

**Legal Primer
for
College and University
Board Professionals
and Trustees**

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Legal Primer for College and University Board Professionals and Trustees

Introduction

Board professionals perform a vital function for their institutions. In today's legal environment, it is imperative that board professionals have the resources to do their work effectively and in accordance with the law. This legal primer is designed to provide concise legal information on a variety of topics pertinent to the work of Board professionals. The primer, in addition to providing general information on applicable laws, provides guidance and assists Board professionals in managing the work of the board and maintaining the corporate record of their institutions.

The summaries of the law presented in this primer are general common law principles, or a summary of pertinent federal regulations that affect the work of any college or university board. There is no discussion of local, municipal laws or state laws which may also pertain to the subjects presented in the primer.

This primer is not intended to substitute for legal advice from legal counsel and Board professionals are encouraged to consult with counsel for more specific information on any of the subjects discussed in this primer.

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Association of Governing Boards of Universities and Colleges;
American Council on Education;
Association of Corporate Counsel; and
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Meeting Management

Manual and Handbooks

There are a million process questions that are asked of board professionals. Writing down your answers and maintaining them in a “Board Manual” or, as I call it, an Opinion’s File helps ensure consistency of decision making. Following the same process each time a similar event occurs, helps prevent claims of arbitrary decision-making or even breach of contract. If your board decides to deviate from the practice or process they used previously, document in the manual or the minutes that the new process was being utilized and the rationale for changing to the new process.

Your board manual should include:

- The mission statement;
- Articles of Incorporation;
- Bylaws and each amendment (with the date of the amendment);
- Board polices (that deal with board governance and board practices);
- The annual budget of the institution;
- The last two years’ audited financial statements;
- Copies of the current insurance policies;
- The names, mail and email addresses, fax and telephone numbers of trustees;
- The same as above for the trustees’ assistants;
- The organizational chart of the institution and contact information for the chief executive and key personnel;
- The charter for each board committees;
- A calendar of events relevant to trustees;
- The institutions strategic plan;
- The committee member roster;
- Trustees’ classes and alumni designations; and
- personal information you should know about trustees, such as name of spouse or significant others, birthdays and names of

family members, emergency contact information, allergies, dietary restrictions, and relevant medical conditions.

This is all important information that you may need in a crisis. Your board manual is good risk prevention. Having material captured electronically on the web or portable device is a plus but there is no substitute for the standard three ring binder.

Meetings

All US corporations are required to have at least one annual meeting. Beyond the annual meeting, it is up to the board, or state statute, how many additional regular meetings are needed to carry out the board's work.

Special Meetings

Special meetings may be necessary to carry out special, unique work. The bylaws of the board should spell out how a special meeting may be called and who has authority to call such a meeting. In some cases, a special meeting may be allowed at shorter notice, or may be called by a majority of members even if the board chair declines to do so. If a special meeting is being called, it is very important that the board follows its process for doing so. To do otherwise may invalidate the actions taken at the special meeting.

Agendas

Board and committee agendas should be prepared and approved by the chair and provided to members in advance of the meeting, to ensure that members have sufficient notice of the scope and purpose of the meeting. This ensures that the trustees can adequately prepare and fulfill their fiduciary obligation.

Your agendas should provide at least the following:

- Beginning and ending times for the meeting;
- The meeting room number or location;
- A list of the members; and
- The agenda of topics to be discussed and/or acted on.

In reconstructing the board's business decision, this may be an important document to prove that the discussion occurred or that the matter was addressed. These agenda can also be helpful in auditing the work of the board to ensure it is fulfilling its complete fiduciary duty.

The agenda should indicate if the item is for discussion only or if action is expected. You may even want to identify the person who is expected to present each item, unless the normal course of business is that the committee chair presents the item.

*For additional related information see this Primer's topic:
Fiduciary Duty*

Meeting Materials

Board materials need to be clear, concise and timely. A trustee should be honestly able to testify that he/she had adequate time to review and deliberate on a matter. The complexity and significance of the matter should determine the length of time and scope of materials a reasonable person would expect. In planning for board and committee meetings, it is critically important to ensuring trustee due diligence that the trustee has been given adequate time and materials for due deliberation.

