

Pepper-Freeh Group Higher Education Webinar Series: Higher Education Oversight and Governance - Role of a College Board of Trustees



January 30, 2013 | Matthew Dolan, Barbara W. Mather, Omar Y. McNeill, David P. Roselle, Ph.D.



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Moderator: Omar Y. McNeill



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- Partner in the White Collar and Corporate Investigations Practice Group of Pepper Hamilton LLP, resident in the Wilmington office
- Member of the Pepper/FGIS Education Risk Counseling, Investigations and Litigation Services Team
- Has counseled clients on compliance, regulatory, legislative and risk mitigation matters. Also recently has led a compliance review into the intercollegiate athletics program at a preeminent university and the day-to-day independent, internal investigation of recently publicized allegations of sexual abuse at the facilities of a major university.

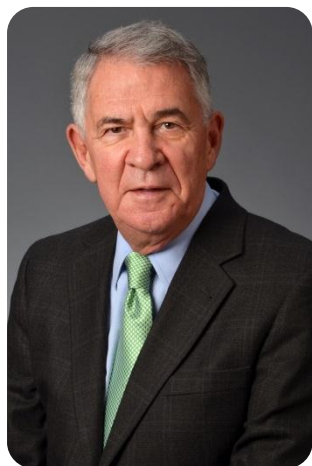
Speaker: Barbara W. Mather



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- Partner in the Philadelphia office of Pepper Hamilton LLP and past chair of the firm's Litigation and Dispute Resolution Department
- Member of the Pepper/FGIS Education Risk Counseling, Investigations and Litigation Services Team
- Trial lawyer with experience in professional responsibility and malpractice, antitrust, securities and corporate governance, and other commercial, as well as college and university law
- Fellow of the American College of Trial Lawyers and a member of the American Law Institute and former chair of Swarthmore College Board of Managers.

Speaker: David P. Roselle, Ph.D.



- Former president, University of Kentucky and University of Delaware
- Current Director of Winterthur Museum and Country Estate in Wilmington, DE
- Also on the board of Blue Cross/Blue Shield of Delaware, Tower Hill School, Soka University USA, VTLS and Wilmington Trust. He has served on additional boards, including the Delaware Chamber of Commerce and the Delaware Public Policy Institute. He joined the OCLC Board of Trustees in 2004.

Speaker: Matthew Dolan



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- Managing Director, Freeh Group International Solutions, LLC and former general counsel, United States Naval Academy
- Member of the Pepper/FGIS Education Risk Counseling, Investigations and Litigation Services Team
- Assisted clients with conducting internal investigations and compliance reviews into sexual assaults, NCAA compliance, financial improprieties, bribery and corruption and ethics
- Extensive experience in criminal prosecutions, investigations, ethics, physical security, strategic planning, governance, and compliance
- Served on crisis action teams as legal advisor and planner for operations around the world.

Recent Scandals in Higher Education



- Sexual assaults on campus (PSU, Amherst)
- Athletics (OSU, Miami)
- Hazing (NIU, FAMU)
- Financial improprieties (St John's)
- Admissions (Illinois)

Responsibilities of the Board



- Tone at the top
- Monitoring President's performance
 - Metrics
 - Annual Review
- Demonstrating appropriate priorities
 - Meetings not defined by social/athletics
 - Clearly define board priorities after each meeting
 - Do not permit administration to solely define board priorities
 - Maintain confidentiality

Compliance and Risk Management



- Assign responsibility to administration member to address each Institutional risk
- Request periodic reports from responsible person
 - What has been done to mitigate risk
- Fully understand rationale to administration decisions
 - Ask probing question on institutional response
 - Review compliance or financial metrics



- Duty of Oversight and Reasonable Inquiry
 - Know what reports/data to request
 - Clery Act (20 USC 1092)
 - Audits (Sarbanes /Oxley)
 - IRS report 990 (Schedule J)
 - NCAA reports (Financial and Program self assessment)
- Clearly define what is required to be reported to board
- Understand the potential institutional risk

