

Excerpt from Minutes of March 2004 Board of Regents Meeting detailing the amendments to the original proposal

Title 4, Chapter 2, new section 3

Approved-Handbook Revision, General Counsel Reporting Line - At its December 2003 meeting, the Board discussed the reporting line for the UCCSN General Counsel and requested that staff bring back policy language for further consideration. The Board approved an amendment to the Board of Regents Handbook (*Title IV, Chapter 2, New Section 3*) (*Ref. J on file in the Board office*).

Chancellor Nichols presented Deputy to the Chancellor, Ms. Nancy Flagg. Ms. Flagg reported that the item had originally been requested by four Regents. Staff was requested to provide language for the January agenda. The item was deferred due to lack of time. In January 2003, a consultant recommended having the General Counsel report directly to the Chancellor. The Executive Evaluation and Compensation Committee considered the matter with some agreement expressed for this reporting line. Subsequent to the Handbook change, four Regents requested it be considered again. Presently, the Handbook does not discuss the position or role of the General Counsel. Staff considered adding a section addressing the System Administration executive staff. Ms. Flagg suggested the addition of a paragraph establishing the duties and responsibilities of System Administration executive staff. Optional language was also provided for Board consideration. She recommended approval of the Handbook change even without inclusion of optional language.

Regent Rosenberg felt strongly that the General Counsel should report to the Board with a line to the Chancellor. He suggested creating a committee of the Board with whom General Counsel works. He questioned why he was not represented individually by General Counsel, but General Counsel acts for him as a member of the Board.

Regent Hill moved approval of adopting the proposed amendment in bold face type, including the language in Section 3 and the two options provided. Regent Derby seconded.

Regent Howard said she realized how it could be problematic for the General Counsel to report to the Chancellor since the reporting line had been changed. She felt the General Counsel should report to the Board and that the position was not sufficiently independent, which could create a conflict when dealing with certain matters. She asked why the reporting line had been changed to the Chancellor. Regent Derby explained that the position formerly reported to the Board through the Chancellor. The Board changed it in 2000. General Counsel provided counsel to the Board, but the Chancellor was the executive officer who prepared the evaluation. A problem arose with yearly evaluations not working well. The Committee then recommended reverting back to the previous reporting line.

Regent Sisolak acknowledged that evaluations had been one of the issues. At the time the Committee made its recommendation, it had not contemplated the situation that later arose (November 2003 issue).

Regent Rosenberg requested the Chancellor's feelings. Chancellor Nichols replied that the consultant, Mr. Bob Woodruff, had suggested the General Counsel should report to the Chancellor. At that time, the presidents were concerned about diverse opinions/defenses being written in court that they and she were unaware of that were also not particularly beneficial for them. Mr. Woodruff suggested it would be better for the position to report to the Chancellor. She related that General Counsel Ray and his staff had worked diligently, to communicate well with everyone regarding the arguments being made in court. She said that communication was the key. The attorneys primarily work for the presidents and campuses. The General Counsel

supervises the legal staff. Although he spends a tremendous amount of time working with the Board, his job description indicates equal parts supervision and direct work with the Board. She felt it made sense to at least have a dotted line to the Chancellor. She also felt the Board clearly needed its General Counsel. She felt the General Counsel would speak up if he felt there was any conflict.

Regent Bandera favored the motion. She congratulated Regent Sisolak's forethought in making the change, adding that the process in place since October 2003 had worked well in a difficult situation. She said it insulated the General Counsel from 13 different bosses and she praised the organizational structure.

Regent Rosenberg disagreed. He asked who would determine the conflict. Chancellor Nichols replied that either one could. Regent Rosenberg said that could be problematic and suggested use of a third party.

Regent Dondero asked how many Regents were required to determine whether a conflict existed. Chair Anthony replied that the Board Chair would decide whether a conflict existed. Regent Dondero asked whether one Regent could bring it to the Chair's attention. Chair Anthony replied that if the Board Chair or the Chancellor decided there is a conflict in supervising the General Counsel, the Board Chair would then become the General Counsel's supervisor.

