



# HR and Legal Counsel

## Partnering to Navigate Complex Legal Issues on Campus

By Youndy Cook

The working relationship between institutional counsel and human resources is a critical one. Both offices have a charge to guide campus practices and make decisions to protect the legal, financial and reputational interests of the university. Counsel's role is to provide proactive professional advice on critical strategic and legal issues and to support the institution with legal guidance. Human resources does the same thing through business practices and processes, effectuating an inclusive, collaborative, safe, legal and efficient working environment.

This working relationship will be affected by the nature and size (or existence) of the institutional counsel's office, the size of the institutional human resources office, the experience of employees within those offices and the volume of matters. Where access to counsel is limited, such as with a small legal office or off-site assigned state counsel, the HR professional must develop techniques for getting the legal service he or she needs. Where access to

counsel is readily available and local, legal and HR may develop an entirely different working relationship. Wherever your institution falls on the spectrum, it is important for the two offices to determine what services are needed, what services can be provided and how to work together most effectively for the institution.

### **Establish the Parameters of the Relationship**

Alignment of human resources and legal counsel is vital to protect the interests of the institution and to ensure a collegial, collaborative working relationship. Each office should take care to create a working relationship based on clear expectations, mutual respect and trust. HR and legal counsel should be knowledgeable of, and have genuine respect for, each other's profession. They should understand the workings and operations of the "business" of the institution as well as each functional office and respect each other's role, work demands and schedule. HR professionals should understand how lawyers are trained and the skill set and perspective they bring to the

institution. Conversely, legal counsel should understand the expertise and knowledge that HR professionals bring to help the institution achieve its goals.

A good starting point to align the efforts of the two offices is a discussion of the expertise level of current employees within each office, particularly with regard to areas of HR operations that are likely candidates for legal matters to arise (for example, employee relations, labor relations, hiring and firing, discrimination claims). Consider in this regard the key players' varying experiences, areas of specialty, work styles and philosophical bent or risk tolerance. What clients need from legal and HR can vary by the client or the matter or other factors, but certain roles and styles may come more naturally to the fore among lawyers and HR professionals.

When establishing a working relationship, or even if employees in each office have worked together for some time, there is great value in having a dialogue about the expectations of each office. Clarifying expectations ensures transparency and an effective and efficient working relationship. Some possible items of discussion between the offices to establish the working parameters include:

- What are the expectations for responsiveness to each office? What are expected turnaround times on documents and/or feedback on issues?
- Are these expectations reasonable? Each office has a say in its customer service needs. Explain why some matters may be in higher demand than others. Clarify when and how this will be articulated.
- Discuss philosophies and perspectives of each office on the academic mission of the university, and how as administrative offices their business strategies support that mission.
- How will opinions and decisions be communicated? In writing? On the phone? Are there external considerations (e.g. public records laws)? Do you agree that face-to-face meetings are best whenever possible and especially on sensitive matters?
- What are the preferences of each office for handling sensitive material and information?
- How will you work together to ensure that the client receives consistent information and relationship management?
- Who are the authorized decision-makers in your office? Who are the back-ups?
- When does attorney-client privilege apply? This is particularly critical for public institutions, where the protections of the privilege may be limited and where public records laws may not comport easily with preferred practices. A corollary question is whether and how to incorporate privileged material into HR documents — for example, is it acceptable that legal advice is captured and maintained in HR records alongside non-privileged materials?
- Who is responsible for influencing the outcome on campus? In which situations will HR be involved, or legal, or other campus entities? (To be thorough, this discussion point also may require an assessment of institutional support for certain efforts.) It is important for HR and legal to present a united front.
- For public institutions: who are the contacts with state agencies, boards of trustees, etc. when there are important updates or decisions being communicated? How is that information disseminated and shared? Does all of the information need to be shared?
- How will your offices ensure seamless communications with university executives (president, vice presidents, etc.)?
- In what types of situations should HR and legal invite in other university entities (executives, EEO, compliance and ethics, diversity, etc.)? How is information shared and in what cases?
- How does each office respond to direct inquiries/issues? What are their intake procedures for walk-in inquires? Complaints? Anonymous tips? Whistle-blowers? When are referrals made?
- Discuss the philosophies of each office in regard to risk assessment/tolerance. Discuss the approach each takes when it comes to cost analysis and risk tolerance for decisions.
- Discuss the ethical expectations of each office.

Creating parameters that address most of these points will almost certainly be feasible at those institutions where HR can work with a local legal office of several lawyers. While the questions remain the same even when working with a one-lawyer office or remote legal counsel (such as assigned state counsel), the resulting parameters will reflect the relationship that works in that environment. The exercise itself will allow HR to identify critical needs issues — if legal counsel is mostly unavailable to HR, HR then knows

that it must be staffed with the internal expertise to address many (or most) matters independently; and if legal is available for consultation on a limited basis, HR then knows how to develop questions, provide information and ask for guidance in matters that require collaboration.

### **How to Overcome Common Challenges**

Establishing the parameters of a strong working relationship is the starting point. Once the legal office and HR have done that, management of matters affecting the institution should be a matter of spotting and addressing the issues. Two common challenges worth mentioning here are forum shopping and maintaining a proactive perspective through crisis.

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### ***Forum Shopping***

As both offices work to maintain a collaborative working relationship, one particularly troublesome area for many legal and HR offices is dealing with “forum shopping.” Each office is probably well aware that there are campus customers who forum shop by getting an opinion from one office and, not liking the first answer, going to the other office looking for a different response. Similarly, a client may approach one office with one part of the problem and then approach the other office with a different portion of the facts (or a different perspective on those facts), perhaps hoping that the first answer received is not the real answer.