Potential Institutional Risks

- Natural Disasters
- Safety and Security
- Environmental
- Study Abroad
- Faculty/Staff/Student Misconduct
- Minors on campus
- Legal compliance
- Reputational risk
- Hazing/sexual abuse incidents
- Disaster (fire & storms)
- Data loss and recovery
- Safety (shooters, alcohol, medical)
- Environmental (dangerous substances, labs)
- Study abroad
- Faculty on Campus (background checks/research integrity)
- Minors on campus
- Legal compliance (FERPA, Clery, NCAA, Hipaa)
- Hazing/sexual abuse
- Student Aid—Title 4/False claims act
- Immigration
- Export Control
- FLSA
- Accommodation for Disabilities
- NCAA violations

Board vs. Administration role



- Board – Vision, Planning and Holding management Accountable for their decisions
- Administration is responsible for the day to day affairs of the University and implementing the boards vision and plan
- Board should determine whether management is appropriately exercising judgment but leave matters of judgment on most issues to management

The Difference Between Governance and Management



- Board is Responsible for Vision, Planning and Holding Management Accountable for their Decisions and Exercise of Judgment
- Management is Responsible for the Day-to-Day Affairs of the University and for Implementing the Board's Vision and Plan

Balancing Board's Role of Oversight with Role of Management



- Ask probing questions
 - Boards can participate effectively in the policy-making process: first, by asking the right questions, which are almost never purely financial in nature; second, by making sure that each realistic course of action has been identified and that a good-faith effort has been made at weighing the costs and benefits; and third, by occasionally introducing new approaches. (The Board Book, W. Bowen, p. 23)

Balancing Board's Role of Oversight with Role of Management



- Review financial and compliance metrics
 - Governing boards should monitor institutional risk management through regular, formal reports by the administrator assigned responsibility (AGB)
 - Management should provide the board with information about misconduct and significant deviations from policy, and the board should evaluate and test Management's responses

Balancing Board's Role of Oversight with Role of Management



- Fully understand the bases for decisions
 - Boards should routinely review dashboards and other performance reports, but should also know the red flags that signal the need for closer inquiry: trends showing significant over- or under-performance; sentinel events; reports of unethical or illegal activity; and reports from external auditors, general counsel, and accreditation agencies (Bader & Assocs.)

Balancing Board's Role of Oversight with Role of Management



- Determine whether management is appropriately exercising its judgment, but leave matters of judgment on most issues to management
 - To avoid slipping from governance into management when reviewing performance problems, the board should focus on whether management recognizes the problem and has established the capability and plans needed to improve results. The board should not micromanage possible solutions; it should hold management accountable for producing better results (Bader & Assocs).

President's Role



- Carry out mission/agenda established by board
- Keep board informed of institutional risk
 - Not sole messenger to board
- Beware of the “Cult of the Personality”

When does board get more involved



- Does the incident impact the long term viability of the Institution?
- Are major reputational risks involved?
- Is the administration conflicted or defending their initial decisions?
- Key risks that may warrant board inquiry
 - Safety and Security i.e. sexual assault or hazing
 - Athletics
 - Submission of rankings data

Role of the General Counsel

- Client is the University not the president
- Relationship between board and GC clearly defined
 - Allows for direct communication to board
 - Reports regularly to board on pending legal matters
- Topics of inquiry from Board to GC
 - Whistleblower/Grievance complaints
 - Pending litigation
 - Ethics issues / Conflict of Interest

Crisis Management



- Many times crisis is created by administrations non-response to issues such as sexual assault, NCAA violations, student misconduct
 - Boards role may be to push the administration
- Expect and plan for the imperfection
 - Develop and plan for crisis
 - Develop list of PR/Legal/Crisis management firms
 - Understand details of potential employment termination
 - Contract reviewed
 - Basis for termination
 - Monetary buyout



- Crisis Action Team
 - Leaders at University/Board augmented by experts
 - Meet daily to synchronize efforts and message
 - Consolidate message to one voice
- Board should require updates on plan
 - Investigation Plan
 - Communication Plan
 - Action – ensure administration is driving solution
- Interaction with Public / Press

Questions & Answers



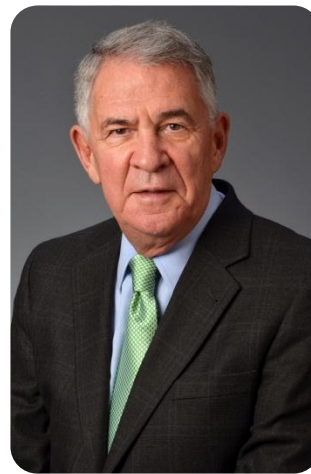
Thank You!



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