

# COMMENTARY

## THE GENERAL COUNSEL OF A NONPROFIT ENTERPRISE: SOME QUESTIONS

*Edward B. Rock\**

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### I. INTRODUCTION

No one has thought about the role of the general counsel more deeply than Geoff Hazard. The role of a lawyer in an organization raises fundamental questions about both the role of the lawyer as well as the key and contested question of “Who is

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\* Saul A. Fox Distinguished Professor of Business Law and Co-Director of the Institute for Law & Economics, University of Pennsylvania Law School. The Author was a speaker at the Thirteenth Annual Houston Law Review Frankel Lecture on November 7, 2008, where he presented an initial version of this Commentary.

the client?" In his article *Legal and Managerial "Cultures" in Corporate Representation*, Geoff pushes the analysis forward by introducing "culture" into the analysis and by urging us to look to the sociological literature to better understand the role of a general counsel in a corporation.<sup>1</sup>

The most important move in Geoff's turn to the sociological literature, I submit, is to push us to examine closely the organizational context in which lawyers interact with their management colleagues. By invoking the concept of "culture," what Geoff ultimately forces us to do is to recognize: (1) that organizations are heterogeneous; (2) that broad principles (e.g., "independent professional judgment," "the client is the corporate juridical entity") are only given substance in concrete contexts; and (3) that much of the real work of understanding the role of lawyers in organizations can only be done at the level of specific organizations with distinctive organizational cultures.

In this brief response, I want to extend Geoff's analysis into a context that he does not address in his article and to begin to think through how it might help us understand the role of the lawyer in a somewhat different organizational context: the nonprofit corporation. Indeed, because this is too broad and heterogeneous a category to be useful, let me make it even more specific: the role of the general counsel in a university.

These are preliminary and rather uninformed comments—more questions than answers. I should emphasize that I have never worked as a lawyer for a university, have never represented a university, and have never worked as in-house counsel for a for-profit corporation either. Instead, I come to this question with a background in corporate law (which I've taught for the last twenty years), and as one who has, of late, become interested in and started teaching about nonprofit organizations. I have also been a member of a university for the past twenty years and thus have a native's understanding—and inevitable misunderstanding—of one university.

## II. BACKGROUND

Let me start with some basic building blocks. First, what is the difference between a for-profit and a nonprofit corporation such as a university? The key difference from which all sorts of other differences flow is the "nondistribution constraint." Unlike a for-profit corporation, which may distribute excess cash flows to

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1. See Geoffrey C. Hazard, Jr., *Legal and Managerial "Cultures" in Corporate Representation*, 46 HOUS. L. REV. 1, 4 (2009).

its shareholders by paying dividends, buying back shares, or liquidating, a nonprofit corporation is prohibited from making distributions.

This nondistribution constraint has two immediate consequences. First, it means that there are no shareholders to elect directors, to buy new shares to finance new projects, to sell their shares and thereby sell control, to approve or veto major decisions, or to sue faithless fiduciaries. Second, and related, the complicated question in corporate law of “for whom is the corporation managed?” instantly becomes even more difficult and contested. For whom is a university managed? Consider briefly some of the implications of these features.

In the for-profit corporation, the roles played by shareholders mean that, as a theoretical and practical matter, the corporation will ultimately be managed for the shareholders. Great discretion is given to the managers in how they maximize shareholder value and even, in the short term, *whether* they maximize shareholder value. However, because only shareholders vote for directors, directors ultimately work for shareholders or else they are displaced. This power, though rarely exercised, means that the working answer to the question “For whom is the corporation managed?” is “ultimately, the shareholders.”

Let us now turn to the parallel question, “For whom is the nonprofit corporation managed?” or more precisely, “For whom is the university managed?” Is there any group connected to a university that serves the same role as the shareholders of a for-profit firm?

### III. THE UNIVERSITY: A HIGHLY STYLIZED AND INCOMPLETE ACCOUNT

Consider the modern American university. Because it is subject to the nondistribution constraint, there are obviously no shareholders. But now think about the implications of this simple difference. First, how is the university to gather the “locked-in” capital to fund its operations? The sources of funds for a university are tuition, government grants, and donations. Tuition is largely “fee for service.” It is a payment in exchange for one of the products that the university produces, namely, education. Government grants often fund particular activities such as basic research. Donations to the university constitute the principal source of what the for-profit world considers “equity capital,” and

for American universities, these gifts overwhelmingly come from alumni.<sup>2</sup>

How do we convince alumni to donate the large sums that they do? It is obviously a complex process, but one essential factor is that donors feel a sense of identification with the university. For the largest givers, this sometimes includes membership on the university's board of trustees. But, as with other nonprofits, big donors often wish to serve on the board without bearing significant fiduciary responsibilities. Here we see a second huge difference between for-profits and universities: the roles of their boards of directors, including the identity of the directors and their understanding of what they are supposed to be doing, are fundamentally different. University boards generally are far larger than boards of publicly held companies, and the tasks performed by each vary greatly.