Open Meetings

Most public institutions are required to have open meetings, where members of the public and press may attend. Each state has its

own open meetings laws. Although the public may be able to attend the open session of a Board meeting, the state law usually permits a public board to hold some portion of the meeting in closed session, outside the purview of the public. Topics generally permitted to be discussed in closed session include:

- Personnel decisions;
- Real estate transactions;
- Labor union discussions;
- Litigation or legal matters; and
- Large gifts/donations.

Since state laws related to open meeting vary widely, it is important to consult relevant state laws for details on open meetings, and exceptions for closed sessions of public meeting.

Merely because an open meeting is designated as such, does not give the public an automatic right to either attend the meeting or address the board. The board may set up rules governing how the public and press may attend (such as advance notice of attendance) and when, if at all, members of the public may address the board.

Record Keeping

The records of the board are the corporate business records of the institution. It is vital that these be both accurate and preserved by the institution. Even materials that supplement the board's decision are important documents in establishing how the board made its decision and the material that was available at the time of the decision. Reports, and even electronic presentations, all make up part of the corporate record so be sure to find a way to preserve and protect this material as part of the total corporate record. In some civil claims, for example, the standard of proof is whether the institution acted reasonably. Proof of "reasonableness" may include showing what materials were reviewed as part of the

decision, and whether the average person similarly situated would have made the same assumptions and reached the same decision.

Governance

Fiduciary Duty

Every board has an obligation to exercise its fiduciary duty. It does so by ensuring that the institution is:

- Achieving its mission;
- Enhancing institutional value;
- Exercising the highest level of integrity;
- Maintaining excellent working conditions; and
- Maintaining an environment appropriate for the benefit of students, faculty and staff.

In fulfilling its fiduciary responsibilities, the board is expected to:

- Select, compensate, and evaluate the chief executive officer (CEO);
- Plan for the succession of the CEO;
- Approve the institution's mission, strategic plan, goals and objectives;
- Annually review and approve its financial plan; and
- Assess the institution's performance against its mission, plans and finances.

In exercising its fiduciary responsibilities, the board should establish adequate monitoring procedures and practices designed to apprise them fully of information required in the exercise of their fiduciary responsibility.

The board must exercise good faith in its dealings and act in a manner that it reasonably believes to be in the best interest of the institution.

The board should spend a sufficient amount of time on institutional matters to prove that it has exercised its fiduciary duty seriously.

Each board member, as a part of his/her fiduciary duty, is expected to confine his/her activities to those consistent with his/her role as

a member of the board, and thus to avoid conflicts of interest which put the individual's interest ahead of the institution's.

For additional related information see this Primer's topic: Conflicts of Interest

Conflicts of Interest

The board should require each trustee to disclose annually, and when circumstances change, any actual or potential conflicts of interest and define the term for board members and administrators. Annual conflicts of interest disclosures are now required by the IRS Form 990. In addition, annual disclosures by key institutional personnel are also helpful in ensuring that no trustee is engaged in an activity with a key manager which may affect the ability of the manager or trustee to do their respective work with fidelity to the institution. The revised Form 990 requires that institutions annually ascertain conflict of interest not only between trustees and management, but also between a trustee's family members, direct business affiliates and the institution, as well as relationships between trustees. The board should review the Form 990 prior to its submission to the IRS.

In addition to completing the certifications for the Form 990, it is good practice to maintain these annual disclosures as part of the corporate record. The board should have a procedure for reviewing and considering the relevance of any disclosed conflict in regard to matters on the board's agenda.

Ethics Laws and Codes

Codes of ethics, whether proscribed by statute or written by the board, are not merely important to good governance, but can identify potential legal troubles before they become big trouble.

Codes, at a minimum, should regulate compliance with standards of conduct, prohibited behavior, and governmental regulations. They may also define prohibited behavior, potential dishonesty, self dealing, or conduct which may have the actual or apparent affect of damaging the interest of the institution.

Reporting violations

Conduct codes should include a method for disclosure of conflicts, as well as reporting alleged violations without fear of reprisal or retribution (whistleblower protection). Prompt attention to handling claims is as important as having the code of conduct. Ensuring accountability for adherence to the code and non-retaliation policies are important to the viability of the code and protecting the institution from liability for misdealing.

Evaluations

Regular evaluation of the board is a good governance practice and a factor an insurance company may consider in setting the price for D&O insurance. Board evaluations should address board composition, committee structures, individual effectiveness, board processes and trustee responsibilities and expectations.