This practice can pit one office against the other and create friction. Over time, you may identify particular departments (or individuals) where this is common or particular issues about which departments are more likely to engage in this practice. Both HR and legal counsel should discuss how they will provide client advice to avoid such scenarios and develop strategies together to address situations where this practice arises. One strategy is to bring the missing party into the loop, in whatever manner may be appropriate — adding a CC to an e-mail, inviting someone to a meeting or having a back-channel conversation.

### ***Keeping a Proactive Perspective***

Any honest discussion of the challenges of campus administration (not just for legal or HR) must recognize that working to achieve proactive long-term goals is particularly difficult when the environment is basically or frequently reactive. Every institution has times when it is in reactive mode, such as when facing budget cuts or dealing with a highly public event on campus. At times, this reactive phase can throw long-term projects completely off schedule or divert so many resources that routine work cannot be completed as expected. If your campus or your department is consistently operating in crisis mode, the effects will be detrimental in the long run. Lower-quality work, the inefficient exchange of information, poor individual performance and added stress are just a few of the problems that will surface from a crisis mode of operation.

HR and legal counsel always work on current issues, certainly, but an effective standing relationship between HR and legal should

also include long-term projects, such as regular review of policies and procedures, plans for upgrades in HR practices, etc. Finding a way to keep those proactive projects on track even during crises is worth some thought in advance. A good planning process can help prevent you from operating in reactive mode. If your department is constantly putting out fires, it is difficult to see the broader context for effective legal and HR stewardship.

To shift to a proactive position, legal counsel and HR should first work to optimize the current system. First, focus on any policies and/or procedures or other HR issues that are the most troublesome or recurrent or present the most risk. Next, collect data or metrics that help support or verify your focus. Then develop a strategic plan to address those issues, build in checkpoints to monitor the plan and revisit that plan periodically. Finally, ensure you are building accountability into the changes to prevent further problems later, including identifying how to measure successful performance in these areas (fewer grievances? fewer engagements? etc.)

Targets for value-add proactive initiatives between HR and legal counsel can focus on strategic HR issues like employee relations, search and selection procedures and even classification and compensation decisions that may result in grievances. HR and legal counsel can work together on policy and procedure development, collective

bargaining and reviewing documentation (handbooks, training materials). It is also beneficial to establish procedures or protocols for actions/responses to specific issues like emergency situations, new policies or regulatory or legal actions (laws, executive action, board action, COOP plans, etc.). A few options to build in regular communication around proactive collaboration between legal counsel and HR might be:

- Schedule a standing meeting between the leaders (or key partners) of each department at the same time each year to reflect and to look forward and discuss priorities for proactive work.
- Have each office host an “open house” for the staff of the other office to make sure staff know each other’s names and faces. This could be a one-time event or an annual opportunity to connect.
- If you are the resident topical expert (e.g., for privacy, benefits, workplace violence), schedule coffee with your counterpart in the other office to discuss gaps and how you could partner to provide enhancements.
- Create and co-lead campus training and development programs, such as a “legal aspects of supervision”-type training.
- Arrange to check in every year or two regarding templates or model documents such as mutual separation agreements, notification letters, checklists, etc. that were created collaboratively to throw out “old shoes” and add improvements, or just to make sure that everyone is in agreement as to what the model document should include.

### Communication Tips for an Effective HR/Legal Counsel Partnership

The leadership and expertise provided by legal counsel and human resources are essential for the success of our organizations. Creating an open, honest, collegial relationship between the two offices is of the utmost importance. Here are some tips on how the two offices can form a solid working relationship.

1. **Communicate regularly, personally and respectfully.** Public institutions, however, need to be mindful of public records issues.
2. **Ensure the prompt and free flow of information.** There should be two-way conversations with continuous feedback and expansive sharing of information between both offices.

3. **Advise and collaborate.** Share and explore recommendations or courses of action that meet the needs of the client and the institution. Be aware that collaboration involves more than just legal counsel and HR working together, and develop an interdisciplinary approach to the client’s matter where appropriate. (Also be mindful that campus politics do matter.)

4. **Reach out.** Ask questions. Ask your client/customer what they think of the situation, what they think the next step should be, whether they have ultimate goals they hope to achieve beyond the immediate legal issue, whether they are aware of any knowledge of particular challenges that you might not be aware of, etc. Also, make time to attend “social” events like receptions and retirement events of the other office – they are a great opportunity to check in informally and develop stronger relationships.

*HR-Specific* – Reach out to counsel as you see fit but try to be proactive if you identify areas of exposure or risk.

*Legal-Specific* – Being a good partner includes reaching out to HR with news and updates about topics affecting HR – and making HR aware of issues in their area which come to your attention through other channels.

5. **Be clear.** Know how to get to the point. Provide a clear message and confirm that it is understood. As part of being clear with your advice/responses, articulate limitations, assumptions and exclusions and provide examples.

6. **Be partners.** Get to know who in the other office is your primary contact, who can make decisions (and who cannot) and who can gather and provide information.

7. **Acknowledge and address challenges.** As an HR professional, you will recognize when a problem is difficult or intractable — don’t expect legal counsel to be able to work a solution when even you think it is unlikely or impossible. Additionally, don’t create unrealistic expectations, and don’t let your clients/customers or other campus stakeholders suffer from them. 

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