



Working with Your College Attorney:

How, When, and Why Community Colleges Seek Legal Counsel¹

Community colleges operate in a complex legal environment. State and federal laws and regulations govern virtually every detail of college operations—who works for the college, how buildings are built, how goods and services are procured, who is eligible to enroll in the college, how students' academic performance will be assessed, how their misconduct will be addressed, and so on. The laws that govern community colleges are constantly changing, evolving, and becoming more complicated. To stay informed and in compliance, the average community college often requires the assistance of legal counsel.

While the cost of seeking legal advice is a concern for every community college, the cost of not seeking timely advice may be even higher. Without adequate information and advice, the board of trustees, a board member, a college administrator, or another college employee can expose the college to legal claims, threats of litigation, or even legal liability. In some circumstances, college personnel or board members may expose themselves to personal liability for damages. In addition, several applicable laws, including the Texas Open Meetings Act and conflict of interest laws, carry criminal penalties for violations. A competent community college attorney will advise the board and college personnel in conducting the business of the college. Working together, the attorney and college officials can ensure compliance with applicable laws and minimize the risk of litigation and liability.

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Finding Legal Information and Advice

When should a community college seek legal advice?

After problems arise. Of course, a community college should call a college attorney when the college finds itself in legal trouble: if the college receives a court summons or other legal document; if the college is accused of violating the rights of an employee, student, or other citizen; if the college is dissatisfied with a vendor's performance; if a supervisor discovers a potential violation of law by a college employee; or if an investigation is brought by a regulatory agency.

¹ An electronic version of this document is available on TASB College eLaw at tasb.org/Services/Community-College-Services/Resources/TASB-College-eLaw/documents/working-with-your-college-attorney.pdf.

Before problems arise. Community colleges also should seek legal guidance in connection with major events, such as issuing bonds, buying or selling real property, signing contracts involving large sums of money, signing certain insurance contracts, or terminating an employee. Colleges are also wise to seek ongoing legal advice to spot potential problems before they develop. College attorneys can perform periodic audits of college practices to ensure compliance with legal requirements. They also can conduct training on a variety of topics.

Where can community colleges get legal information and advice?

College policy and regulations: All community colleges maintain policies. The legal policies, provided by TASB as reference material for use by colleges, comprise an abridged collection of state and federal statutes and legal authorities applicable to colleges. The local policies, on the other hand, are rules adopted by the college board of trustees. Many colleges also maintain administrative regulations. These materials address many of the day-to-day operational questions that arise in a college. In fact, consulting applicable policies before making decisions or picking up the phone for legal advice may save legal fees. College policies will not answer every question, but they can reduce the number of calls to an attorney or make calls more productive. When new or complicated issues emerge, however, the information in a policy manual cannot replace the advice of an attorney.

The model policies issued by TASB Community College Services provides an invaluable starting place for colleges, but we strongly encourages colleges to work with their attorneys to customize college policies as needed and to audit policy adoption and compliance regularly to ensure that policies meet the unique needs of the college and are being implemented consistently.

State agencies: Several state agencies may provide legal information, interpretation, or advice on specific subject areas relevant to community colleges. For example, the Texas Secretary of State Elections Division provides information on all aspects of elections, the Texas Ethics Commission addresses questions on campaign finance and political advertising, and the Texas Comptroller's office is a resource for property tax information. Additionally, The Texas Higher Education Coordinating Board provides information and resources on academic and workforce programs at Texas community colleges.

TASB and other associations: The Texas Association of School Boards (TASB), and other associations serving college personnel offer legal information and advice as a benefit of membership. With their comprehensive focus on higher education law issues, these associations are well-positioned to offer their members training and advice about state and national trends, emerging legal issues, and local choices. The training and information provided by these associations supplement, but do not replace, the advice of a college's private counsel.