Policy vs. Management

The job of the board is to set policy. Board members must understand and respect the difference between their policy making work and the management responsibilities of the institution's

employees. When trustees step outside their role as policy makers, they run the risk of being deposed at trial for decisions they made. Accordingly, it is important to be sure that with the exception of some limited decision making authority vested exclusively in the Board, that trustees refrain from making administrative decisions. Sticking to the policy making role protects board members; should a legal issue arise, the administration would likely be called upon at trial to testify to the rationale for the decision.

Since trustees may have limited terms, may be hard to locate at the time of trial, from a practical point of view, administrators who have a longer institutional tenure are better witnesses at trial. In addition, long serving administrators ensure institutional continuity of decision making.

Whistleblower Complaints

Since Sarbanes Oxley legislation was passed, boards of nonprofit and for-profit organizations are to provide employees and others make complaints in good faith against the administration or, , the board Boards should ensure that there is a formal process for complaints and for whistleblower protection.

Most often whistleblower complaints are based on some financial irregularity that may not easily be reported through the institution's normal complaint procedures. Whistleblower complaints should be reported to the audit or the finance committee of the board, and then the actual investigation of the complaint conducted by an internal or external investigator, depending on the type of complaint and the individuals alleged to have been involved. Finally, the results of the complaint should be reported to the same board committee, and generally the results of the investigation, at least in general terms, should be communicated to the complainant. The complainant should be assured that there will be no retaliation of any kind arising out of a good faith complaint.

Committees

Committee Evaluations

Annually, the each committee should evaluate its work against its charter to be sure that it has conducted all relevant reviews and dealt with each matter within its jurisdiction. This annual evaluation offers the opportunity to design the next year's work plan, as well. Additionally, during the course of the year, there may be new matters which should be added to the committee charter to ensure regular review. Changes that may be needed in the committee's charter should be referred to the board chair or appropriate committee.

Finally, each committee needs to ensure it has the resources and authority appropriate to discharge its fiduciary duties and responsibilities. It should ensure that it has clear rules on how it may engage external consultants and what approvals are required for it to do so, and which trustee or officers will be responsible for executing contacts and payments for these services.

Audit Committee

The audit committee's responsibility is to supervise and ensure the soundness of the institution's audit and its relationship with its independent accountants.

At least annually, the board should meet in executive session with its independent accountants to ensure that it can ask questions about management free from management influence.

The audit committee:

- Provides the board, independent accountants, and the internal auditors with direct non-management access to each other on a regular basis;

Reviews with management the adequacy of the institution's accounting controls and management information systems;

Reviews the adequacy of the institution's internal audit program;

Reviews and, may accept on behalf of the board, the report of the auditors; and

Reviews the performance of the independent accountants and makes recommendations to the Board on the selection and engagement of its accountants.

The audit committee may also find the need to authorize the engagement of special audits.

Compensation Committee

The Compensation Committee is responsible for reviewing the compensation of the CEO and, in many institutions, other senior level positions.

The Compensation Committee:

Reviews and approves compensation policies;

Leads the board in the development of written CEO evaluations and discusses the board's evaluation with the CEO; and

Monitors and recommends the total compensation of senior officers, documents the process, and ensures compliance with required reporting, including the revised federal tax Form 990 and related schedules.

The Compensation Committee should also review and approve travel and other expenses of the CEO including housing and other expenses associated with the CEO's responsibilities.

The committee should also review any external income of the CEO including outside board compensation, and other income of the CEO which may impact the CEO's ability to provide undivided service and loyalty to the institution.

The Compensation Committee should regularly review perquisites and benefits of senior officers to ensure that they are in keeping with the total compensation of the CEO and senior officers and institutional policies. Some board's have restricted the use of private club memberships to ensure that they do not discriminate and are consistent with the institution's mission and values.

The Compensation Committee should have sole authority to engage compensation consultants. These engaged consultants should be advised that they report to the Compensation Committee and not to management.

The Compensation Committee's charter should ensure compliance with IRS procedures.

The Compensation Committee should consist of only independent directors.

Executive Compensation

Since the implementation of the revised Form 990, total compensation, including base salary, perquisites, and benefits, must be included in the annual form. Boards are encouraged to review executive compensation as a committee of the whole even if the initial work or annual evaluations are done by a Compensation Committee. The full board should review, and have

access to the complete Form 990 and all related schedules prior to submission to the IRS as part of its obligation to ensure that total compensation is not excessive. Total compensation now includes all benefits, such as club memberships, and the IRS requires that the institution set a fair market rental value on the president's campus-owned residence and include this value in the calculation of total compensation.

