

# 2018 Texas Higher Education Leadership Conference

Effective Trusteeship, The Fiduciary Role of the Board, Ethics and Best  
Practices for Board Governance

Dona Cornell  
Vice Chancellor for Legal Affairs  
and General Counsel  
University of Houston System

# Role of the Governing Board

- ▶ Preserve institutional independence
- ▶ Enhance the public image
- ▶ Insist on clarity of focus and mission
- ▶ Provide policy direction and establish goals consistent with the mission
- ▶ Set admission standards
- ▶ Act as a fiduciary for funds under the control of the institution
- ▶ Appoint the president or other chief executive officer of each institution within the board's control
- ▶ Ensure formal positions on matters of importance being considered are shared with the Texas Higher Education Coordinating Board
  - ▶ Section 51.352 Texas Education Code

# Fiduciary Relationship

- ▶ As a fiduciary you owe the following duties to the institutions that you represent:
  - ▶ Duty of Care
  - ▶ Duty of Loyalty
  - ▶ Duty of Obedience

# Duty of Care

- ▶ The duty of care does not require professional expertise, extensive consideration, or full knowledge of the matter at hand by every board member. Instead, the duty generally requires board members to be reasonably well informed of the relevant issues.

# Duty of Care

- ▶ Officers and board members may rely upon expert advice in making their determinations. For example, a board member may rely on information, opinions, reports, or statements, including financial statements and other financial data that are prepared or presented by those within the institution one can reasonably rely upon.
- ▶ Who would this typically include?

# Duty of Loyalty

- ▶ Under this duty, a college or university board member must be loyal to the institution and not use the position of authority to obtain, directly or indirectly, a benefit for him or herself or for another organization in which the board member has an interest.
- ▶ What would be included in an evaluation of this duty? Financial interests? Political interests? Personal interests? Other leadership positions he or she holds with other organizations?

# Duty of Obedience

- ▶ This is the duty of board members to ensure that the college or university is operating in furtherance of its stated purposes (as set forth in its governing documents) and is operating in compliance with the law. The board should also periodically re-evaluate its purposes and mission and must be prepared to amend or change them when it is necessary and appropriate to do so.

# Corporate Board Best Practices Applicable to Higher Education

1. Ensuring there are clearly defined roles, responsibilities, and accountabilities.
2. Practicing and holding good ethics and keeping integrity in high regard.
3. Ensuring strategic management by aligning goals with mission.
4. Creating organizational effectiveness in governance.
5. Providing effective risk management oversight.



# Duty of Care

- ▶ Creating organizational effectiveness in governance.
- ▶ Providing effective risk management oversight.

# Organizational Effectiveness

## Shared Governance

- ▶ Universities and Colleges are unique in that there is value to both academic freedom and constituent participation.
- ▶ Shared governance as a system has two primary parts:
  - ▶ The first part is a system for creating alignment of stakeholders on issues of institutional direction by developing common understandings of the challenges the institution faces.
  - ▶ The second part is a system of checks and balances for decisions regarding operational issues such as academic programs, tenure and promotion policies, budgeting, and student life.

# Organizational Effectiveness

## Shared Governance- Best Practices

- ▶ 1. Actively engage board members, administrators, and faculty leaders in a serious discussion of what shared governance is (and isn't).
- ▶ 2. Periodically assess the state of shared governance and develop an action plan to improve it.
- ▶ 3. Expressly support strong faculty governance of the academic program.
- ▶ 4. Maintain a steadfast commitment to three-way transparency and frequent communication.
- ▶ 5. Develop ways to increase social capital between board members and faculty members.

# Risk Management Board Responsibility

- ▶ 1. Establish risk management as an institutional priority.
- ▶ 2. Consider the institution's tolerance for risk.
- ▶ 3. Call on senior administrators to establish a process for identifying, prioritizing and monitoring risk, with formal assignment of responsibility for risk assessment and management to an appropriate individual or office.
- ▶ 4. Monitor the plan's implementation through regular, formal reporting to the board or an appropriate board committee by the appropriate senior administrator.

# Duty of Loyalty

- ▶ Practicing and holding good ethics and keeping integrity in high regard.

# Duty of Loyalty

## Ethics and Integrity

- ▶ Faithfully pursuing the interests of the institution and its charitable or public purposes rather than one's own interests or the interests of another person or organization.
- ▶ Actively disclosing existing or potential financial conflicts of interest and dual interests, and recusing oneself from board discussions and votes on transactions or policy matters, in accordance with the institution's conflict-of-interest policy and state law.
- ▶ Maintaining complete confidentiality about any matters presented to the governing board at all times, unless otherwise directed by the board and subject to state transparency laws applicable to public institutions.
- ▶ Retaining the governing board's independence from external and internal stakeholders in the conduct of its oversight and policy responsibilities.

