

GOVERNANCE MATTERS

A Practical Guide

for University Trustees

*ILLINOIS PUBLIC UNIVERSITY TRUSTEES
ANNUAL TRAINING CONFERENCE
ILLINOIS BOARD OF HIGHER EDUCATION
OCTOBER, 2017*

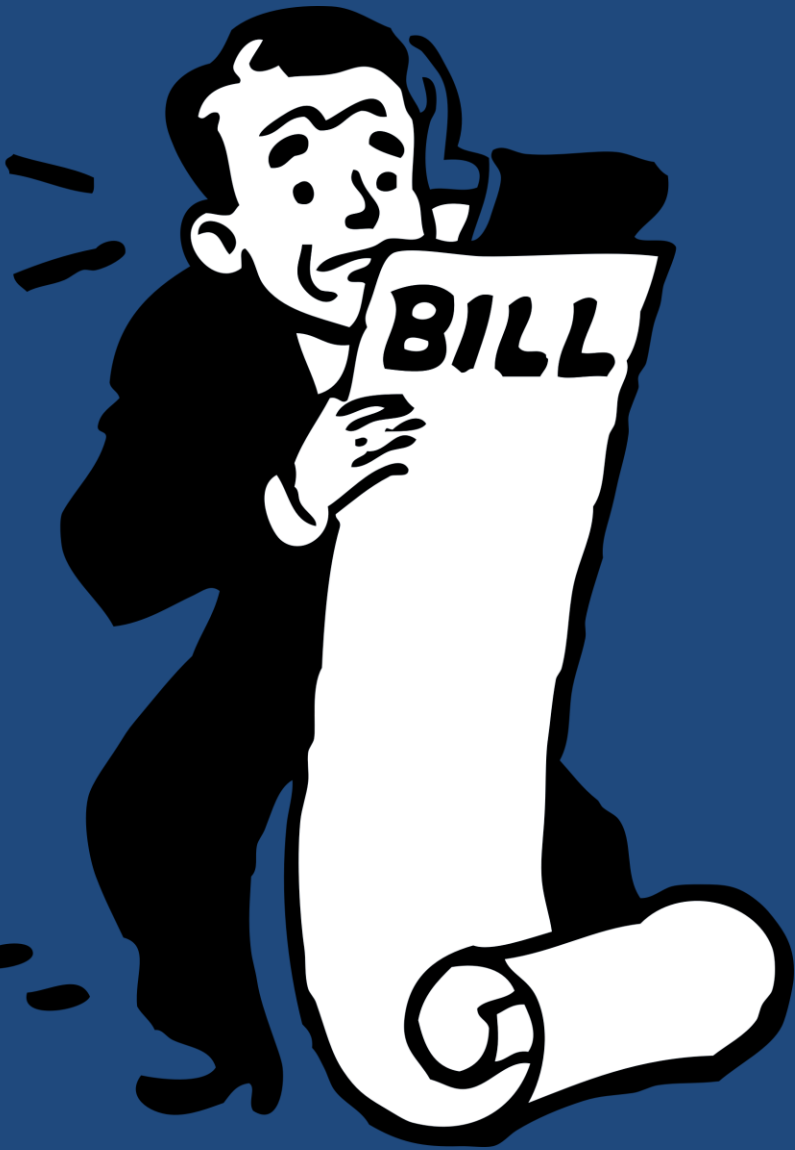
“Life short, art long, opportunity fleeting, experience misleading, judgment difficult.”

Hippocrates 460-270 B.C.

Illinois trustees are required to govern in a complex, increasingly uncertain and risky environment.

Stakes are high....

Rewards are few



- ▣ In 2016, the Illinois General Assembly enacted amendments to the Board of Higher Education Act recognizing the importance of good governance by University Boards of Trustees.
- ▣ Effective as of January 1, 2017, each voting member of a governing board of a public university must complete a minimum of 4 hours of professional development leadership training.
- ▣ Topics are to include training on various matters including ethics and fiduciary responsibilities.

Good governance is critically important for University Trustees to achieve optimal performance and maintain the confidence of their constituencies.

Goal of today's presentation is to provide an overview of some of the Illinois laws that you as Trustees are required to follow and some of the pitfalls that have occurred as a result of Trustees failing to follow good governance principles.