Intermediate Sanctions

The IRS has sought to ensure that nonprofit organizations do not use their nonprofit status to inure to the benefit of a small group of individuals who have significant influence over the charitable activities of the organization. In the past, the IRS had the ultimate authority to remove the tax exempt status of the organization for flagrant violations. In recent years, the IRS has sought to ensure compliance using a lesser penalty than total revocation of tax exempt status and defined it as an "intermediate sanction."

"Intermediate sanctions" are an excise tax imposed by the IRS on boards and individuals for improper and unreasonable payments or benefits made to "disqualified persons." This excise tax will be imposed on both the recipient of the excess benefit as well as the board members who voted in favor of granting the benefit.

A disqualified person is defined as an individual who was in a substantial position of influence over the affairs or finances of the institution. This would include most senior officers of the institution or trustees. Disqualified persons may also include the family members of institutional officers and board members. In fact, the definition of a "disqualified person" is broad enough to include other senior financial officers and even deans and directors.

The determination of the status of a “disqualified person” rests with the board. Therefore, one of the most important responsibilities of the Compensation Committee is to determine accurately who is a “disqualified person” under the IRS definition.

The independence of the members of the Compensation Committee is an important element in determining whether the compensation of a disqualified person was reasonable.

The presumption of reasonableness is an important part of establishing appropriate compensation for IRS purposes and avoiding intermediate sanctions – although this presumption is subject to challenge by the IRS.

Safe Harbor Provisions

The IRS will evaluate compensation and benefits to see if the board relied on appropriate data in setting total compensation – including salary, deferred compensation, and other benefits (like life insurance, retirement pay and bonuses).

It is important, therefore to select appropriate comparator institutions when establishing comparable pay studies. The comparators should include institutions of similar size, scope, and geographical location, along with similar scope of responsibilities and duties of the executive.

The IRS will also look to reasonable industry standards to determine reasonableness.

Finally it is important that the entire board, and not merely the Compensation Committee, understand and approve the total compensation of its executives. The IRS will be interested in which trustees voted for and against the compensation to determine if those voting for the compensation acted independently, and

whether their votes were reasonable. For this reason, it may be beneficial to note in board minutes who voted for and against the compensation, if the vote is not unanimous. If the compensation is challenged by the IRS, those voting for an “excess benefit” may be subject to excise tax penalties.

Finally, it is important that the board and committee minutes also accurately reflect contemporaneous documentation of the basis for compensation decisions to ensure that the presumption of reasonableness required to avoid “intermediate sanctions” is preserved.

Excess Benefit Transactions

The IRS prohibits nonprofit boards from conveying excess benefits to its board members and senior officers.

For additional related information see this Primer’s topic: Compensation Committee.

Finance Committee

The Finance Committee is responsible for assisting the board in fulfilling its oversight of the fiscal stability of the institution.

The Finance Committee:

- Reviews the budget, financial affairs and financial considerations of the institution;

- Makes recommendations to the board regarding the approval of the institutional budget; however the full board, and not the committee, should approve the institutional budget, to ensure both transparency and accountability.

- Reviews annual institutional expenditures and particularly extraordinary expenditures to ensure that they are consistent with the approved budget.

The Finance Committee may also review the reports of its investment advisors, or its investment subcommittee, to evaluate the results of managed funds, including employee benefit plans, retirement accounts and funds invested directly by the institution.

The Finance Committee, like the Audit and Compensation Committee, should have the authority to engage external consultants to assist them from time to time in their work.

At least annually the Finance Committee should meet in executive session without management, any attorneys or other consultants or accountants engaged by the institution.

Governance Committee

The Governance Committee is, in addition to the traditional nominating responsibility, also responsible for ensuring that the board is functioning properly.

The Governance Committee:

Reviews candidates for consideration for board service, and should develop selection criteria for candidates;

Oversees and evaluates the performance of incumbent Board members;

Develops a statement of trustee responsibilities, to serve as a job description for current and prospective board members;

Makes recommendations on overall board performance, including the scope of committee charters both to ensure coverage and eliminate the duplication of work by committees;

Develops and nominates board officers and other volunteer leaders;

Ensures the timeliness and completion of board elections;

Makes recommendations regarding board composition, diversity, duties and functions of board members and committees; and

Periodically reviews the board's governance documents including bylaws and policies to ensure that they are consistent with practice and contemporary.