TASB members have access to TASB Community College Services as part of their membership. This includes free telephone consultation with TASB Community College Services attorneys. TASB Community College Services provides confidential legal advice on all areas of higher education law to colleges across the state. The telephone service is available daily to any person calling on behalf of a member college and representing the legal interests of the college. The service is an excellent way to obtain, at no cost, quick answers to routine legal questions and to consult with an attorney before taking an action that may have legal implications. In some instances, of course, it is necessary for a college's private counsel to consider specific facts and circumstances, as well as the political and philosophical climate in the college, before advising college officials on the best course of action. In such cases, TASB Community College Services will refer callers to the college's private attorney to ensure the college gets appropriate advice and guidance. In addition, when a college is represented by counsel in a particular matter, TASB Community College Services will defer to the opinions and advice of that counsel on issues related to the matter. TASB Community College Services does not provide written legal opinions, contract or document review, or any sort of representation in board meetings, grievance hearings, litigation, or other proceedings.

Private counsel: Texas community colleges are represented by attorneys all over the state with expertise in a variety of subject areas. Some are organized into law firms; others work as solo practitioners. Some are general practitioners who represent colleges in addition to other types of entities or individuals. Others represent colleges exclusively. Even within higher education law, subspecialties exist in areas such as employment law, business law, and constitutional law.

A college attorney generally serves in one of two roles: to advise a college during day-to-day decision-making or to represent the college before a court or other legal authority when legal challenges are raised. A college's attorney can consult with the board and key administrators on specific legal issues; draft and review contracts; customize, draft, and audit the college's policies and procedures; negotiate with third parties on behalf of the college; provide written legal opinions; attend board meetings; and represent the college in administrative and court proceedings.

In-house counsel: Some community colleges find it both advantageous and economical to hire one or more attorneys to work as employees of the college as *in-house* counsel. In-house counsel usually act as general counsel to the college and provide routine legal services for the college. The college usually will retain counsel from private law firms to represent the college in litigation or on projects that require specialized legal expertise. For more, see below at Considering In-House Counsel.

Hiring a College Attorney

How does a community college select (procure) a college attorney?

Competitive procurement is not required. The Texas Education Code specifically states that the competitive procurement requirements for contracts over \$50,000 do not apply to contracts for professional services rendered, including services of an attorney. Tex. Educ. Code § 44.031(f). In addition, attorneys are not listed in the Professional Services Procurement Act as professional services for which the use of competitive bidding is specifically prohibited. See Tex. Gov't Code §§ 2254.001-.006 (requiring a specific process for hiring certain professionals, including architects, engineers, and accountants). Therefore, a community college may procure the services of an attorney or a law firm by any means the board deems appropriate.

Send a request for proposals or qualifications. To ensure that the community college is getting the best value and a well-qualified attorney, the board should use some type of procedure to elicit information from potential candidates. Most boards use either a *request for proposals* process or a less formal request for qualifications process, inviting firms to submit materials describing their professional qualifications to provide legal services to the college.

Conduct interviews. Written submissions should be followed by interviews with the top candidates. The information gathered from potential candidates aids the board in determining whether the college's needs can best be met by a local attorney or firm or by an attorney or firm in another location.

Consider recommendations and other resources. When searching for the right attorney or law firm, the board should seek recommendations from other community colleges. In addition, the board should consider the experience of college personnel who have worked with attorneys representing the college in the past; they may be able to identify areas where legal services have been most necessary and useful, as well as characteristics that made a lawyer or firm a particularly good fit for the college. Most law firms maintain websites that may provide additional information for a board to consider.

Although TASB Community College Services does not recommend specific attorneys or firms, the membership list of the [Texas Council of School Attorneys](#) (CSA) is available [by name](#) or [by region](#) on the TASB Legal Services website. CSA is an organization of attorneys who primarily represent school districts, but also represent some community colleges. CSA promotes relationships among school attorneys and offers continuing legal education programs and other assistance to its members. Similarly, the membership list of the [Texas Association of Community College Attorneys](#) (TACCA) is available on the TACCA website.

In addition, [Martindale-Hubbell](#) provides a database of background information on attorneys, and the [State Bar of Texas](#) provides information regarding an attorney's license and any disciplinary history.

What qualities should a community college look for in an attorney?

In interviewing and evaluating prospective counsel, the board should consider relevant factors, such as the following:

Experience and expertise:

- How much experience and expertise does the attorney have in the major areas of higher education law?
- What expertise and experience could be provided by other members of the attorney's firm, if any?
- What percentage of the attorney's time is spent representing community colleges?
- If the attorney is hired for a particular purpose, such as bond counsel or collection of delinquent taxes, what is the attorney's expertise in that area?

