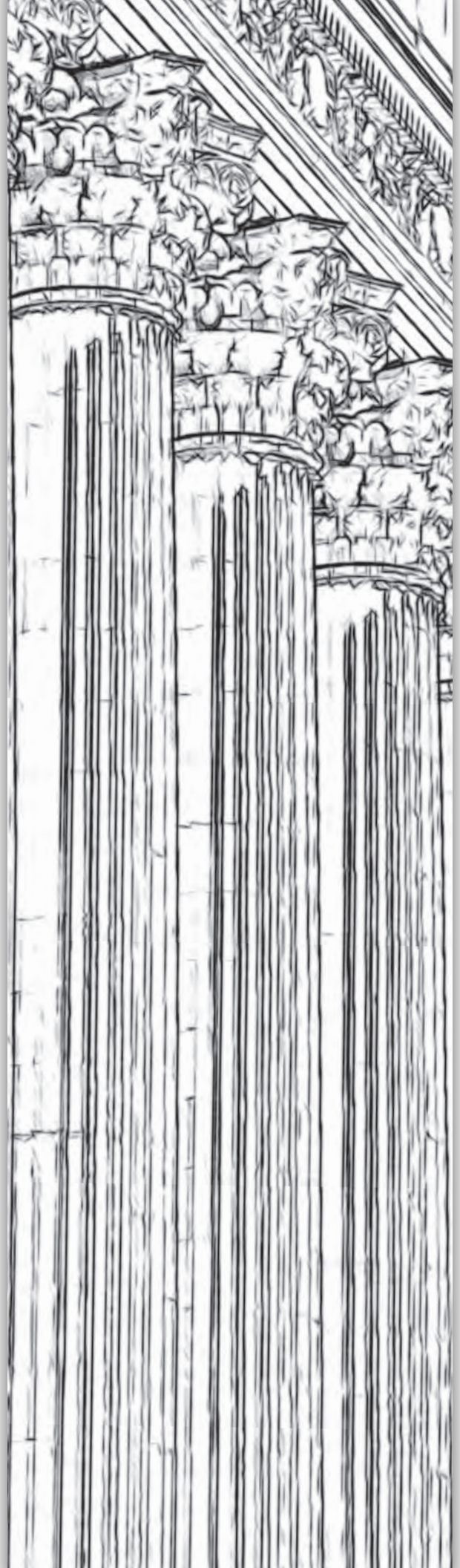

AGB PRESS

TOP 10 CAMPUS LEGAL ISSUES FOR BOARDS

Lawrence White

SEXUAL VIOLENCE

RISKY STUDENT BEHAVIOR

CYBERSECURITY

ONLINE LEARNING

AFFIRMATIVE ACTION IN ADMISSIONS AND FINANCIAL AID

WORKPLACE ISSUES

STATUTORY AND REGULATORY COMPLIANCE

FEDERAL COST ACCOUNTING AND EFFORT REPORTING

CONSTRUCTION AND DEFERRED MAINTENANCE

TRANSPARENCY, ETHICAL CONDUCT, AND BEHAVIOR

ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES

TOP 10 CAMPUS LEGAL ISSUES FOR BOARDS

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INTRODUCTION

A principle responsibility of a board member is to understand the environment in which his or her institution operates. Today, that environment includes a host of legal risks that every institution of higher education must be prepared to assess and proactively address.

Those risks can be significant. It is relatively common in this day and age for board members to be named as parties in lawsuits challenging board decisions. Within just the past few months, lawsuits have been filed against university trustees for approving tuition increases, authorizing construction of campus facilities, terminating an administrator, allegedly failing to prevent sexual harassment, and allegedly contributing to the death of a college football player. The consequences of being named as a defendant in even an insubstantial lawsuit can be formidable. Defense costs can be as high as $250,000, and settlement payments range even higher.

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Colleges and universities work to contain and manage those risks through such standard mechanisms as purchasing insurance, shifting risks to vendors through contractual indemnification provisions, and adopting best practices designed to reduce risk to tolerable levels. Most institutions also, of course, employ competent professionals whose jobs focus significantly on assessing and protecting against various legal risks. Chief financial officers, human resource directors, operations managers, lawyers, risk managers, auditors, insurance directors, and many other administrators devote significant time and effort to the identification of legal issues and the mitigation of risk. Our colleagues at other national organizations, including the National Association of College and University Attorneys, the National Association of College and University Business Officers, and the University Risk Management and Insurance Association, generate important resources to aid in this task.