Trustee Recruitment

Keeping track of the distinct qualities of your trustees helps define the skills, characteristics, and backgrounds you are looking for in the recruitment of new trustees. Are you seeking diversity? Diversity can be defined beyond race and gender. Consider other characteristics, such as age, geographical diversity, professions, alumni status, academic degrees, capacity to contribute financially, and religious affiliation. Having a clear idea about your current board's make up, will help you identify underrepresented populations, and may even eliminate claims of unlawful discrimination or bias. Remember: the law permits discrimination. It only prohibits discrimination on the basis of protected classification (usually immutable characteristics like age, race, and national origin). States define "protected classifications" differently. For example, in the District of Columbia, political affiliation, and sexual orientation, like race and age, are protected classifications.

In addition to other qualifications the institution may be seeking in new trustees, it is important to have at least two trustees who have sufficient financial experience to serve on the Finance Committee. This is an outgrowth of the Sarbanes Oxley legislation required of for profit companies traded on a public stock exchange.

Committee Chairs

It is recommended that committee chairs have term limits for service. This ensures that committees retain their independence and are not exclusively the province of select trustees.

Board Office Management

Document Retention

Boards should have a document retention and destruction policy. In general, I recommend that an institution retain general business records for 6 years. This ensures that the records are available for most cases that may occur, since the longest statute of limitations, in most states, is 6 years. However, certain records including records related to the board meetings, documents related to real estate transactions, and documents and records related to institutional gifts should be maintained permanently. Documents related to any matter in litigation must also be retained, and the intentional destruction or alteration of such documents may be illegal.

Electronic Discovery

New litigation discovery rules now require that counsel produce all records including electronic records as part of the case. This additional requirement for records places additional responsibility on the parties and their counsel to preserve and protect any records which may be relevant to the case as soon as they have reason to know that a complaint will be filed. As a result, most counsel upon receipt of a complaint will implement a “litigation hold” on all relevant records of the institution including all electronic records including emails. Records and communications to and from the board may also be relevant to a lawsuit. Therefore, it is extremely important to advise the board that their communications, especially any electronic records, are all part of the institution’s obligation to produce records in litigation.

Records between board members may be maintained on the electronic servers of the board member’s company or private accounts like AOL and others. Although it is impractical to obtain these records in litigation, and although not yet decided by the courts, it is possible that a court may require the parties to produce

all relevant evidence even if that material is held by a third party. For this reason, it is recommended that boards use an institutional email address for their communications between each other related to institutional business, or use an institutional board portal to communicate with one another.

Gifts and Fundraising

As a general rule, the IRS defines a gift as money or property given by a detached disinterested grantor. Trustees may seek to give gifts while at the same time seeking a specific return, like the award of a contract, enrollment for relatives, or season passes to football games. Consultation with counsel is important before representing to a trustee that these will be classified by the institution as a gift. If there are inappropriate strings attached to the gift, the donor may really not be detached and disinterested. In fact, the donation may be more like a contract, incentive payment, or grant which are not deductible as a gift.

Before sending an acknowledgement for the receipt of a gift, be sure it really can be called a gift under the limitations of the Internal Revenue Code.

Gifts to Trustees

It's important to keep track of gifts given to donors. Be sure to keep gifts for the tax year under \$50 per person. In the event of an IRS audit, you may need to prove that any gifts given to trustees in any year were of nominal value. You can usually exclude the cost of board meals at regularly scheduled board meetings and events where trustees are expected to attend (commencement, graduation). However, extravagant gifts, including gifts and benefits to trustee spouses, and gifts in excess of \$50 dollars may have to be reported to the IRS on the new Form 990.

Insurance

Types of Insurance

There are usually three types of legal liability insurance:

1. Directors and Officers Liability insurance (D&O) – for wrongful acts by directors and officers;
2. General Liability (GL) insurance – for personal injury cases, breach of contract and may even include some types of discrimination claims;
3. Umbrella insurance policies – these policies are activated after the claim has exceeded the limits of the GL or D&O policy – these are usually for catastrophic losses and large class action claims.