The 4 “I”s of Good Governance



- Informed
- Independent
- Integrity
- Impact

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Informed

Boards of Trustees need to be informed and knowledgeable of state laws that impact a Trustee's decision-making process.

- 1) The Freedom of Information Act
- 2) The Open Meetings Act
- 3) The State Employees' & Officers' Ethics Act
- 4) The Governmental Ethics Act
- 5) The Gubernatorial Boards & Commissions Act
- 6) Individual University Acts & University Policies



SIPRESS

*"My desire to be well-informed is currently
at odds with my desire to remain sane."*

FOIA Landscape

- ❑ Illinois was the last state to enact a law permitting access to public records (*See* Public Act 83-1013, effective July 1, 1984).
- ❑ A 1999 audit by the Associated Press found that more than two-thirds of state government organizations did not comply with FOIA.
- ❑ A 2006 investigation by the BGA yielded a 60% noncompliance rate with almost 40% of the Illinois governments tested reporting that they never even responded to the FOIA request.
- ❑ Since 2010, there have been numerous amendments and proposed amendments to FOIA law.

- ❑ As of January 2017, Mayor Emanuel's administration faced 54 lawsuits involving FOIA.
- ❑ In 2016, the City of Chicago shelled out \$670,000 in 27 settlements alleging officials violated open records laws—almost five times what it paid in the previous eight years combined.
- ❑ The most expensive case was the Laquan McDonald video. The City paid \$97,500 in fees and court costs to fight the release of the videotape.
- ❑ The City also paid \$96,275 in the BGA's case involving the release of Mayor Emanuel's emails.

Chicago Tribune

BGA Shining a Light on Government



Judge rejects Emanuel assertion that emails are exempt from disclosure

MAY 31, 2016

Emails on Laquan McDonald shooting ordered disclosed, refuels privacy debate

CHICAGO **SUN**TIMES

City delays release of police shooting video despite 90-day policy



What is a Public Record?

- ▣ Section 2(c) of FOIA (5 ILCS 140/2(c)) provides that “public records” are: “[a]ll records *** and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.”
- ▣ The presumption is that all public documents are open to inspection as noted in Section 1.2 of FOIA (5 ILCS 140/1.2): “[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.”

- ❑ Compensation & Bonuses: In 2016, the Illinois AG held that the Housing Authority of the City of Freeport must disclose records relating to employee compensation and bonuses because such records relate to the use of public funds.
- ❑ Facebook/Skype: In 2016, the Illinois AG found that a public body must disclose Facebook and Skype account names because such names are akin to or derived from the individual's legal name, which is subject to disclosure.
- ❑ Student Records: In 2017, a Kentucky Court held that the Family Educational Rights and Privacy Act ("FERPA") protected University of Kentucky student information in a sexual assault case as educational records exempt from disclosure under FOIA laws. The Court also held that the records could not be disclosed in redacted form because redaction would not offer adequate protection from identifying the students.

- ▣ College of DuPage Foundation: In 2017, an Illinois appellate court held that the College of DuPage Foundation must disclose a federal subpoena that it had fought to keep private. In its ruling, the Court found that while the foundation is not technically a public body, it is subject to FOIA. “It is undisputed that the foundation is not merely soliciting donations from individual citizens and private corporations for the college educational programs, but the foundation also holds all private donations to the college, even those the foundation did not solicit.” As such, the Court ruled that the Foundation was contracted to perform a duty that “directly relates to the government” function of the College of DuPage and its records are subject to FOIA.

The Illinois AG has held that a public body responding to a FOIA request must conduct an adequate search of personal e-mail accounts and personal devices when email communications and text messages concern the business of the public agency.



Chicago Tribune/Emanuel cases. In December 2016, the Emanuel administration was forced to turn over thousands of emails from the Mayor's personal email account (and the personal email accounts of two aides).

- The released emails included disparaging remarks made by Governor Rauner to members of Emanuel's administration (prior to Governor Rauner becoming Governor) with the Governor remarking that CPS teachers are "virtually illiterate" and half of the city's principals are "incompetent".
- The released emails also show Mayor Emanuel's frequent attempts to discuss public business with people in business, government and the media such as:
 - David Plouffe, a top official at ride-share company Uber. Plouffe contacted Emanuel about the issue of signs that needed to be placed on vehicles doing pickups at the City's two major airports.
 - Alan Warms, an investor who contributed thousands of dollars to Emanuel's campaign committee. Warms complained about a huge uptick in crime in his neighborhood. The Mayor responded within minutes stating that more officers were added to the area and that he was passing along Warms' address to the police district.