Quality:

- What is the quality of the legal services provided by the attorney or firm?
- What other clients does the attorney represent?
- What do those clients say about the attorney?

Cost:

- Are the fee arrangements offered flexible enough to provide the services the college needs while remaining sufficiently economical for the college's budget?
- Can the attorney and college arrive at a mutually agreeable fee arrangement? (For more, see information below on fee arrangements.)

Accessibility:

- Is the attorney available and willing to attend board meetings or hearings at the college's request, either in person or by telephone or videoconference?
- Will the attorney be easy to reach by phone, email, or other electronic communication?
- Is the attorney committed to keeping the appropriate college representatives fully informed about developments in matters involving the college?

- Will the attorney personally perform or supervise the college's legal work?
- What role will be played, if any, by other attorneys, law clerks, and legal assistants?

Conflicts of interest:

- Does the attorney or firm represent any other clients that might present a conflict of interest in the future?
- Does the attorney have a family or other relationship with a board member or administrator that may present a conflict between the interests of the community college and the interests of the individual board member or administrator?

Personality:

- Will the attorney's personality and manner complement those of the board, the administration, and staff?

Professional organizations:

- Does the attorney participate in professional organizations, such as the Texas Association of Community College Attorneys, the State Bar of Texas School Law Section, the Texas Council of School Attorneys, or the National Association of College and University Attorneys?
- Has the attorney demonstrated a commitment to public education through involvement in these or other activities?

How does a community college finalize its choice of a college attorney or law firm?

The board decides. The board, acting as a body corporate, selects and retains the community college's attorney. While the college president or chancellor's recommendation is valuable, the board represents the college that will be the attorney's client.

Discuss in open session. Discussions and deliberations regarding the retention of an attorney, interviews with prospective counsel or discussions of their qualifications, and discussions or negotiations of the contract between the college and its attorney may *not* be conducted in closed meetings. All such discussions and deliberations must be conducted in properly posted open meetings. An outside attorney or law firm is an independent contractor; therefore, the personnel exception in the Texas Open Meetings Act does not apply. Tex. Gov't Code § 551.074; Tex. Att'y Gen. Op. No. MW-129 (1980). Of course, if the community college is employing an attorney to serve as a member of its staff, then the attorney will be an employee of the college and his or her employment may be discussed in closed session pursuant to the personnel exception.

Nepotism laws may apply. According to the attorney general, nepotism laws are applicable to independent contractors as well as to employees. Accordingly, a community college may not hire an individual related to a board member within a prohibited degree to provide legal services, regardless of whether the individual is hired as a regular employee or as an independent contractor. The attorney general has opined, however, that the nepotism laws may not apply to prohibit the retention of a law firm in which a board member's relative owns an interest. Tex. Att'y Gen. Op. No. DM-76 (1992); Tex. Att'y Gen. LO-97-028 (1997).

Should a community college sign a contract with its attorney or firm?

Although it is not legally required, community colleges are strongly encouraged to retain an attorney or law firm pursuant to a written agreement. This agreement should include the effective dates of the contract; a description of the fee structure, including terms related to the provision of cost or fee estimates; the attorney's duties; the positions or persons within the college with whom the attorney is authorized to communicate; insurance requirements; billing and payment schedules, including the level of detail expected on invoices; the conditions under which the contract may be cancelled; and any other terms or conditioned agreed to by the parties.

What are the possible fee arrangements for legal representation?

Hourly rate: Some attorneys or firms charge an hourly rate for all legal services provided to community college clients. In this case, a college should inquire about the hourly rates for other firm personnel who may perform legal services for the college, such as consulting attorneys, legal assistants, and law clerks.

Retainer: Many firms that specialize in higher education law offer a retainer agreement under which a college pays a set amount for certain specified services, such as phone or email consultation, periodical subscriptions, policy drafting or review, agenda preparation or review, or limited in-service training. Additional services, like attending hearings, advice on complex or open-ended legal issues, or significant training events may be provided at an additional hourly rate. A retainer agreement should define clearly the legal services covered by the retainer and those services covered by an hourly rate.