# Duty of Loyalty

## Ethics and Integrity

- ▶ Texas Ethics Commission -The “Should Nots”
- ▶ State officer or employee should not:
  - ▶ Accept gift, favor or service that might tend to influence in the discharge of official duties;
  - ▶ Accept other employment or business opportunity that could require disclosure of confidential information;
  - ▶ Accept other employment or compensation that can impair independence of judgment;
  - ▶ Make personal investments that could create a conflict with public obligations;  
or
  - ▶ Intentionally or knowingly accept or solicit a benefit for having exercised official duties.

# Duty of Loyalty

## Community Colleges

### Local Government Code Chapter 176

- ▶ When entering into a contract (or considering it), the vendor and the board member or officer) must file a conflict of interest questionnaire if the vendor has a “business relationship” with a local government entity AND at least one of the following:
  - ▶ An employment or other business relationship with a board member, officer, or one of their family members, of the entity, where the board member/officer/family member received taxable income exceeding \$2,500 in the previous 12 months (except for investment income);
  - ▶ Has given the officer or their family member one or more gifts totaling \$100 with the previous calendar year (this includes lodging, transportation or entertainment but excludes food); or
  - ▶ Has a family relationship with a board member or officer.
- ▶ The required forms are on the website of the Texas Ethics Commission. Disclosure must also include each business relationship where the board member/officer serves as an officer of the entity or owns at least 1%.



# Duty of Loyalty

## State Universities

### Texas Education Code Chapter 51

- ▶ Contracting with State Universities Regents/Board members must disclose to the University any potential conflict of interest specified by state law or University policy of any known financial interests regarding contracts or bids.
- ▶ Institutions of higher education can transact with a business entity even if one or more board members has a substantial interest in the business subject to certain requirements. Board members must disclose the interest in a board meeting, refrain from voting, and the Board must approve the contract by a majority vote. *See Texas Education Code § 51.923*

# Duty of Loyalty State Universities

A former state officer or employee of the University who during the course of employment participated on behalf of the University in either contract negotiation or procurement involving a person may not accept employment from that person before the 2<sup>nd</sup> anniversary of the date the contract was signed or the procurement was terminated or withdrawn.

See Tx. Govt. Code § 572.069.

# Duty of Obedience

- ▶ Having clearly defined roles, responsibilities, and accountabilities.
- ▶ Ensuring strategic management by aligning goals and working towards common goals.

# Duty of Obedience

## Roles, Responsibilities, and Accountabilities

- ▶ Ensuring that the institution is acting at all times in accordance with its mission and purposes.
- ▶ Ensuring that the college or university, in all of its activities, is acting in legal and ethical compliance with the law and applicable internal and external rules.
- ▶ Instituting effective internal controls to achieve compliance and to identify and address problems.

# Strategic Management

## Strategic Plans- Best Practices

- ▶ 1. Empower the president to engage stakeholders in a participatory process to develop a plan that could impact the growth and success of the institution.
- ▶ 2. Engage in communication to gain insight from all stakeholders. Surveying constituents often leads to created shared values and visions for the future of your institution.
- ▶ 3. Monitor the strategic plan, ensuring performance measures are understood and the administration is utilizing the plan for decision-making.
- ▶ 4. Boards are most effective when they use the strategic plan to govern, not administer its implementation.
- ▶ 5. Update plans by being mindful of the vision, mission, and values of the original plan.

# Hypotheticals

# Hypothetical 1

- ▶ The president/chancellor of your institution invites you to attend a basketball game to meet with potential donors for the athletics program.
- ▶ What is your proper role?

# Hypothetical 2

- ▶ Your brother owns a consulting company that is planning on placing a bid for a major contract for the University/College. You later come to find out that his company was selected as the vendor for this project. The contract for this project comes to the board for approval.
- ▶ What do you do?
- ▶ What is the best practice?



# Hypothetical 3

- ▶ You get a call from the Governor's office insisting that you vote against any tuition increase because the Governor is concerned that it will hurt his re-election bid.
- ▶ What is the proper way to handle this situation?

# Hypothetical 4

- ▶ The Dean of the School of Business sends a letter to the board where he unilaterally has made the decision to raise the annual teaching load of faculty members based on the amount of publications to peer reviewed journals. This new requirement was to be applied retroactively to past performance. The Dean has not discussed this with any faculty members but wants the board input.
- ▶ What do you do?
- ▶ What is your role?

# Hypothetical 5

- ▶ You are approached by a friend who intends to bid on a new construction project on your campus. He asks you if you might give him some tips to make his bid more attractive. He also asks if you could put him in contact with someone in your construction group.
- ▶ What do you do?
- ▶ What is the best response?

# Hypothetical 6

- ▶ You are informed in executive session that your president/chancellor has approved multiple “emergency leaves” for up to four months for several departing employees. You are told this is appropriate but you are also aware that there are multiple media reports questioning the legality of this approach.
- ▶ What do you do?