In light of the alumni's role in providing the "equity capital" of the university, and their domination of the board of directors, would it be descriptively accurate to say that the university is managed for the alumni? Not in any robust sense. While it is true that alumni are "residual beneficiaries" in a certain sense—the current "value" of their degrees depends in part on the current success of the university—they have minimal control rights, little ability to intervene, and limited knowledge about what is going on. Indeed, the difficulties with thinking of alumni as parallel to shareholders are illustrated by the problems that universities like Dartmouth, which give the broad mass of alumni important roles in electing directors, encounter when they seek to change the direction of the university.

Would it be descriptively accurate to say that the university is run for the students? Again, while it is clear that students are important "stakeholders" in the university, there are vast areas of university activities that do not relate directly to teaching students. In particular, students have often complained that the focus on research—both in allocating resources as well as in selecting and tenuring faculty—is inconsistent with the teaching mission (at least until the students graduate and instantly become more interested in high profile, famous faculty than in how well they teach!).

Other nonprofit institutions face a similar question when they determine for whom their organization is operated. My

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2. See R.G. Ehrenberg & C.L. Smith, *The Sources and Uses of Annual Giving at Selective Private Research Universities and Liberal Arts Colleges*, 22 *ECON. EDUC. REV.* 223, 224–27 (2003) (showing that alumni have consistently donated more than other individuals, foundations, and corporations).

colleague Michael Fitts and I taught a seminar together on nonprofits this year. Ralph Muller, who runs the University of Pennsylvania Health System, came to talk to the class about managing a health care nonprofit. Muller took a health system that was losing hundreds of millions of dollars and turned it into one that is making hundreds of millions of dollars. What is his goal? How does he answer the question “For whom is the health system managed?”

He sees himself as seeking to make the health system the best academic medical center it can be in teaching and research, as measured by the aspirations of his faculty and faculty members at other universities whom they would like to recruit. As it happens, top medical researchers like to perform complicated procedures: the more complicated the better. Fortunately, those are areas in which Penn can achieve a degree of market power, thereby allowing it to charge high prices and to use the profits to subsidize research or obstetric care, for instance. Why acquire Pennsylvania Hospital and build it into the largest provider of obstetric care in Philadelphia (delivering 40% of the babies born in Philadelphia) when you lose money on every baby you deliver? Simply put, Penn cannot train doctors without teaching them how to deliver babies.

Defining the mission in this way has content. The goal is not to maximize profits. Were that his goal, he could make even more money for the university by buying some additional hospitals. The goal is also *not* maximizing the delivery of charity care, although substantial charity care is provided. Nonprofit does not mean nice.

One of the things that corporate law teaches is that while the corporation may be managed *for* the benefit of the shareholders, that does not mean it is managed *by* the shareholders themselves. Systems differ in how they structure the relationship between the shareholders and the board of directors. In the nonprofit context, things are even more complicated: the administrative hierarchy of the typical university does not, in reality, reflect who calls the shots. Although the board of trustees—nominally the legal source of all power—may have significant input into matters such as endowment investment policy, the overall budget, and in some cases, the hiring and firing of the university president, most of the critical decisions in the university are inevitably made by the tenured faculty who are beyond the reach of both the

administrators and the board of trustees.<sup>3</sup> Even worse from a management perspective is that the content of the maximand (to maximize the excellence of the teaching and research mission of the university) will be deeply contested by the different interest groups within the university. A management structure in which the top of the hierarchy cannot, even in principle, redirect the course of the firm is, to corporate law eyes, a very odd one indeed.<sup>4</sup>

#### IV. SO WHAT'S A GENERAL COUNSEL TO DO?

So far, I've been talking at a pretty general level, a level at which both Geoff and I agree not much progress can be made. To give the discussion some content, I'd like to consider some challenges that the general counsel at Penn—who has varied over the years—has confronted. In each case, I know about the issue but complacently retain a tenured faculty member's perfect ignorance of the actual facts. I also know nothing about how these issues were in fact handled by the general counsels who were stuck with the responsibility. These cases are better thought of as law school hypos based loosely on real world events.