The retainer may be a fixed monthly or annual rate or a not-to-exceed fee. A fixed rate remains the same no matter how much work the attorney or firm performs under the retainer in a particular period. Under a not-to-exceed fee, the attorney or firm bills the college at an hourly rate up to a predetermined maximum. If the bill for the month does not reach the maximum, the college pays only for the hours of legal services provided. If the bill exceeds the maximum, the college pays only the agreed maximum for services covered by the retainer; other services are billed at an hourly rate.

Flat fee: A college may enter into a flat fee arrangement where the board agrees to pay a fixed amount for legal services without regard to the actual number of hours of worked. A flat fee arrangement may be appropriate for such legal services as an in-service training, a response to a demand letter, a written legal opinion, service as a hearing officer, attendance at a set number of board meetings, or representation in a contested matter.

The attorney general opined that a flat fee arrangement is not a gift of public funds in violation of the Texas Constitution, article III, section 52, if the board determines that the fee arrangement accomplishes a public purpose, the board retains sufficient control over the expenditure to ensure that the public purpose is accomplished, and the college receives a return benefit. The fact that board membership may change over the period of representation does not result in a lack of sufficient control to ensure the public purpose is accomplished. Whether the fee will return a *sufficient* benefit to the college depends on such factors as the complexity and quality of the representation, as well as the number of hours of legal services provided. The benefit received and the expenditure need not be equal; however, gross disparity that suggests unconscionability, fraud, or bad faith could raise questions as to the sufficiency of the benefit received. Tex. Att’y Gen. Op. No. KP-99 (2016).

Contingent fee: Contingent fee arrangements are typically used when a client who is a plaintiff in a legal proceeding agrees to pay an attorney a share of any award recovered in the legal action. These arrangements are rarely used by colleges, except in the area of delinquent tax collection. Such fee arrangements must be in writing and must comply with the Texas Tax Code section 6.30. See Tex. Att’y Gen. Op. No. JC-290 (2000) (examining the authority to enter a contingent fee contract under various Texas Tax Code provisions); Tex. Disciplinary R. of Prof’l Conduct 1.04(d) (addressing contingent fees generally).

Costs: An agreement for legal services will likely require the college to reimburse the attorney or firm for expenses directly related to providing legal services to the college, such as travel, postage, copies, filing fees, expert fees, and the like. Colleges should not agree to pay overhead costs, such as general maintenance expenses, personnel costs, or membership fees.

Considering In-House Counsel

What services do in-house counsel provide for community colleges?

The scope of legal services provided by in-house counsel depends on the number and expertise of attorneys employed by the community college and the needs and resources of the college. Typical tasks may include the following:

Risk management: Because in-house counsel are generally more familiar with college personnel and operations, they are uniquely positioned to identify and reduce legal risks in the college, to advise college officials within the context of local needs or other local

considerations, and to anticipate interconnected legal needs that reduce future legal risks. In addition, administrators may be more likely to seek answers earlier from in-house counsel, instead of guessing and hoping for the best when trouble is brewing. Not only can administrators seek input from in-house counsel in the early phases of planning and establishing day-to-day procedures, but they also get a more timely response from an attorney dedicated to the college. In-house attorneys spend a significant portion of their time doing “preventative” legal work by answering inquiries from college employees, participating in the college president or chancellor’s leadership team, disseminating new legal information, drafting and reviewing policies, auditing college records for legal compliance, negotiating and reviewing contracts, preparing written legal opinions on issues facing the college, and attending board meetings. In-house counsel also may investigate allegations of employee wrongdoing, discrimination, or harassment.

Management of legal services: In-house counsel can encourage effective management of all legal services to the community college. Most in-house counsel monitor the work done and bills sent by outside law firms that represent the college.

In-house counsel also can assist with certain aspects of litigation, such as coordinating the discovery process or handling subpoenas served on the college. In-house counsel can ensure that legal advice and litigation strategies impacting the college are consistent, uniform, and not contradictory to other college operations.

Dispute resolution: In-house counsel may meet with complaining parties informally in order to resolve a dispute before it reaches the board or requires the involvement of an outside law firm. In-house counsel may also advise administrators in handling grievances.

Training: Consistent and high quality staff training is essential to avoiding legal pitfalls in a college. In-house counsel routinely develop and conduct training for staff and board members on legal issues as part of the community college’s strategic plan.