Yet, at the same time, boards, as fiduciaries of their institutions, must play their own role in understanding and mitigating major risks. The Association of Governing Boards of Universities and

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Colleges (AGB) has developed *Top 10 Campus Legal Issues for Boards* specifically to help trustees navigate this increasingly challenging terrain.

This booklet focuses on the legal risks that pervade college campuses every day, as well as those that are emerging in the rapidly changing environment in which boards and institutional leaders today operate. While some of the legal risks outlined in the booklet have been with us for some time—such as those related to alcohol abuse or construction and deferred maintenance—the specific concerns surrounding them and their potential repercussions have shifted over time. Other risks, such as cyberattacks and issues related to online learning, have appeared more recently and, by their very nature, have presented boards with fast-evolving external pressures that are a challenge to stay ahead of and that can have unpredictable impacts.

Why is it important for board members to appreciate the substantial legal risks their institutions face? The answer, as Harry Truman might have said, is that the buck stops with the governing board. The principle of fiduciary duty, discussed at length in the conclusion, assigns to the governing board ultimate legal responsibility for the conduct of institutional affairs. When board members are called upon to take action—particularly on matters that are contentious, controversial, and dependent on an understanding of pertinent laws—they are required by this principle to do so knowledgeably.

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Top 10 Campus Legal Issues for Boards, then, is a first step in acquainting board members with the common legal risks they are expected to understand and address by virtue of their role as leaders in the higher education community. The topics discussed are based on a subjective, protean, inclusive standard for determining when a matter qualifies as a "risk" and when that risk is sufficiently "major" to command the attention of the board. For our purposes, a matter is considered to be legal risk if: (1) it warrants disclosure to and discussion with the president, and (2) resolution of the

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matter impacts or could reasonably be expected to impact the institution's reputation or the manner in which the institution conducts its business.

The task of assessing legal issues and risks is complicated by the fact that not all institutions face the same ones to the same degree. Public institutions of higher education have legal and operational characteristics that make them different from independent institutions. Community colleges, religiously affiliated colleges, historically black colleges and universities, colleges with medical schools, colleges that operate expansive Division I athletic programs, colleges in urban areas, highly selective colleges, proprietary colleges—each subcategory of higher education has its own operational idiosyncrasies, and it would be hubristic if not downright foolish to suggest that all manage the same legal risks in the same manner. The descriptions, suggestions and comments herein are intended as generalizations that should never be mistaken for universal truths. The pages that follow attempt to provide a level of specificity that neither sacrifices utility nor overgeneralizes to the point that there are no useful lessons for institutions shaped by their own histories, missions, and cultures.

This publication includes discussion of 10 categories of legal risk, questions boards should ask, and additional resources and references for further exploration of each issue. Topics are described narratively and not arrayed in order of significance or in any other order. All illuminate two general points that boards would be well advised to heed in assessing risks at their own institutions. First, to paraphrase movie hero Jerry Maguire, legal risk correlates exactly with where the money is. If one looks at the institution's revenues and expenses, the general rule is that legal risk hovers around the largest numbers: research, athletics, buildings and grounds, procurement, and payroll. Second, a direct correlation exists between legal risk and underinvestment in internal resources. In areas, like data security, human resources, and grant and contract accounting, for example, institutions chronically underspend, making risk management more topical and, in many instances, more pressing.

Cognizant of the fact that talented board members will not serve unless protected against the risk of litigation, virtually every college and university in the country indemnifies board members against lawsuits. But it is, of course, vastly better for a board member to be aware of and knowledgeable about those risks in order to avoid them in the first place. We hope this publication will serve as a guide to the general scope of key legal concerns that higher education institutions and their governing boards will need to stay abreast of over the next few years.

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SEXUAL VIOLENCE

Sexual violence has increasingly become a top issue for higher education, one that government officials, legislators, the news media, and the general public are demanding colleges and universities manage more effectively, if not eliminate. Preventing sexual assault and handling complaints correctly and effectively are important for institutions for many reasons: to protect the physical and emotional health of students, especially women; to comply with new legal requirements imposed by the U.S. Department of Education's Office for Civil Rights (OCR), the U.S. Department of Justice, the White House, and Congress; and to protect the institution from legal exposure for failure to satisfy compliance requirements in this heavily regulated area.

