had an impact upon institutional policy making in the area of student issues was examined within four institutional categories. The first of these was Institutional Type. Here, respondents were divided into three sub-categories within a modified form of the Carnegie Council patterns of identification. These

included Research Institutions, Comprehensive Institutions and Liberal Arts Institutions. Figure 1 describes the data which were collected from within the Institutional Type category.

Within the total sample studied, 66.7% of the respondents indicated that the time spent within their practice related to student issues was primarily operational in nature. This meant that the duties were "... purely technical in nature and do not reflect or impact institutional educational policy" (Gregory, 16). Of the remaining respondents, 10.3% indicated that they performed no duties related to student issues, 6.4% indicated that their duties were equally split between operations and policy making, and 16.7% reported that they performed legal duties related to student issues that were primarily policy making in nature. Those who made this latter statement described duties "... the fulfillment of which impact upon, or are affected by, the educational policy of the individual institution" (Gregory, 17).

Respondents from within the Research Institution sub-category differed most significantly from the categorical totals described above. Here, only 46.2% of the counsel who responded indicated that their practice was primarily operational in nature. At the same time, 30.8% of these respondents reported that their duties were primarily policy making in nature, and 15.4% noted that their practice was equally divided between operations and policy making. In this sub-category 7.7% of the respondents reported that no student issues duties were performed.

Within the Comprehensive Institutional sub-category, the highest percentage of respondents, 76.0%, reported that their duties were primarily operational in nature. Within this same sub-category, 12.0% of the respondents indicated duties that were primarily policy making in nature. Here also, 8.0% reported duties equally divided between operations and policy making, and 4.0% noted no student issues duties performed.

The Liberal Arts Institution sub-category reportedly included counsel who, in 67.5% of the cases, performed operations duties. Here also, 15.0% of the respondents indicated duties that were primarily policy making in nature with regard to student issues and an equal number (15%) who reported performing no duties dealing with student issues. Finally, 2.0% of the sample reported that their student issues duties were equally divided between operations and policy making.

MANAGEMENT FORM CATEGORY

The second category of institutional counsel within which data were reported was Management Form. Here, student issues were examined within sub-categories which included institutions owned and operated by some governmental entity (public) and institutions managed by entity not related to any governmental unit (private). Within the private institution sub-category, data were also segregated for institutions operated by sectarian religious organizations and those operated by non-sectarian private organizations. Figure 2 describes the data collected within the Management Form Category.

When responses were arranged within this category, 66.7% of the respondents reported that their work was primarily operational. Here, 16.7% of the responses noted that counsel's work was primarily policy making in nature, and 6.4% of the responses indicated work equally divided between operations and policy making. No student issue work was reported for 10.3% of the respondent counsel.

Within the public institution sub-category, 75.9% of the counsel reportedly had operational duties. No counsel indicated that they did not perform student issue duties, and 17.2% of the counsel reported duties primarily policy making in nature. Here, 6.9% of the counsel reportedly spent equal time on operational and policy making duties.

A smaller percentage (61.2%) of the private institution respondents reported that they performed operational duties related to student issues. In the same sub-category 16.3% of the respondents indicated that the counsel on their campus performed a role that was primarily policy making in nature. An equal percentage (16.3%) of the respondents reported that they performed no duties related to student issues, and 6.1% reported that their duties were equally divided between operations and policy making.

INSTITUTIONAL SIZE CATEGORY

The third category within which data were evaluated is Institutional Size. Here the data were primarily divided into two sub-categories: institutions with FTE enrollments of less than 5000 students and those with enrollments of 5000 or more FTE students. Figure 3 describes the data collected within the Institutional Size category, including a further breakdown of data by enrollment within each of the sub-categories noted above.

In the Institutional Size category as a whole, 66.7% of counsel indicated that their duties were operational, while 16.7% noted policy making duties. Here, 6.4% indicated equal time spent on operational and policy-making duties and 10.3%, while all from the "small" institution sub-category, reported that they performed no duties related to student issues.

In the "large" institution sub-category, 68.0% of the respondents reported that counsel at their institution performed operational duties. Here also, 20% of the counsel performed policy making duties related to student issues. In the sub-category, 12.0% indicated equal time spent in both operations and policy making, and no one reported that they performed no such duties.

In the "small" institution sub-category, 66.0% of those reporting indicated that counsel at their institution performed operational duties. Equal numbers (15.0%) reported that they either performed duties that were primarily policy making in nature or (15%) that they performed no duties related to student issues. Only 3.7% of the respondents in this category noted that they spent equal amounts of time in operations and policy making.

COUNSEL HIRING PATTERNS CATEGORY

The fourth, and final, category within which data were reported was the Counsel Hiring Pattern category. Within this category, data were reported in two sub-categories, including part-time counsel and full-time counsel. Figure 4 describes the data collected in the Counsel Hiring Pattern category, including a more detailed breakdown of the various types of full-time and part-time counsel reported as being present within the respondent institutions and the performance patterns within each.

