CSIG
CENTER for STRATEGIC and INCLUSIVE GOVERNANCE

ON THE SCALES OF GOVERNANCE: BALANCING

LEADERSHIP AND LEGAL INSIGHT

Setting the Scales: Balanced Collaboration Between Boards and Counsel

The balance scale stands as a symbol of thoughtful judgment, principled integrity, and the steady equilibrium essential to sound decision-making. As colleges and universities face unprecedented legal, political, and societal uncertainty, the weight borne by higher education governing boards and university legal counsel is only increasing. Therefore, the relationship between the board and legal counsel must not only function—but flourish. Maintaining equilibrium built on trust, transparency, and legal foresight is essential to safeguarding the institution's mission, ensuring legal compliance, and mitigating potential missteps.

The Weight of Legal Wisdom: Balancing Strategic Guidance

University counsel serves as the legal anchor and strategic guide of the institution. When external and internal inputs threaten to tip the scale, counsel advice ensures institutional decisions remain grounded in law, guided by ethics, and aligned with the institution's core mission.

Key responsibilities include:

- **Impartial Guidance:** Counsel offers candid, unbiased legal assessments, even when politically sensitive or complex.
- **Clarity in Complexity:** Counsel translates dense legal doctrine into understandable guidance tailored to academic environments. Counsel should help boards understand not just what is legal, but why it matters, and how it connects to mission and values.
- **Practical Navigation:** Beyond saying "no," counsel charts alternative routes aligned with institutional priorities, framing and identifying alternatives as paths to progress while minimizing risk.
- **Guardians of Confidentiality:** Counsel ensures sensitive conversations and institutional interests are protected.
- **Early Warning System:** Counsel raises issues before they escalate and offer ways to mitigate risk, addressing not only legal liabilities, but also threats to institutional missions.

Calibrating the Connection: Maintaining Balanced Communication

A scale only works when it is properly calibrated— the same is true of the board- relationship. Open, consistent communication ensures informed governance and swift responses to risk and board related matters.

To maintain balance:

- **Meet with Purpose and Frequency:** Schedule regular meetings- sessions should be standard, adjusting frequency when legal complexity increases.
- **Create Pathways for Urgency:** Develop opportunities for real-time updates through secure and board accessible communication channels.
- **Preserve Executive Session Space:** Make space for strategic, privileged dialogue. These sessions allow the board to hear vital legal guidance and consider sensitive issues without external pressures or procedural constraints.

The Balance of Power and Principle: A Partnership Worth Protecting

Board members provide direction. Counsel provides guardrails. When both are respected, institutions thrive. A well-balanced board-counsel relationship includes mutual respect and shared responsibility. To keep the scales from tipping, both parties must recognize each other's roles and support professional integrity.

To strengthen this partnership boards should:

- **Foster Open Dialogue:** Legal perspectives should be welcomed early—not as afterthoughts to decision-making.
- **Provide Adequate Support:** Ensure counsel has resources, staff, and autonomy to manage increasing legal burdens.
- **Include Counsel in Strategy:** Big decisions need legal insight at the planning table, not the final checkpoint. Take a proactive approach to integrating legal guidance.
- **Respect Legal Ethics:** Counsel has obligations to maintain institutional integrity, as well as an ethical responsibility to the bar in which they are members. Boards should protect and reinforce ability to manage both.

The Crucial Balanced Partnership

Risk Assessment and Mitigation

Board's Role:

- Engage proactively with counsel to assess potential mission, legal and political risks based on evolving regulations, legislative changes, shifts that impact higher education.

Counsel's Role:

- Provide timely, comprehensive briefings on emerging legal trends, potential liabilities, and high-impact practices.
- Conduct proactive policy reviews to ensure alignment with current legal standards and institutional missions.

Questions for Consideration:

1. How is the institution's mission defined and prioritized amid legal and political challenges?
2. How might changes in legislation or regulation impact the institution's mission?
3. What are the board's priorities regarding balancing the mission-driven goals with legal and financial risk mitigation?
4. In what ways does our mission intersect with evolving societal values and legal interpretations?

Strategic Planning and Policy Development

Board's Role:

- Incorporate legal insight into strategic planning and decision-making.
- Consult counsel early on the legal impact of proposed initiatives and policies.

Counsel's Role:

- Provide expert legal guidance on strategic decisions, policies, and liabilities.
- Assist in drafting and revising policy language to ensure compliance and reduce institutional risk.

Questions for Consideration:

1. What are the board's expectations for addressing legal and ethical considerations in strategic planning?
2. What legal risks and opportunities are associated with each proposed strategic initiative?
3. How do the proposed changes align with current and anticipated legal and regulatory requirements?
4. Are there any legal barriers to implementing the strategic plan?
5. Does current or proposed policy comply with federal, state, and local laws and regulations?
6. Could the proposed policy face legal challenges?
7. How will the policy affect stakeholders' legal rights and obligations?

Fiduciary Oversight and Compliance

Board's Role:

- Maintain strict oversight of institutional finances.
- Ensure compliance with applicable laws and regulations.

Counsel's Role:

- Advise the board on fiduciary duties, conflicts of interest, and compliance obligations.
- Facilitate communication with auditors and regulatory agencies.

Questions for Consideration:

1. What are the board's expectations regarding the legal implications of the institution's investment portfolio?
2. How does the investment portfolio align with the institution's mission?

Board's Role:

- Establish clear communication and decision-making protocols for crisis situations.
- Leverage counsel's expertise to navigate legal complexities and safeguard the institution.

Counsel's Role:

- Deliver timely, accurate legal guidance during crises and regulatory shifts.
- Support compliant communication strategies aligned with evolving legal requirements and implications.

Questions for Consideration:

1. What are the board's concerns about emerging legal and regulatory trends affecting the institution's ability to fulfill its mission?
2. How can we proactively address potential legal challenges related to diversity, equity, inclusion, and access?
3. How can we integrate legal considerations into the board's decision-making process at every stage?
4. What are the board's expectations for transparency and accountability in legally sensitive matters?

Final Weigh-In: Questions for Board Reflection

1. Are we involving counsel early enough to shape direction, not just react to legal issues or defend decisions?
2. Do board members feel equipped to interpret legal guidance in governance?
3. Are we supporting counsel's dual obligation to the institution and the law?
4. Have we built a culture where legal clarity is a shared goal in strategic discussions, or only when risk arises?

The Counterweight in Motion: Action Steps for a Balanced Approach

To strengthen your institution's legal and governance equilibrium, consider these practical steps:

- Schedule a joint strategic planning workshop to explore governance shifts and emerging risks, targeting the alignment of legal guidance with board responsibilities.
- Review Executive Session practices for timeliness, effectiveness, and meaningful counsel engagement.
- Audit legal resourcing and authority—ensure counsel is empowered and supported.
- Implement an annual board-counsel partnership review to identify strengths and gaps.