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3. See José A. Cabranes, *Myth and Reality of University Trusteeship in the Post-Enron Era*, 76 *FORDHAM L. REV.* 955, 960–61 (2007) (“Regardless of the role of the trustees as legal representatives of the university in its dealings with external forces, it is still the faculty that actually governs.”).

4. This fundamental ambiguity is nicely captured by a long time University general counsel:

What we have in a college or a university is a perpetual corporate entity with a sublime mission transcending its managers and its current constituency; a sublime cause in a corporate form. Unlike the case with most corporations, there is a duality between management of the corporation and stewardship over the cause. To manage the university corporation is not to manage its essential subject matter, which is knowledge and our cultural traditions. This is different from the business corporation selling products or services for a profit, where the products and the services and the profits are all within the ambit of corporate management. The very essence of a business corporation is managed by its board members and officers; the essence of the university is not.

The board members and administrators of a university have all the powers over the formal corporate entity that the directors and officers of a business corporation have, and are viewed by the state and the legal system as managers of the entity; but as to the very essence of the entity, they are not managers at all. They are facilitators. This duality provides fertile ground for ambiguity . . . .

. . . .

When college presidents say the faculty *are* the college; [and] when the faculty say they do not manage the institution at all . . . there is more ambiguity than I can eliminate in forty-five minutes or in a career. Yet I think the duality of essential mission on the one hand, and corporate management designed to facilitate that mission on the other, is useful to keep in mind.

John A. Beach, *The Management and Governance of Academic Institutions*, 12 *J.C. & U.L.* 301, 326–27 (1985) (footnotes omitted).

I should also add that there are large aspects of the university counsel's role that are not captured by these hypos. University lawyers worry about an incredible range of legal matters including employment matters, licensing agreements, landlord-tenant issues, liquor licenses, hotels, concert halls and theaters, health care providers on a huge scale, and so forth. I have very few answers about what the general counsel of a university should do, but I feel a great deal of sympathy for the incredible difficulty of the position. These perhaps idiosyncratic examples, however, present some of the problems raised by the essential contestability of the core mission.

A. *Two Contrasting Cases: Water Buffalo and High Rise Sex*

Let me start with a pair of contrasting cases involving student misconduct.

*Hypo 1: Water Buffalo*

Late one night in January 1993, a student, annoyed by noise from the dispersal of a sorority party, yelled from his window, "Shut up, you water buffaloes!" The sorority sisters were African-American. The shouting student was white. The sorority sisters filed a complaint with the university's disciplinary body alleging a violation of the university's racial harassment policy, which prohibited the use of racial epithets, even though no one could find any evidence that the term "water buffalo" had ever been used in that manner. From these rather pedestrian facts arose a public storm that made its way into the *Wall Street Journal* and ultimately into the confirmation hearings of Sheldon Hackney, Penn's then-president, who was nominated to head the National Endowment of the Humanities.<sup>5</sup> Once the sorority sisters filed a complaint, the procedure took on a life of its own. The judicial inquiry officer investigated the incident, pursued the case, and offered a settlement to the student, which he rejected. The matter lingered for months and became "Exhibit A" in the culture wars of political correctness run wild.<sup>6</sup>

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5. See Editorial, *Buffaloed at Penn*, WALL ST. J., Apr. 26, 1993, at A12 (noting the absurdity of the racial harassment allegations).

6. For a further account of the incident, see Alissa Kaye, *Controversial 'Water Buffalo' Case Continues*, DAILY PENNSYLVANIAN, May 14, 1993, available at <http://media.www.dailypennsylvanian.com/media/storage/paper882/news/1993/05/14/Resources/Graduation.Controversial.water.Buffalo.Case.Continues-2188649.shtml>.