What services do in-house counsel not provide for community colleges?

Despite the broad scope of legal services that in-house counsel can provide, there are circumstances when a community college will need to retain outside counsel. This may be driven by the capacity of the legal department to handle the volume of work or by the nature of the particular issue. Some areas that might warrant retention of outside counsel include the following:

Litigation: If a community college becomes a party to litigation, either as a plaintiff or a defendant, it will be necessary to retain counsel to represent the college in that litigation. Sometimes this representation may be covered by a college’s insurance coverage.

Special projects: Depending on the experience and expertise of a community college's in-house counsel, certain matters or projects may require more specialized counsel. This might include tax ratification elections, bond elections and issuances, alleged Title IX violations, eminent domain matters, or politically-charged issues.

How much does in-house counsel cost a community college?

The component costs include:

Salary and benefits: This must be considered for the attorney positions as well as administrative staff and legal assistants.

Overhead: This includes the customary cost of office space, furniture, equipment, utilities, and other facility overhead expenses.

Unique costs: Adding a legal department will likely require paying for specialized legal research materials, mandatory continuing legal education training, mandatory State Bar of Texas membership, and voluntary membership in other associations.

How much does employing in-house counsel save a community college?

A board considering in-house counsel should compare the estimated cost of in-house counsel based on the components set out above with the annual cost of legal services of the type that in-house counsel would provide. Direct cost savings alone may not offset the increased cost of adding one or more positions on the payroll; however, considering the money saved by renegotiating contracts, resolving disputes earlier, managing legal services more efficiently, and preventing legal claims through more legal training, in-house counsel may be a bargain for some community colleges. Although cost savings cannot be guaranteed, many colleges realize significant savings, depending on the size and circumstances of the college.

Communicating with Your College Attorney

Who does a community college attorney represent?

An attorney's relationship with a client is governed primarily by the Texas Disciplinary Rules of Professional Conduct—the ethical rules applicable to every attorney licensed in the state of Texas. A community college's attorney represents the college as an entity, not any single person associated with the college. The board of trustees, acting as a body corporate, governs the college. Consequently, the attorney owes the ethical obligation to the college, not to any individual board member, board officer, or employee, including the college president or chancellor. Tex. Disciplinary R. of Prof'l Conduct 1.12. Under

certain conditions, the attorney may also provide limited representation of individuals acting for the college. Such circumstances may arise when a lawsuit is filed against the college and individual administrators or trustees are named as co-defendants. This can only occur, however, when there is no conflict in the interests of the parties. Tex. Disciplinary R. of Prof'l Conduct 1.06.

In some larger community colleges, the board may retain counsel specifically to represent the board and its interests. This special counsel role may supplement the work of general counsel or other outside counsel, but the representation focuses on providing immediate and direct advice to the board. Typically, outside of board meetings, the board's counsel will coordinate primarily with the board president or board officers to avoid unnecessary expense, confusion in communication, or concerns about violating the Texas Open Meetings Act (OMA). The attorney for the board may facilitate communication and coordination between the board and administration and help ensure compliance with the OMA, the rules of parliamentary procedure, and local board policy during board meetings. Like other attorneys for the college, board counsel represents the college's interests and not those of any individual trustee.

Who in the community college may communicate with the college attorney?

When an attorney represents an entity, such as a community college, the attorney may report to and accept direction from the entity's authorized representatives. Tex. Disciplinary R. of Prof'l Conduct 1.12. As a general matter, in a college this could include the college president or chancellor and other specified administrators, as well as board members. To control the flow of information and the cost of legal services, however, colleges often limit who has access to the college's attorney.

In most community colleges, the college president or chancellor and the board president are the primary contacts for the college's attorney. In some colleges, the other trustees may also contact the attorney. Depending on factors like the size and complexity of the college administration, other administrators may need access to the attorney. Both the college and the attorney need a clear understanding of who is authorized to call the attorney and under what circumstances. The parameters should be specified in the written agreement between the attorney and the college, in policy or other written procedure, or both. In deciding who may contact the college's attorney, a college should bear in mind that the wider the circle of access, the greater the potential for unexpected legal costs and the need for outside counsel to help harmonize diverse points of view. However, the cost of not seeking advice can far outweigh the cost of a preventative phone call. Each college must decide how best to strike the balance between the need to control costs and the need to get timely legal advice.