Former Obama aide fined \$90,000 for illegally lobbying Emanuel on Uber's behalf

- ❑ In connection with the 2016 release of Mayor Emanuel's emails, the Chicago Board of Ethics sent letters of suspected lobbying violations to 14 individuals and companies who contacted Mayor Emanuel seeking to improperly influence the Mayor with respect to issues affecting those companies.
- ❑ The Chicago Board of Ethics noted that potential fines were likely to be "significant" in the event the Board finds the suspected lobbying violations occurred.
- ❑ The Chicago Board of Ethics already found that David Plouffe's emails to Mayor Emanuel, on behalf of Uber, violated City rules regarding lobbying and fined Uber \$92,000.

TALLY OF ETHICS PROBES TIED TO EMANUEL EMAIL RELEASE HITS 14

Apr 19, 2017 6:35 PM

UBER

EVERYONE'S PRIVATE DRIVER™

Emanuel immediately responded, directing Plouffe to his staff.

Governor Rauner's Policy on Personal E-mail Addresses

“Please advise your board members and commissioners that we still have a zero-tolerance policy on the use of personal e-mail for state business.”

– Christina M. McClernon,
Assistant General Counsel,
Office of Governor Bruce Rauner

Consequences of Failing to Adhere to FOIA Requirements

- ▣ College of DuPage case. The Chicago Tribune initiated an investigation against the college which raised questions about top administrators' expense accounts and other spending issues. The Tribune ultimately filed a lawsuit contending that the College and its foundation violated FOIA by refusing to produce records held by the foundation including documents relating to a foundation account that paid expenses for the college's prior president, Robert Breuder. After the lawsuit was filed, the college turned over some records showing how Breuder used foundation money (nearly \$102,000) on high-end restaurants, trustees' bar bills, a refile for a departing foundation officer, among other expenses. The College fired Breuder and rescinded his \$763,000 severance package amid growing public scrutiny.
- ▣ University of Illinois case. Chancellor Phyllis Wise was forced to resign over encouraging key personnel to utilize personal email addresses to attempt to maintain confidentiality on certain University related topics.

Daily Herald: Watchdogs file lawsuit against COD for withholding public records

April 2, 2015 09:46 PM
(not rated)
Original Article, [click here](#).



By: **Melissa Silverberg**

A group of government watchdogs filed a lawsuit against College of DuPage on Thursday alleging numerous violations of the Illinois Freedom of Information Act.



DuPage County | updated: 4/29/2016 5:17 PM

College of DuPage may admit Open Meetings Act violations on Breuder's contract



News / Watchdog / College of DuPage

DuPage prosecutors sue College of DuPage board over Breuder contract vote

CHICAGO SUN@TIMES

TRENDING

Chicago Tribune

News

CHICAGO NEWS 10/20/2015, 08:16pm

College of DuPage board fires president

Sun-Times Staff
email

SATURDAY, MAY 16, 2015

COLLEGE OF DUPAGE SCANDAL THREATENS SCHOOL'S ACCREDITATION



GLEN ELLYN, IL - College of DuPage is facing further scrutiny for its spending following decisions by the state and the accreditation agency that oversees the school.

Open Meetings Act

- ▣ The Open Meetings Act is designed to prohibit secret deliberations and action on matters which, due to their potential impact on the public, properly should be discussed in a public forum. *People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 202 (1980).

- ▣ What is a “meeting” under the Open Meetings Act?
 - “Meeting” is defined as “any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.” 5 ILCS 120/1.02.



MANKOFF

*“Let’s never forget that the public’s desire for transparency
has to be balanced by our need for concealment.”*

CN
COLLECTION

Community College Example

- ❑ At a 2015 special meeting, the Board discussed the financial condition of the College in executive session under 2(c)(1) and 2(c)(5) of the OMA, allowing public agencies to go into executive session to discuss personnel matters and the lease or purchase of real property.
- ❑ The topics in executive session included:
 - Financial Uncertainties of the College;
 - Financial Stewardship;
 - Financial 5 Year Forecast;
 - Property Tax Levies; and
 - Impacts of Limited Financial Resources.
- ❑ AG concluded that Board's brief discussion on general matters related to employees in general (such as staffing levels and the importance of having a financial context for upcoming negotiations with employees) and the College's efforts to sell or lease property owned by the College did not authorize the Board to enter into executive session pursuant to 2(c)(1) and 2(c)(5) of the OMA.