Within the full-time counsel sub-category, 47% of the respondents reported that at their institutions counsel performed operational duties. This and the Research Institution sub-category of the Institutional Type category were the only two within all of the categories in which operations were not listed by a majority of respondents as the primary focus of their work. Operational duties were, however, a plurality within this sub-category. Here, 29.4% of the counsel reportedly performed policy making duties. No individuals within this sub-category reported that they did not perform any duties related to student issues. In this sub-category, 23.5% of the counsel reportedly spent equal amounts of time on operations and policy making. This was the largest percentage of any group who reported such results.

One may assume that the results from the "Research Institutions" and the "Large Institutions" would be most similar since they would include many of the same respondents. A number of the "Comprehensive Institutions" may, however, also fall into the "Large Institutions" sub-category as well and thus may impact upon the data comparison.

The part-time Counsel sub-category respondents noted that 73.0% of them performed duties that were primarily operational. In this sub-category, 12.7% of the counsel reportedly performed policy making duties, and an equal number (12.7%) indicated that they performed no duties related to student issues. Here, only 1.6% of the counsel reportedly spent equal time on operations and policy making.

It would appear consistent with the literature to assume that part-time counsel are less intimately involved with the day to day operations of an institution. Thus, they would be less likely to be involved in a number of policy making issues.

Conclusions

The following conclusions were drawn from this study and from the literature reviewed for it:

1. The percentage of institutions of higher education that employ legal counsel, on at least a part-time basis, has increased since 1973. A study by Pfeifer (1973) reported that 87 percent of the institutions that he studied employed institutional counsel. The current study reported that 92.6 percent of the population employed such counsel. This conclusion was sup-

ported in a study by Gehring (1984), which indicated that over 96 percent of the sample reported that their institution employed counsel.

2. The primary means by which legal services were provided to the institutions in the study was through part-time counsel, and this part-time service was provided predominantly by attorneys who were in private practice as single practitioners or as members of private firms, as opposed to offices of an Attorney General or other public official. This study indicated that 79.5 percent of the respondent institutions were represented by part-time counsel and that 51.8 percent of these respondents received services provided by counsel who were private practitioners. Thus, 20.5 percent of the respondents reported that legal services were provided by full-time counsel. These figures have changed little from the Pfeifer study (1973), in which 23.21 percent of the counsel who were employed on a full-time basis and 76.79 percent were employed on a part-time basis.
3. A majority of the counsel who provided legal services to colleges and universities spent between zero and ten hours during an average week in provision of these services to their client institutions. This study indicated that 63.4 percent of counsel performed legal services for client institutions for ten hours or less during an average week. Of the remaining respondents, 8.5 percent reported 11 to 20 hours spent during an average week on legal duties for the institution: 11 percent reported 21 to 40 hours during an average week on performance of legal duties for their institution. While this did not conflict directly with comments in the literature about the increasing load of legal work for counsel of colleges and universities, it did seem to indicate that such increases were limited to a smaller percentage of the populations than could be inferred from the literature.
4. A majority of the counsel in the total sample population who reported providing legal service to colleges and universities on student issues said that they did so in a manner whereby these duties were primarily operational in nature rather than having much impact upon the policy making of the institution. Here, 66.7 percent of the responses indicated that counsel at their institution performed duties that were primarily operational in nature. Majorities of the sample when arranged in each of the institutional categories (institutional type, management form, institutional size and counsel hiring pattern) also reported similar performance of duties related to student issues.
5. The reported amount of time spent during an average week on performance of legal duties related to student issues varied by institutional type. This study found that counsel within the research and doctoral institution sub-category, as a group, spent more time during an average week in performance of both operational and policy-making duties than did their counterparts within the comprehensive institution sub-category or the liberal arts institution sub-category. Those in the comprehensive in-

stitution sub-category also spent more time in an average week on these duties than did their counterparts in the liberal arts sub-category.

6. The reported amount of time spent during an average week on performance of legal duties related to student issues also varied by institutional size. The study indicated that counsel from institutions in the large institution sub-category (5,000 or more FTE students) spent more time during an average week in performance of these duties, and in both manners of performance, than did their counterparts who performed legal duties for institutions in the small institution sub-category (less than 5,000 FTE students).
7. The reported amount of time spent during an average week on performance of legal duties related to student issues also varied by counsel from institutions with full-time counsel spent more time during an average week in performance of duties related to student issues, and in both manners of performance, than did their counterparts who performed legal duties on a part-time basis.
8. The percentage of actual time spent on operational duties was larger than the percentage of time spent on policy making duties in every category and sub-category of each, as they related to student issues.

Recommendations and Summary

This study indicates that further study should be made regarding the role of college and university legal counsel in institutional policy making. While the study described how counsel perceived their role and how they spent their time with regard to this role, it did not explore the qualitative aspects of the role of those counsel who involve themselves in institutional policy making. For example, has this policy-making role for counsel resulted in less legal difficulties or better quality decision making for the institutions in question?