Are communications with a college attorney confidential?

From the public: The Texas Disciplinary Rules of Professional Conduct prohibit an attorney from revealing confidential client information—that is, information regarding a client or supplied by a client during the course of representation. Tex. Disciplinary R. of Prof'l Conduct 1.05. Further, the attorney-client privilege protects from disclosure confidential communications between a client and its attorney that were made for the purpose of obtaining legal advice. Tex. R. Evid. 503. By shielding those communications, the privilege allows unrestrained communication and contact between the attorney and client, without fear that the communications will be revealed in public or a legal proceeding. *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied).

For Texas community colleges, the attorney-client privilege protects communications from disclosure in litigation as well as in response to public information requests. Tex. Gov't Code §552.107. In fact, the Texas Supreme Court found the attorney-client privilege to be a compelling reason to overcome the presumption of openness under Texas Government Code section 552.302. *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017). According to the Court, “in the public sector, maintaining candid attorney-client communication directly and significantly serves the public interest by facilitating access to legal advice vital to formulation and implementation of governmental policy. Full and frank legal discourse also protects the government’s interest in litigation, business transactions, and other matters affecting the public.” *Paxton*, 509 S.W.3d at 250. Without the privilege, colleges might fail to engage in “fruitful self-analysis and decide not to seek needed legal advice.” *In re City of Georgetown*, 53 S.W.3d 328 at 333 (Tex. 2001).

Remember that an in-house attorney may function in multiple capacities: For example, an in-house attorney may serve as a lawyer when giving legal advice and as an administrator when performing administrative tasks, such as providing training on legal compliance. Thus, all communications with in-house counsel are not necessarily confidential and protected from public disclosure.

The OMA also protects a college’s communications with its attorney by allowing a private consultation when the board seeks its attorney’s advice about pending or contemplated litigation or a settlement offer, or on a matter in which the attorney’s duty of confidentiality conflicts with the requirement for an open meeting. Tex. Gov’t Code § 551.071.

Not from the board: Although communications with the community college attorney’s are generally privileged from the public, individual communications by authorized college representatives with access to the college attorney are not privileged from the client, namely the board. When dealing with the college’s attorney, board members and college personnel must remember that the attorney represents the college, which acts through a majority of its board members. Therefore, the attorney does not represent the interests of

any individual board member, administrator, or employee. Tex. Disciplinary R. of Prof'l Conduct 1.12. As a result, what an individual board member, administrator, or employee tells the college attorney and the advice the attorney renders cannot be kept from the board when it implicates the college's broader interest. Moreover, the board should expect the college attorney to keep the president informed about board members' questions and the attorney's advice, unless the consultation involves a matter in which the board and college president or chancellor have conflicting interests.

What are some ways to facilitate clear communication with the college's attorney?

Call early. As stated above, a key to managing risk is calling the attorney before problems develop. While college attorneys may have considerable knowledge about issues facing colleges, everyone benefits from more time to fully consider and, if necessary, research legal issues.

Communicate facts as completely and accurately as possible. Every legal opinion is limited by and to the underlying facts and circumstances as understood by the attorney giving the advice. If an attorney lacks relevant information at the time advice is given, the advice may be incomplete or flawed. Thus, it is important to give the attorney as much accurate information as possible.

Listen carefully. Both college attorneys and colleges benefit from taking the time to communicate carefully about the substance of the attorney's legal advice. Attorneys may assume that college officials have more information about a situation or relevant legal authorities than they do. Alternatively, college officials may hear only what they expect or want to hear when an attorney offers advice. Taking the time to clarify understanding will prevent problems later.

What TASB Policies apply to legal representation?

See TASB Policy BCC(LOCAL).

Where can I get more information about legal representation?

As always, if you have questions about these or other legal issues, college representatives may contact TASB Community College Services at 800.580.1488 or colleges@tasb.org.

For more information on community college law topics,
visit TASB Community College eLaw online at colleges.tasb.org/elaw.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the college's own attorney in order to apply these legal principles to specific fact situations.