Northern Illinois University

- ❑ Following an OEIG report that alleged improper spending at NIU, the NIU President, Doug Baker, resigned and was awarded a \$617,500 severance package by the NIU Board of Trustees.
- ❑ A member of the public sued the NIU Board alleging the Board violated the Open Meetings Act by : (1) failing to provide proper notice of the meeting; (2) failing to provide a full description of the agenda item involving Baker's severance award; and (2) failing to make a required performance review of the President publicly available.
- ❑ The Complaint cites to a new State law that requires State Universities to consider the performance review in any employment compensation and to make that review available to the public on the respective University's website at least 48 hours prior to the Board approving a bonus incentive-based compensation, raise or severance agreement for the president or all chancellors of the University.

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Independent

Good governance requires that Trustees are independent decision-makers acting in the sole interest of their respective University. Trustees are required to comply with conflicts of interest prohibitions in the Illinois Governmental Ethics Act and individual policies of their respective Universities.

When identifying whether a conflict of interest exists impacting his/her ability to be an independent decision-maker, a Trustee should consider the following stages:

- Identifying the conflict; and
- Managing the conflict.

Identifying Conflicts of Interest

- ▣ A conflict of interest arises when a Trustee is required to make a decision where:
 - 1) the Trustee is obliged to act in the best interests of his/her University constituencies; and
 - 2) at the same time, the Trustee has or may have either: (i) a separate personal interest or (ii) another duty owed to a different beneficiary in relation to that decision, giving rise to a possible conflict with the Trustee's duty as a Trustee of the University Board.
- ▣ Conflicts may be classified as real conflicts or potential conflicts.

Managing Conflicts of Interest

- ❑ Board Members should disclose any actual or potential conflicts of interest immediately upon discovery.
- ❑ Paramount importance because avoiding appearances of conflicts maintains public confidence in the University's institutional integrity as a prudently managed University operated for the sole and exclusive benefit of its members.
- ❑ When managing a conflict, the role of a legal adviser is important to consider how the conflict may affect (or appear to affect) the independence of the Trustee's decision making.
- ❑ A decision taken by a Trustee with a conflict may be invalidated if the Trustee did not take proper steps to manage the conflict.

- ▣ Constituency Interests. Elected or appointed Trustees often have responsibilities toward his or her constituency.
- ▣ *Identify the conflict*: A Trustee's interest in his or her responsibilities to his or her constituency may cause a conflict of interest on a particular matter. Trustees must recognize at all times that the Trustee's obligation is to act in the best interest of the University as a whole and not to a particular constituency that he or she has been elected or appointed to represent.
- ▣ *Manage the conflict*: If a Trustee believes that an interest to his or her constituency may create a conflict, the Trustee is encouraged to seek legal advise before participating in the discussion or vote at issue and disclose the conflict to the Board. Trustees must recognize at all times that the Trustee's duty is to act in the best interest of the University as a whole and not to a particular constituency that he or she has been elected or appointed to represent.

- ▣ Personal and Financial Interests. Trustees (and his or her spouse and/or immediate family member) are prohibited from having a financial or personal interest in contracts or business operations that affect or appear to affect that party's independence, objectivity or loyalty to the University.
- ▣ *Identify the conflict:* possible conflicts include (i) referring any prospective vendor to the University for a specific transaction without Board approval; (ii) engaging in outside employment with any University vendor; (iii) using his or her prestige as a Board Member to encourage the hiring of family members at vendors of the University; (iv) engaging in activities that are incompatible with his or her duties as a Board Member such as using his or her prestige, influence or position with the University to receive any private gain or advantage or divulging confidential or non-public information to any unauthorized person which he or she gains by reasons of his or her role as a Trustee.
- ▣ *Manage the conflict:* The Trustee should notify the Board as soon as possible about the conflict and should seek legal advice regarding appropriate responses to managing the conflict.