*Hypo 2: High Rise Sex*

One afternoon in September 2005, a student couple had a sexual encounter. For reasons that were never fully explained, they ended up having sex against the window of his or her room in “High Rise North,” a multi-story dorm at Penn with very large windows. As one might imagine, a crowd gathered and, in this age of digital photography, some pictures were taken. Some of those pictures ended up on the personal website of one of the onlookers and thus became available to the whole World Wide Web. The girl in the picture soon thought better of things and complained to the university’s Office of Student Conduct (OSC), which charged the photographer–poster with violating the university’s code of student conduct, sexual harassment policy, and policy on acceptable uses of electronic resources.<sup>7</sup> According to press reports, the charge stated that the student “posted naked pictures of another University of Pennsylvania student on [his] personal Web site through the University’s servers, without that student’s authorization and in a manner highly invasive of the student’s privacy.”<sup>8</sup> According to the memo, the posting caused one of the pictured students “serious distress” and created “an intimidating living environment for her.” The OSC proposal called for the photographer to be placed on disciplinary probation until graduation and required that he write an essay “discussing what was wrong with the conduct [he was] involved in” and a letter of apology. The student rejected the OSC’s proposed resolution and asked for a disciplinary hearing. Within days of the story becoming public, however, the university decided to drop all disciplinary charges.<sup>9</sup> Within a week, the incident, which was beginning to attract national attention, was largely forgotten.

In these two contrasting cases, we see one of the most difficult aspects of a university general counsel’s job: reconciling the university’s internal procedures, administered by deeply committed employees, with the university’s long term goals. In “Water Buffalo,” the president took the public position that those procedures had to take their course and that there was nothing

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7. Jason Schwartz, *Racy Photo Lands Student in Trouble*, DAILY PENNSYLVANIAN, Nov. 30, 2005, available at <http://media.www.dailypennsylvanian.com/media/storage/paper882/news/2005/11/30/News/Racy-Photo.Lands.Student.In.Trouble-2146436.shtml>.

8. *Id.*

9. Jason Schwartz, *University Drops All Charges Against Photographer*, DAILY PENNSYLVANIAN, Dec. 1, 2005, available at <http://media.www.dailypennsylvanian.com/media/storage/paper882/news/2005/12/01/BreakingNews/University.Drops.All.Charges.Against.Photographer-2146464.shtml>.

he could do to bring matters to a swift conclusion. The result was a personal and public relations disaster for everyone involved: the university, the president, and the individual students. In retrospect, it would have been far better for everyone involved if someone—the general counsel, the provost, the president—had made the issue “go away” at the beginning. “High Rise Sex,” as salacious as it was for a few days, quickly disappeared.

But—and here’s the challenge—when a university has procedures in place, making an incident disappear in the interests of all (or most) of those involved is a delicate and difficult mission that requires a combination of insight, diplomacy, and tact. While there are obviously parallels in the for-profit world, the differences in context show the unique nature of the challenges faced by universities. At Penn, I have no doubt that the institutional memory of the “Water Buffalo” incident made it easier to get rid of the “High Rise Sex” matter.

#### *B. The Solomon Amendment*

Next, consider the problems raised when traditional notions of academic autonomy clash with governmental directives. The University of Pennsylvania Law School prohibits employers who discriminate from using its placement facilities:

The University of Pennsylvania and its Law School do not discriminate on the basis of race, sex, sexual orientation, gender identity, religion, color, national or ethnic origin, age, disability, or status as a Vietnam Era Veteran or disabled veteran. Employers utilizing our Career Planning facilities will be held to the same standard of non-discrimination.<sup>10</sup>

Many universities have taken the position that the military’s “don’t ask, don’t tell” policy impermissibly discriminates on the basis of sexual orientation. As a result, many of those universities, including Penn, banned the military from using campus career planning facilities. In 1996, to counteract this trend, Congress enacted the Solomon Amendment, which withheld all federal funding for any university that, in the determination of the Secretary of Defense, has:

[A] policy or practice (regardless of when implemented) that either prohibits, or in effect prevents . . . the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who

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10. Univ. of Pa. Law School, On-Campus Recruiting, <http://www.law.upenn.edu/cpp/employer/recruiting/oncampus/> (last visited Mar. 6, 2009).

are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer . . . .<sup>11</sup>

Because large research universities like Penn receive huge amounts of federal money for research, student aid, and other purposes, the university took the position that, as much as it condemned the congressional policy, it would comply. Indeed, “the University President ordered the Law School not to enforce its antidiscrimination policy against military recruiters.”<sup>12</sup>

Although members of the law faculty believed that the Solomon Amendment was unconstitutional, the university did not want to challenge it. Frustrated with the university’s unwillingness to mount a constitutional challenge, members of the law faculty, along with some students, brought a declaratory judgment action alleging that the university’s preexisting policies complied with the requirements of the Solomon Amendment because they allowed military recruiters alternative and arguably equivalent access to students.<sup>13</sup> Ultimately, of course, the Supreme Court upheld the Solomon Amendment.<sup>14</sup>