There may be multiple layers of umbrella policies.

Some institutions are self insured – so claims are paid from the institution's general funds.

There is usually a deductible the institution must pay in the event of a successful claim, before the insurance policy payment of the claim.

Insurance Coverage

If a claim has the potential to be covered by an insurance contract, if you initiate an investigation of an insurance covered event without first contracting the carrier and getting approval to go forward, your actions may affect the coverage or even void the insurance policy. When in doubt, ask the carrier first.

Who is covered by the policy?

Volunteers, employees, and even agents of the institution, will usually be covered under the policy for act that results in injury to others. However, most policies will not cover individuals engaged

in criminal activity, or significantly outside of the scope of their authority.

Managing the Media

Although you might assume that managing the media is merely a public relations issue, for lawyers, managing the media is a critical part of our work. “No comment” is never a satisfactory answer, although at times it may be the only answer.

It has been my experience that managing the media requires three critical elements:

1. Providing a concise statement, with at least one pithy comment that summarizes your position;
2. Providing your statement to the media in a timely fashion; and
3. Addressing the issues you want addressed in spite of the questions that may be posed –i.e., controlling the interview.

I recommend that you ask the reporter to provide questions by email, and ascertain the deadline of the reporter. Consult with your public relations office and counsel in developing your statement, and finally make sure that the statement has at least one “quotable quote” ... A sentence that has a singular work or phrase that captures the nature and essence of what you want to convey.

Although you may be misquoted, in my experience, your quotable quote will find its way into the piece and that may be the best you can hope for.

If the chair of your board is not a good spokesperson, select someone else to be the designated spokesperson. Consider providing your board leaders with training on managing the media. Be sure all board members are informed of board policies

regarding communication with the media and who speaks on behalf of the board.

When the Reporter Calls

Just give the facts – the more you say the more likely you’re heading for trouble. Most television interviews will be edited down, so keep your statements short, sweet and to the point.

Do not speculate or answer hypothetical questions.

If there’s a lot of background material to support the quote – consider providing the background in a one page summary and keep the interview short.

Consider providing the background to the reporter in advance of the interview. This allows you to focus the interview on the issues you want developed instead of spending interview time explaining the background.

If you have the opportunity, ask the reporter to provide you with an advance copy of the interview, so that you and counsel can review the material to be sure it’s accurate. Reporters are happy to have you ensure accuracy. If you can’t get an advance copy of the interview at least ask to have it read back to you so that you can correct any inaccuracy.

If you’ve received a question and you don’t have the accurate answer at hand – ask to get back to the reporter with the accurate answer and then be sure you do so in a timely fashion.

When giving an interview, slow down – make sure the reporter is able to keep up with you as he/she writes.

Volunteers

When using volunteers it is a good idea to provide them with a written scope of duties (work) so that they do not operate outside of what the institution has intended. Keeping expectations clear and defining what the deliverables will be is important to maintaining a smooth relationship with your volunteers and making their experience rewarding. Having a defined scope of work in a written document also helps to let the Board and the volunteer know when the job is done. It's easier to end the volunteer's service when you can say clearly that the objective has been achieved.

In the case of volunteers who engage in activities outside the scope of their volunteer activity, they may be outside your insurance coverage and therefore obligated personally for injury or loss resulting from activity beyond the scope of their engagement.

*For additional related information see this Primer's topic:
Insurance*

Work for Hire and Copyright

A copyright comes into existence the moment the creator sets it down in a readable form. This may be music recorded or written, art painted or sculpted, and even software programs written down in computer code, or other works written, recorded or otherwise preserved. Under general common law copyright, the owner/creator has all rights and title to the created work, any parts of it, and any derivations of it. However, intellectual property that is produced for another under an agreement, whether a consulting agreement or employment agreement, is an exception to these general copyright ownership rules. Once paid for, the ownership right shifts to the payer and the work is considered a "work for hire" and owned exclusively by the payer.

If you engage a consultant or employee to design materials for the board, including logos and other artwork, computer programs and data storage systems, you should be sure to have a written contract for service, or include this in a written assignment or written job description of the employee to be sure that at the project's completion the institution owns the final product. In the case of software designs, it is important to be sure that the programmer has not included proprietary software codes within the design of the final product. If this has been done, ensure that the institution has received a license in perpetuity to use and even modify the software source code or other proprietary data.

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