

Decision Making and Relationships by and among the Board, President, and Counsel in a Challenging Climate

2022 NCACCT Spring Legislative/Law Seminar



Stresses for Institutional Decision- Making

- Politically sensitive topics
- Strongly held personal disagreements
- Allegations of misconduct by board members and senior officials
- Board factions
- Social and cultural divisions
- Nature of crises



Stresses for Institutional Decision- Making

- Differences matter, but there are some common denominators in governance and roles of board members, Presidents, and attorneys:
 - Laws of operation for North Carolina community colleges
 - Governing documents
 - Rules of Professional Conduct
 - Gap fillers

San Mateo County Community College District mulls conflict of interest policies

Officials aim to clarify reporting requirements and process amid corruption investigation

**Ex-COD president says politics
tainted search for successor; trustee
Ruben Perez rejects allegations**

**Judge denies LBCC's request to block trustee
from closed session meetings**

Rossley v. Drake University

Trustee was removed from the Board of Trustees of Drake University after conflicts of interests arose during a Title IX investigation involving the Trustee's son.

After Trustee was removed from the Board, he filed suit alleging Title IX retaliation, disability retaliation, and breach of contract.

Rossley v. Drake University

- Trustee Communications:
 - "Please let this email serve as my disclosure that my son may be initiating litigation against Drake University in the event that his hearing verdict is not overturned on appeal." – Trustee email to VP of Finance and University attorney, while son's expulsion appeal was pending.
 - Email to Dean of Students and Chair of the Board with a list of nine specific criticisms of the Dean and University's investigation.
 - Email to Board members and members of the faculty and administration, criticizing the University for its handling of the investigation.
 - Verbal communications with at least three alumni or donors at an annual alumni event.

Rossley v. Drake University

- Board Response:
 - Board Chair and Board member asked Trustee to stop speaking to alumni and donors about his son's disciplinary process and the University's compliance with the law.
 - Trustee agreed to disassociate himself at the time and later sent an "assurance" email recognizing a conflict of interest.
 - Board Affairs Committee advised Trustee that his actions created a conflict of interest and asked him to take a leave of absence.

Rossley v. Drake University

- More back-and-forth:
 - Trustee denied conflict of interest and refused to take a leave.
 - President sent email to Board, advising a special meeting to vote on how to address Trustee's conflict of interest related to his son's Title IX case.
 - Board met, determined Trustee had a conflict of interest, and referred the matter back to the Committee to recommend a course of action.
 - Ultimately, Board accepted Committee's recommendation to vote on removal due to a conflict of interest – insistence on using Board position to advocate for his son.

Rossley v. Drake University

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After Trustee was removed from the Board, he filed suit alleging Title IX retaliation, disability retaliation, and breach of contract.

All claims failed.

Higgs v. Houston-Philpot

- Higgs was a member of the Delta College Board of Trustees and an attorney.
- Higgs filed a lawsuit against the Board alleging violations of the Open Meetings Act because he was interrupted while speaking during the public comment segment of a public budget meeting.
- State law provided: “A person shall be permitted to address a meeting of a public body under rules established and recorded by the public body.”

Breuder v. Board of Trustees

- Robert Breuder served as President of the College of DuPage from 2009 until his termination in 2015
- Breuder filed a lawsuit against the Board and individual board members for due process violations, breach of contract, defamation, and civil conspiracy
- Some Defendants filed counterclaims against Breuder, alleging breach of contract and breach of fiduciary duty

Breuder v. Board of Trustees

- Board moved to compel Breuder to produce documents withheld as privileged under the attorney-client privilege and work product doctrine.
 - “Work product” – documents prepared in anticipation of litigation or for trial
 - Attorney-client – where legal advice is sought from a professional legal adviser, made in confidence by the client
- Breuder alleged certain communications with two college employees were protected by the work product doctrine; communications with the former college attorney were protected by attorney-client privilege; and communications with his wife were protected under both doctrines.

Best Practices

- Personal relationships are critical to good governance and good decision making (and survival)!
- Communicate, communicate, communicate!!
- Always seek to act ethically and in the best interests of the institution you are serving, whether that is as a Present, Board member, or counsel to the Board.

A Checklist for Board Decision Making

- Relevant information is provided on a timely basis.
- Meeting attendance requirements are enforced.
- Where relevant, the reasonableness of financial terms is confirmed.
- Arms-length nature of negotiations is confirmed for the record.
- Results of “due diligence” and transaction options, and related risks, are shared with the Board.
- The relationship between the goal of the transaction and the institution’s educational mission is confirmed by the Board.
- Board minutes and resolutions are used judiciously to record the material deliberations of the Board.

Worst Case Scenario

- N.C.G.S. 115D-19: Removal of a Trustee
 1. Either State Board of CC or local Board has "sufficient evidence" a Trustee is "not capable of discharging, or is not discharging, the duties of his office as required by law or lawful regulation, or is guilty of immoral or disreputable conduct."
 2. Board must hold public meeting. Trustee is entitled to due process.
 3. Board cannot hold a public meeting to consider removal until the Board knows the "charges".
 4. Trustees can seek legal advice in a closed session but the allegations, and how to respond, must be discussed in a public meeting.