My interest in this regard is not the constitutional question but rather the legal issue of standing and the parallel institutional questions. Imagine for a moment some regulation impinging on General Motors (GM), a regulation that the people who worked at Chevrolet thought outrageous. GM managers, including the general counsel, decide for a variety of reasons that GM will not challenge the regulation. Is it even conceivable that Chevy would challenge it independently? Or that some of the top managers at Chevy would decide to challenge it in their quasi-individual capacity? Of course not. But the nature of a university, in which the faculty and the students both have some grounds for believing that they *are* the university (and the peculiar stubbornness and creativity of law professors), makes such a scenario much less surprising. But how then does a general counsel chart the legal strategy of the university when there are all these law professors who think they know better and are

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11. 10 U.S.C. § 983(b) (2006).

12. *Burbank v. Rumsfeld*, No. Civ.A. 03-5497, 2004 WL 1925532, at \*2 (E.D. Pa. Aug. 26, 2004).

13. *Id.* at \*1–2.

14. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60, 70 (2006) (ruling that the Solomon Amendment was constitutional because it did not violate a law school’s freedom of speech or association).

willing to spend hours arguing or even litigating their position? It boggles my corporate lawyer's mind.

*C. Adelphi and Reporting Up the Ladder*

My final example is a less amusing one and brings us back to some of the core themes of Geoff Hazard's paper. Adelphi University is located on Long Island, New York. Peter Diamandopoulos became its president in 1985. He had ambitious plans for the university. However, by 1995, he had lost the support of all of the constituencies in the university except for the board of trustees. The New York Board of Regents, an independent body appointed by the state legislature, has power to remove trustees for "neglect of duty." Responding to newspaper accounts revealing that Diamandopoulos was the second highest paid college president in the country, the Board of Regents investigated and, after uncovering a combination of incompetence, neglect of duty, and conflicts of interest, replaced eighteen of the Adelphi University trustees.<sup>15</sup>

I have no idea whether Adelphi had a general counsel or what he or she did or did not do. My interest in this case is different: when you have a governing board that does not govern—as is the case in most nonprofit corporations—what happens to the concept of "reporting up"?

Under Rule 1.13(b) of the Model Rules of Professional Conduct:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.<sup>16</sup>

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15. Bruce Lambert, *New York Regents Oust 18 Trustees from Adelphi U.*, N.Y. TIMES, Feb. 11, 1997, at A1.

16. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2008).

As noted above, under applicable nonprofit corporate law, the “highest authority” that can act on behalf of a nonprofit corporation is its board of directors. The problem, of course, is that the board of directors of most nonprofit corporations is uninvolved. When, as anticipated under Rule 1.13, the lawyer believes that, say, the president is engaging in conduct that violates a legal obligation to the organization, what should the lawyer do? Although the comments to Rule 1.13 address differences between the roles of government lawyers and lawyers in private organizations, no attention is paid to the nonprofit sector.<sup>17</sup>

Rule 1.13 is but one development in the evolution of the role of lawyers for organizations. The Sarbanes–Oxley Act implements most of Rule 1.13 in the public company context and mandates an effective “reporting up” process in which counsel must:

[R]eport evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and . . . if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.<sup>18</sup>

This has given rise to the concept of a qualified legal compliance committee (QLCC). As the statutory provision indicates, this may normally be the audit committee but need not be.<sup>19</sup> Although the Sarbanes–Oxley Act does not apply to nonprofit corporations, the standards of governance established in it have become a source of wisdom for better-counseled nonprofits. Who was the QLCC at Adelphi? Who is the QLCC at Penn? Here, of course, we return to the question with which I

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17. For a valuable discussion of reporting up in the nonprofit corporation, see generally Michael W. Peregrine, James R. Schwartz & William W. Horton, ‘Up the Ladder’ Counsel Reporting Processes for the Nonpublic/Nonprofit Corporation, 2 CORP. ACCOUNTABILITY REP. 423 (2004).

18. 15 U.S.C. § 7245 (2006). This section of the Sarbanes–Oxley Act is implemented in 17 C.F.R. § 205 (2008).

19. See 17 C.F.R. § 205.2(k) (2008) (providing that the QLCC may consist of a member of an equivalent committee of independent directors if the issuer lacks an audit committee).

started: the governance of the nonprofit. For all of the complexity or even incoherence of university governance, and for all of the ambiguity of the role of the university's board of trustees, at a minimum, a university board of trustees should have an audit committee that can play the role of a higher authority, a role that should be broadcast widely to all members of the university community.