Regent Sisolak felt it was a difficult situation if the General Counsel did not report to the client. He asked why the Board would need to approve the General Counsel settling a case, since the Board was not the reporting line. General Counsel Ray stated that the Board is the client to whom he reports. The relationship is complicated by being comprised of 13 people. It is further complicated by the diverse sizes and institutions represented. It would depend upon who is involved in each case and at what level the issue was. He viewed this issue as more of a personnel matter than a description of his legal obligation. The key for him was what entity is involved. Regent Sisolak was not sure that was clearly specified, and he did not want to forego the attorney-client privilege. He requested a definitive opinion. He did not want to be unable to meet with the attorney. General Counsel Ray said that if it was an issue he needed to communicate to the Board, he would do so. He said he would also communicate information when asked. Regent Sisolak asked whether General Counsel Ray was responsible to the person he was defending and who was paying the bill or rather to someone designated by the client. He asked whether General Counsel could have an attorney-client privilege with multiple parties. General Counsel Ray replied that the client was the single entity of the Board of Regents. He said it became very complex, adding that his legal and ethical obligations were to the Board of Regents. Chancellor Nichols said that the entire legal staff acted on behalf of the Board of Regents. She said the Board delegated to the presidents when working on campus-based lawsuits. The attorney-client privilege is extended to the legal staff's discussions with UCCSN presidents. General Counsel Ray explained that did not infer that he could not discuss matters with the Board. Chancellor Nichols again stated that all of the attorneys work for the Board.

Regent Hill stated the same situation was found in corporate America. The collective Board is the client. He advised Board members not to concern themselves about the attorney-client privilege with regard to communication with individuals within the line of command. He said the ultimate boss is the Board and they delegate certain duties to others. He agreed that the Board Chair would make the decision if a conflict arose. Regent Hill did not feel a group of three Regents was necessary to make such a decision and that such an arrangement could entail Open Meeting Law issues. He indicated his support for the proposed language.

Regent Kirkpatrick suggested making the reference to the Board Chair consistent throughout the reference material. He then asked how conflicts would be resolved if the Chancellor overrides General Counsel's advice and cited a specific instance involving a settlement. Chair Anthony replied that the Board Chair would become involved. General Counsel Ray stated that, in the

instance posed, the authority rested with the institution president and that is how the settlement occurred.

Regent Rosenberg said he failed to see how meeting with three Regents would require public notice of a meeting, noting that it did not comprise a quorum of the Board. He felt the Board should have representatives helping to make the decisions with General Counsel.

Chair Anthony indicated his support for the motion, praising the appropriate use of the chain of command. He was comfortable with the General Counsel reporting to the Chancellor. He observed that the Board Chair could handle any conflicts that arise. If the Board disapproved, the matter could be placed on the next meeting agenda. He felt it was more a personnel issue.

Ms. Flagg suggested the Board could consider as part of their motion for the Chancellor to return with proposed annual evaluation guidelines for the General Counsel (Ref. J, Page 3 of 3). She said the Chancellor would not evaluate the General Counsel without consulting with the clients.

Regent Howard noted a point of order, stating that she did not think that Ms. Flagg should advocate for or against this agenda item, adding that it was not appropriate. Chair Anthony established that Ms. Flagg had merely provided a suggestion.

Regent Sisolak stated that the situation cited by Regent Kirkpatrick could not be brought before the Board. He said the Board had tried to do so, but did not have that option. Even though it went through the chain of command, it was a done deal in spite of the fact that some Regents wanted to discuss the matter.

Upon a roll call vote the motion carried. Regents Anthony, Bandera, Derby, Hill, Kirkpatrick, Schofield, Seastrand and Whipple voted yes. Regents Alden, Dondero, Howard, Rosenberg and Sisolak voted no.