This study was based on the perceptions of counsel of their role and the amounts of time spent on policy making and operations. These self reported perceptions and reports of time spent may not provide an accurate indicator of the actual importance of counsel in the development of educational policy, particularly at large institutions that retain full-time counsel. Further study is needed in order to confirm or repudiate how these duties are performed.

There is a great deal of overlap between several of the sub-categories studied above. For instance, it would seem logical from a study of the literature to assume that virtually all of the "Research Institutions" would also fall within the group of "Large Institutions" and that virtually all of the "Liberal Arts Institutions" would also be "Small Institutions". There are also a number of sub-categories spread across the spectrum of several other sub-categories. Included among these are the "private institution" sub-category, which, although it includes mainly small institutions, does include some large research institutions as well. Thus, the sub-category breakdown within each of the four

major categories helps to give a broad picture of the institutional setting across the country.

The conclusions drawn from this study clearly indicate that there is much yet to be discovered about the way in which counsel perform their duties at colleges and universities around the country. The many types of institutions that exist, the differing institutional roles these variations imply, and the many ways in which the institutional constituencies view the role of counsel have an impact on the way in which college and university legal duties are performed. Only with continued study and concentrated attention within higher education can those who have responsibility for institutional governance be sure that the best possible legal services are being provided for their institution and those similarly situated.

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Table 1.
 Legal Duty Types Described by Institutional Type
 Student Issues

	Research Institutions	Comprehensive Institutions	Liberal Arts Institutions	Category Totals
None	1 7.7%	1 4.0%	6 15.0%	8 10.3%
Policy Making	4 30.8%	3 12.0%	6 15.0%	13 16.7%
Operations	6 46.2%	19 76.0%	27 67.5%	52 66.7%
Equal Time	2 15.4%	2 8.0%	1 2.0%	5 6.4%
Column Total	13	25	40	78

N = 83

Missing Observations = 5
 Missing Observations - Research = 0
 Missing Observations - Comprehensive = 5
 Missing Observations - Liberal Arts = 0

Table 3
Legal Duty Types Described by Institution Size
Student Issues

	Less Than 1000	1000 To 2499	2500 To 4999	5000 To 9999	10000 To 14999	Over 15000	Category Total	Enrollments Below 5000	Enrollments 5000 & Over
None	4 21.1%	3 13.0%	1 9.1%	0 0.0%	0 0.0%	0 0.0%	8 10.3%	8 15.0%	0 0.0%
Policy Making	2 10.5%	2 8.7%	4 36.4%	40 33.3%	1 0.0%	1 14.3%	13 16.7%	8 15.0%	5 20.0%
Operations	13 68.4%	17 73.9%	5 45.5%	8 66.7%	3 50.0%	6 85.7%	52 66.7%	35 66.0%	17 68.0%
Equal Time	0 0.0%	1 4.3%	1 9.1%	0 0.0%	3 50.0%	0 0.0%	5 6.4%	2 3.7%	3 12.0%
Column Totals	19	23	11	12	6	7	78	53	25

N = 83

Missing Observations = 5

Missing Observations - Under 5000 = 4

Missing Observations - 5000 or More = 1

Table 2
Legal Duty Types Described by Management Form
Student Issues

	Public Institutions	Private Sectarian	Private Non-Sect.	Category Totals	Total Private
None	0 0.0%	2 10.0%	6 20.7%	8 10.3%	8 16.3%
Policy Making	5 17.2%	3 15.0%	5 17.2%	13 16.7%	8 16.3%
Operations	22 75.9%	15 75.0%	15 51.7%	52 66.6%	30 61.2%
Equal Time	2 6.9%	0 0.0%	3 10.3%	5 6.4%	3 6.1%
Column Totals	29	20	29	78	49

N = 83
 Missing Observations = 5
 Missing Observations - Public Institutions = 5
 Missing Observations - Private Institutions = 0

Table 4
Legal Duty Types Described by Counsel Hiring Patterns
Student Issues

	Full-Time In-House Counsel	Part-Time In-House Counsel	Firm Or Practition.	Att. Gen Off Campus	Board Member	Other	Combined	Full-Time & Att. Gen. On Campus	Category Totals	All Part-Time	All Full-Time
None	0 0.0%	0 0.0%	8 19.5%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	8 10.3%	8 12.7%	0 0.0%
Policy Making	4 26.7%	3 42.9%	3 7.3%	1 16.7%	0 0.0%	1 50.0%	0 0.0%	1 50.0%	13 16.7%	8 12.7%	5 29.4%
Operat- ions	7 46.7%	3 42.9%	30 73.2%	5 83.3%	1 100.0%	1 50.0%	4 100.0%	1 50.0%	51 66.7%	46 73.0%	8 47.0%
Equal Time	4 26.7%	1 14.3%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	5 6.4%	1 1.6%	4 23.5%
Column Totals	15	7	41	6	1	2	4	2	78	61	17

N = 83

Missing Observations = 5

Missing Observations - Full-Time = 0

Missing Observations - Part-Time = 5