ISBE Example

- ❑ Illinois State Board of Education Chairman violated the agency's conflicts of interest policy by participating in discussions and a Board vote relating to Illinois' No Child Left Behind Act waiver application without disclosing his wife's ownership of a supplemental educational services provider to the entities subject to ISBE jurisdiction.
- ❑ The agency's conflict of interest policy specifically prohibited the following types of behavior: (1) Using public office for direct or indirect private gain; (2) giving preferential treatment to any organization or person; (3) losing independent or impartiality of action; (4) making a Board decision outside official channels; or (5) adversely affecting the confidence of the public in the integrity of the Board.
- ❑ OEIG concluded that the Chairman's wife's ownership could "reasonably create the appearance of [the Chairman]'s loss of independence or impartiality. ...Thus, [the Chairman] was required to disclose this interest to the Board when he participated in the Board discussions and vote."

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Integrity

Good governance requires Trustees to act with integrity in all University decisions.

Boards of Trustees need to operate within the ethical requirements of state laws including the State Officials' and Employees' Ethics Act ("Ethics Act"). All public institutions of Higher Education are considered "state agencies" for purposes of the Ethics Act.

Gift Ban

- ▣ The Illinois Gift Ban, codified in the Ethics Act, applies to all Board Members (and Staff) and prohibits Board Members (and their respective spouses/immediate family members) from submitting or accepting any “gift” from a prohibited source.



A “prohibited source” are people or entities that fit one or more of the following categories:

- (1) do or seek to do business with the respective University;
- (2) conduct activities regulated by the respective University;
- (3) have interests that may be substantially affected by the University’s official duties; or
- (4) are registered or required to be registered as lobbyists.

Gifts from prohibited sources do not violate the Gift Ban if they fall under one or more of the following exceptions:

- Gifts available to the public under the same conditions;
- Gifts for which the recipient paid market value;
- Gifts received from a relative;
- Foods or refreshments not exceeding \$75 per day;
- Gifts from one prohibited source with a cumulative value of less than \$100 during any calendar year.

Gift Ban Violations

- ▣ OEIG Illinois Department of Transportation Case: An IDOT Office Administrator violated the Illinois Gift Ban Act by accepting payment for a flight ticket for her daughter from the owner of a IDOT official testing station.
- ▣ OEIG University of Illinois at Chicago Case: OEIG Investigation found that Midwest Foods and its co-owner gave prohibited gifts to University of Illinois Associate Athletic Director and other UIC employees and officials. The illicit gifts included Chicago Bulls and White Sox games as well as use of a rental apartment in California. Midwest Foods was considered a prohibited source because it did business with UIC and sought to do additional business.

Political Activity

- ❑ Ethics Act strictly prohibits employees and Board Members from using State resources for prohibited political activity. 5 ILCS 430/5-15(a).
- ❑ Ethics Act does not permit any exception for anyone to engage in *de minimis* use of University property for political campaign activities even if the employee:
 - Is a tenured faculty or professor of a State University;
 - Did not think about what they were doing (or not doing);
 - Describes their conduct as an error that was “miniscule”;
 - Used State resources that only represented a fraction of their overall e-mail use; or
 - Did not think about using their personal e-mail as opposed to their State e-mail.

Political Activity Violation

- ▣ Tenured University professors exchanged seemingly innocuous, limited e-mails using both their State University email accounts and their personal e-mail accounts to communicate about a fellow Professor's campaign for Congress. E-mails included:
 - A request and response regarding drafting an introductory speech for the Professor in preparation for a campaign meeting;
 - A list of contact information in order to assist the Professor in sending invitations for a campaign meet and greet;
 - A request and response regarding distributing the Professor's campaign materials at a meeting in Washington D.C.; and
 - A request and response regarding assistance in soliciting campaign donations from other University employees.

- ▣ All of the University professors were required to complete the annual training on the State Ethics Act.
- ▣ The University professors admitted that they knew that “you’re not supposed to” use State e-mail in regards to a political matter but argued that the violation was a “miniscule error” and that they “could not believe time was being wasted on something so trivial”.
- ▣ OEIG responded by finding all of the University professors involved in the e-mail exchanges were in violation of the State Ethics Act.
 - “[a] violation of State law is not a trivial matter. In addition, what is also similarly not trivial, is that a tenured professor, who said she completed ethics training each fall and said she was familiar with the training related to prohibited political activity, nevertheless either intentionally disregarded or simply ignored her annual training.”