Worst Case Scenario

- N.C.G.S. 115D-19: Removal of a Trustee (second option)
 1. A local Board may declare vacant the office of a member who does not attend three consecutive, scheduled meetings without justifiable excuse.
 2. A local Board may also declare an office vacant if a member does not participate in a trustee orientation and education session within six months of appointment.
 3. The local Board must notify the appropriate appointing body of any vacancy.

Unanswered Questions

- Who directs an initial allegation should be investigated?
- How is evidence gathered?
- What does "substantial evidence" look like?
- Who makes these decisions?
- What do your governing documents say?

Hypothetical

Internal Audit conducts an audit of the President's Office and the Secretary's Office, which provides Board support. The Internal Auditor submits the report to the Board, and the report contains the following:

The Chair of the Board has not disclosed he has invested in several faculty or incubator start-up businesses that he learned of from reports to the Board about the institution's activities.

A Board member has submitted false requests for reimbursement of \$500 in travel expenses to board meetings or events. The Board member explained they made a mistake and reimbursed the institution.

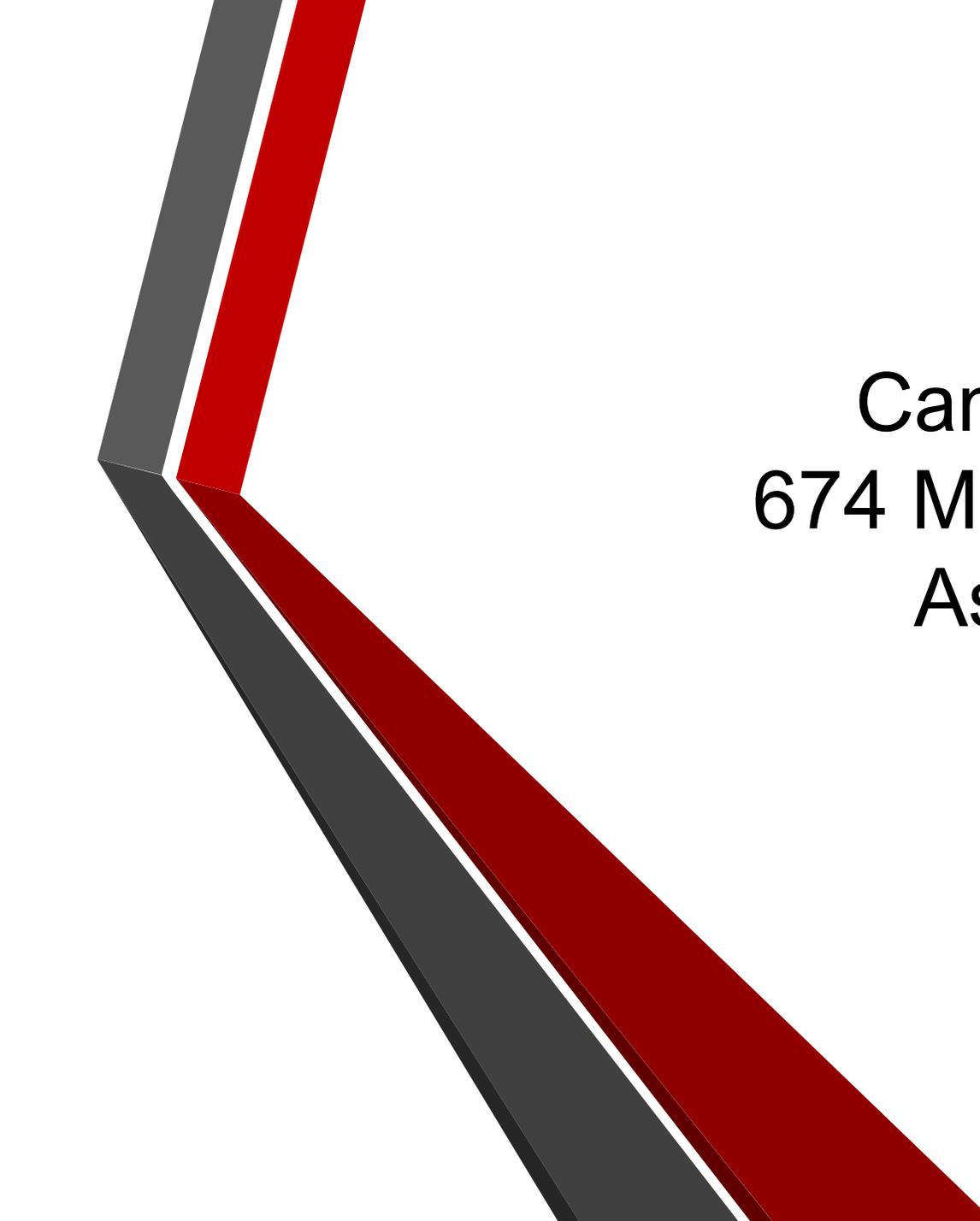
A recent allegation the President committed research misconduct on a federal grant 10 years ago when they were a professor at another institution. The whistleblower plans to go public.

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“Would everyone check to see they have an attorney? I seem to have ended up with two.”

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