What does my university do in this regard? Having no first hand experience, I went online to see what I could find out. There is, of course, a webpage devoted to the board of trustees in which we are told that:

Formal institutional governance and fiduciary responsibility for the University of Pennsylvania rest solely with its Board of Trustees. The trustees delegate the responsibility for the day-to-day management of the University of Pennsylvania to the administration and, in particular, to the president. For this reason, one of the most important responsibilities of the trustees is the selection, retention, and replacement of the president. The trustees, however, seek to support and reinforce the administration in several ways. They serve as a bridge between the University and the world; on the one hand, interpreting the institution to the public, and on the other hand, bringing in experience and perceptions gained outside the University. The trustees provide leadership in the identification and development of financial resources. They oversee the University's relations with other institutions, the private sector, government bodies, and the media. In consultation with the president, the trustees determine the long-range allocation of resources, making decisions in the context of the needs and expectations of the University's constituencies and of society.

The primary work of the trustees is carried out by eleven committees: Academic Policy, Audit and Compliance, Budget and Finance, Compensation, Development, External Affairs, Facilities and Campus Planning, Honorary Degrees and Awards, Neighborhood Initiatives, Nominating, and Student Life. An Executive Committee is empowered to act on behalf of the trustees between meetings of the full board, which are held in the winter, spring and fall.<sup>20</sup>

This is nice, as far as it goes. By clicking on the tab for "The Trustees," one can find out who they are. It turns out that there are some fifty-eight very eminent men and women who serve as

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20. Univ. of Pa., Board of Trustees, <http://www.upenn.edu/secretary/trustees/index.html> (last visited Mar. 6, 2009).

trustees. But who serves on the key committees? Who is on the audit and compliance committee? The executive committee? There are no tabs for individual committees and no easy way (at least for me) to find out who is on which committee. By contrast, of course, one need only look at Goldman Sachs' "investors" webpage to find out who is on which committee, including the identity of the chair.<sup>21</sup>

## V. CONCLUSION

What can we learn from this? There are, it seems to me, a number of lessons. First, because the very mission of nonprofits is contested and can be captured by different stakeholders, individual nonprofits will have very different organizational cultures. The crazy peculiarities of universities are almost a parody of this point. How lawyers function within these cultures will thus be quite specific to their organizations.

Second, the actual distribution of authority and responsibility within an organization—what procedures are in place, who runs those procedures, who has the critical information, and who makes the critical judgments—will determine the lawyer's actual role.

Third, for all of the uniqueness and contestability of nonprofit organizations, legal structure still matters. The history of the last 50 years of corporate law is the story of putting new wine in old bottles. In the 1960s, it was recognized that the board of directors of a modern publicly traded corporation cannot manage the firm and any normative expectation that the "business and affairs of a corporation shall be managed by or under the direction of its board of directors" would be disappointed.<sup>22</sup> So, instead of expecting the board to manage, new tasks were invented for the institution, giving birth to the "monitoring board." The monitoring board developed over time: beginning with the SEC studies in the 1960s, continuing with scholarly writing, finding acceptance—and controversy—in the ALI's Principles of Corporate Governance, and culminating in Sarbanes-Oxley and the stock exchange reforms it mandates. Now, it is the accepted understanding of what the board of directors is supposed to do.

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21. See Goldman Sachs, Investors, <http://www2.goldmansachs.com/our-firm/investors/corporate-governance/index.html> (last visited Mar. 6, 2009).

22. LITIGATION ISSUES IN THE DISTRIBUTION OF SECURITIES: AN INTERNATIONAL PERSPECTIVE 416 (William G. Horton & Gerhard Wegen eds., 1997) (quoting WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 1.02, at 3-4 (4th ed. 1988)).

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A similar process of redefinition is required in the nonprofit sector. Nonprofits have boards that clearly cannot and do not manage the nonprofit. But they are there and can be tasked with some key functions, one of which is to monitor the top management. At the very least, one should expect that university boards will have audit committees that perform on par with those of for-profit boards, with the same access to information, experts, and advice.

Geoff Hazard has spent his career thinking about the role of lawyers. He has done so with a characteristic style: grounded in institutional reality, no-nonsense, appropriately cynical, and occasionally aspirational. It is this set of qualities that are needed to understand the role of the lawyer in nonprofit organizations.