GROWING EXTERNAL DEMANDS

Title IX, a 1972 law that prohibits gender discrimination in educational programs and activities that receive federal financial assistance, requires campuses to investigate reports of sexual assault, even when an assault has not been reported to the police. The federal government began enforcing that law more assertively in 2011, when OCR formulated and distributed detailed rules on how institutions must process complaints and conduct disciplinary proceedings.

At the beginning of 2014, the White House established a cabinet-level Task Force to Protect Students from Sexual Assault, and in April 2014 that body issued its first report, which featured widely publicized recommendations on ways for colleges and universities to step up their efforts to punish perpetrators of sexual violence on campus. At the same time, the Senate Subcommittee on Financial and Contracting Oversight, then chaired by Missouri Democrat Claire McCaskill, conducted a survey of 350 colleges and universities to learn how sexual assault is reported and investigated and to gauge how effective federal oversight and enforcement efforts have been. In early 2015, Sen. McCaskill introduced far-reaching legislation—the proposed Campus Safety and Accountability Act—that, among other things, would subject colleges and universities to significant fines for processing complaints improperly.

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In May 2014, as part of the federal effort to highlight the problem of sexual violence on campus, OCR published a list of 55 colleges and universities under investigation for possible violations of federal law regarding the handling of sexual violence and harassment complaints. "We are making this list available," the OCR told the news media, "in an effort to bring more transparency to our enforcement work and to foster better public awareness of civil rights." It was the first time in a very long while, if ever, that the Education Department had aggregated and published accusations of wrongdoing. The OCR's action served as an implicit warning to the higher education community that serious consequences will attach not when allegations are proven but when they are initially leveled.

The OCR's May 1 list of institutions under investigation identified the 55 colleges and universities by name, including some of the nation's most illustrious institutions—Amherst College, Dartmouth College, Harvard University, Princeton University, Swarthmore College, Vanderbilt University, and many others. Two months later, OCR published an expanded list of 67 institutions under investigation. Later in 2014, the list grew again to 85 institutions, and by the time this goes to press, the list will probably encompass an even greater number of institutions. As part of the OCR investigative process, each college or university on the list will be required to produce thousands of pages of documentation on its handling of sexual-assault complaints. OCR representatives will make campus visits, host open meetings, interview students, and take other measures designed to shine a spotlight on each institution's processes for handling sexual-assault investigations.

The OCR process will almost certainly end with the negotiation of a so-called Voluntary Resolution Agreement committing the institution to make changes in its processes for investigating and adjudicating sexual-assault complaints. Although this publication has focused on processes applicable to students, Title IX standards apply as well to the institutional policies covering faculty members and other employees who complain of sexual assault or other forms of sexual violence. One of the perplexing practical problems facing many institutions is how to cope with governance requirements when faculty and staff policies require revision. Frequently the policies that must be changed to effectuate an OCR voluntary resolution agreement require approval or ratification by a faculty senate, faculty union, or union representing staff employees. Coordinating compliance deadlines in an OCR agreement with timetables for the renegotiation of collective bargaining agreements can pose significant practical problems for institutional lawyers and institutional boards.

THE DIFFERENCE BETWEEN CAMPUS PROCEEDINGS AND CRIMINAL TRIALS

Campus sexual-assault proceedings differ from rape trials in criminal courts. Perhaps the most common misperceptions among board members are that sexual assault must be proven beyond a reasonable doubt (as is the case in criminal prosecutions) and that consent—in the form of a complainant's failure to say no—is a defense to sexual assault. Both those misperceptions derive from criminal law, which provides procedural protections for persons accused of rape that are not available to respondents in campus proceedings.

A campus proceeding is not a criminal proceeding. OCR requires that campus sexual-assault cases be adjudicated under the "preponderance of evidence" standard, a standard that is easier for a complainant to meet—and, perhaps for that reason, controversial in various circles, particularly among faculty at some law schools who consider the "preponderance" standard to be insufficiently protective of the due-process rights of persons accused of sexual assault. OCR also requires that consent be assessed under a standard different from the "failure to say no" standard used in criminal proceedings. Under most campus Title IX policies, a complainant must affirmatively consent to sexual activity by saying "yes" and using clear words to manifest consent. In fact, in 2014, colleges and universities in a number of states, including California, Maine, and New York, approved significant changes in their policies and procedures involving sexual assault, notably the move to "affirmative consent" policies.

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