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Impact

Good governance requires Trustees to be knowledgeable of the existence of risks and ensure that proper procedures and processes are developed in advance to address such risks. Ensuring that proper procedures and processes are followed will result in a lasting impact on the University's governance.

“Leadership is an action, not a position.” –Donald McGannon

University Severance

- ▣ In 2016, the Illinois General Assembly passed new legislation impacting employment contracts and severance packages for University Presidents and Chancellors (Public Act 99-0694).
- ▣ Specifically, the law includes, but is not limited, to the following:
 - Severance under the employment contract may not exceed one year salary and applicable benefits;
 - An employment contract may not exceed 4 years;
 - An employment contract may not include any automatic rollover clauses; and
 - Final action on the formation, renewal, extension or termination of an employment contract must be made during an open meeting of the Board of Trustees.

Sexual Harassment

- ▣ Under the Illinois Human Rights Act, sexual harassment is defined as: “any unwelcome sexual advances, requests for sexual favors or any conduct of a sexual nature when:
 - Submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual’s employment;
 - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 - Such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.
- ▣ The courts have determined that sexual harassment is a form of discrimination under Title VII of the U.S. Civil Rights Act of 1964, as amended in 1991.

- ▣ **Verbal:** Sexual innuendos, suggestive comments, insults, humor, and jokes about sex, anatomy or gender-specific traits, sexual propositions threats, repeated requests for dates, or statements of a sexual nature about other employees, even outside of their presence.
- ▣ **Non-verbal:** Suggestive or insulting sounds (whistling), leering, obscene gestures, sexually suggestive bodily gestures, “catcalls”, “smacking” or “kissing” noises.
- ▣ **Visual:** Posters, signs, pin-ups or slogans of a sexual nature, viewing pornographic materials or websites.

- ▣ **Physical**: “Touching, unwelcome hugging or kissing, pinching, brushing the body, and coerced sexual act, or actual assault.
- ▣ **Textual/Electronic**: “Sexting” (electronically sending messages with sexual content including pictures and video) the use of sexually explicit language, harassment, cyber stalking and treats via all forms of electronic communication (e-mail, text/picture/video messages, intranet/on-line postings, blogs, instant messages and social network websites like Facebook and Twitter).



Uber board member resigns after making a joke about women at a company meeting on sexism

21st Century Fox Pressed by Investment Group to Overhaul Board



LEADERSHIP • UBER
Uber Board Expected to Review Sexual Harassment Report Wednesday



David Bonderman Resigns From Uber Board After Sexist Remark

Weinstein Company hit with lawsuit following sexual assault allegations



Actor Dominique Huett files \$5m civil suit against film company for 'abetting' Harvey Weinstein, alleging board members knew about and covered up misconduct

Weinstein Company

- ▣ Following the revelations regarding the Harvey Weinstein sexual harassment scandal, an actress is suing the Weinstein production company claiming that the Weinstein Company and its Board of Directors “aided and abetted” Weinstein.
- ▣ Specifically, she alleges the Board of Directors was negligent in ignoring Weinstein’s behavior, which she alleges they had been aware of since the 1990’s.
- ▣ The lawsuit states: “The Board of Directors was aware of the probable dangerous consequences of failing to remove or adequately supervise Weinstein. In failing to do so, the Defendant acted with actual malice and with conscious disregard to Plaintiff’s safety.”

Southern Illinois University

- ▣ In 2012, a SIU student worker in the SIU student employment program sued SIU after three encounters with a former SIU professor and substantial donor, in which the former professor touched the student inappropriately and complimented him on what he believed to be his feminine features.
- ▣ SIU's response to the harassment was held by the court to be reasonable because of the following:
 - 2 SIU officials were “quite helpful in shepherding the [student] through the complaint process...and the officials encouraged the [student] to pursue a formal complaint.”
 - SIU took corrective action such as assigning the Professor to another area of the University, issuing a formal reprimand, requiring sexual harassment training, and making a good faith effort to minimize his contact with the student.



"It's an amazing coincidence, isn't it, that we all served on the same board of directors?"