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MEMORANDUM

ATTORNEY-CLIENT COMMUNICATION

To: Antioch University Board of Trustees

From: Jack R. Pigman
David Weaver
William Groves

Date: May 7, 2008

Re: **Fiduciary Duties**

Executive Summary

During the last several Board discussions of the negotiations with A3C, we have become increasingly concerned about the necessity for and our duty to remind Trustees of their fiduciary duties to the University. Those duties can be stated as follows:

1. The duties require good faith determinations and decisions of what the Trustee reasonably believes to be in or not opposed to the best interests of the corporation.

2. The duty of loyalty runs to the corporation and not to any separate component of the corporation.

3. In the discharge of the duty of care, a Trustee may rely upon advice, counsel and reports which the Trustee reasonably believes to merit confidence.

4. Trustees have a duty to speak openly and with candor, and to not withhold information which, if known, would cause reliance upon advice, counsel or reports to not be warranted.

5. Trustees discharge the duty of care by reading all information, asking appropriate questions , seeking additional information and being prepared.

Discussion

Over the last several months we have provided both oral and written advice and materials concerning the fiduciary duties of the Trustees in connection with the various decisions to be made concerning the future of Antioch College. We thought it would be helpful to briefly review that advice, particularly in light of the current discussions about the potential change in the membership of the Board.

In general, the directors (i.e., the Trustees) of an Ohio non-profit corporation, such as the University, are charged with oversight and management of the corporation. As such, the

Trustees are fiduciaries who owe duties both to the corporation and to the general public. Ohio Revised Code §1702.30 sets forth the standard of care required of each Trustee. Generally, a Trustee must act in good faith, and in a manner in which the Trustee reasonably believes to be in or not opposed to the best interest of the corporation as a whole, not in the interest of any particular constituency within the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances.

The statute also makes clear that in exercising the duty of care, a Trustee is entitled to rely upon the information, opinions, reports or statements, including financial statements and other financial data, prepared or presented: (1) by one or more directors, officers, or employees of the University who the Trustee reasonably believes to be reliable and competent in the matters prepared or presented; (2) counsel, public accountants and other persons in matters that the Trustee reasonably believes are within the persons' professional competence; and (3) the committee of Trustees upon which the Trustee does not service, which has been duly established in accordance with the provisions of the articles of regulations, as to matters within its designated authority, which committee the Trustee reasonably believes to merit confidence.

The Ohio statute also clearly specifies that a Trustee shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause reliance on information, opinions, reports or statements that are prepared or presented by the persons or committee described above to be unwarranted. Trustees are expected to speak openly and with candor, and when relevant information is available it must be shared.

The Ohio statute makes clear that a Trustee shall not be found to have failed to perform his or her duties in accordance with the statute unless it is proved, by clear and convincing evidence that the Trustee has not acted in good faith. However, the statute also specifies, as examples, the actions of the Board that can be examined, including any action that involves or effects: (1) a change or potential change in control of the corporation; (2) a termination or potential termination of the Trustee's service to the corporation as a Trustee; or (3) the Trustee's service in any other position or relationship with the corporation.

The Ohio statute makes clear that for purposes of determining what a director reasonably believes to be in or not opposed to the best interest of the corporation, a director <u>shall</u> consider the purposes of the corporation and <u>may</u> consider any of the following: (1) the interest of the employees, suppliers, creditors and customers of the corporation; (2) the economy of the state and of the nation; (3) community and societal considerations; and (4) the long term and short term best interests of the corporation including, but not limited to, the possiblity that those interests may be served by the continued independence of the corporation. It is also clear from case law that emotion and sentiment are not legitimate considerations in determining what is in or not opposed to the best interests of the corporation.

The recent discussions that have occurred with A3C have taken many twists and turns and, most recently, have been on an accelerated and uncharted path. As the Trustees confront decisions arising from those discussions, it is important that each Trustee approach those decisions on an informed basis. Courts that have examined whether a Trustee has fulfilled his or her duty of care look at:

1. Whether the Trustee has regularly attended all necessary meetings.

2. Whether the Trustee has read and reviewed pertinent information, including financial information.

3. If information was not provided at or prior to the meeting, whether the Trustee has insisted the information be made available.

3. Whether the Trustee analyzed the information that has been provided and made appropriate inquiries concerning the information if there is ambiguity, uncertainty or lack of clarity in any of the information which has been provided.

We recognize that all of the Trustees are volunteers, actively engaged in numerous other endeavors and activities, and often are taking time out of their busy day. However, we are concerned that in some of the recent Board calls, while most of the Trustees have "attended," some have joined late or rejoined meetings after substantial reports have been made or discussions have been had, some have been distracted by other matters, and some have indicated they have not received or read materials which were distributed prior to the meeting. We would caution taking the time to read and prepare for each meeting.

Additionally, while the Chair has been very conscientious about distributing information and materials prior to the meeting and has tried to develop and encourage appropriate dialog thereby affording the opportunity for questions, care must be taken to insure that questions are asked and answered, and all ambiguities are clarified. If a Trustee believes that additional details are required or are needed before an informed vote can be taken, then it is the duty of the Trustee to insist upon such information, report or information prior to action being taken.[1]

While all of the various proposals from A3C have been timely reported, and discussed with the Board in the meetings that have occurred over the last several weeks, we are concerned that the Trustees take the time necessary to be fully informed, that all questions be answered, that any ambiguities or lack of specificity in any proposal be addressed and that each Trustee be satisfied that his or her reliance upon the report, information, opinions or the statements of others is properly founded.

While we know that each of the Trustees has been, in varying degrees, engaged and has attempted to be fully informed in the process, and while we know that the Trustees have had numerous and detailed discussions about the future direction for Antioch College and Antioch University, the current proposals mark a dramatic change in the direction the University and the Trustees might take, and involve potential decisions actions which involve all three of those areas listed in the statute as examples of decisions warranting a high level of scrutiny in the

[1] Attached is a list of questions developed by counsel after they received the Memorandum of April 28, 2008. It is provided as an illustration of the types of questions which are raised by the proposal outlined in the Memorandum. The list was not intended to be exhaustive, but rather to identify some additional areas of inquiry. Querry whether these questions have been answered or whether some or all of these questions must be resolved before any final decisions can be made?

exercise of fiduciary duties: (i) change of control; (ii) termination (by resignation) or potential termination of a Trustees' service; and (iii) the change in relationship or position of certain Trustees. In other words, the statute provides some guidance on the kinds of decisions which may be scrutinized closely by other parties and the current proposal falls squarely within those categories. The 8-8-4 Plan is a change in control of the board and it is to be accomplished through the mass resignation of a majority of the current board, and in doing so there will be changes in the chair and other officers of the board.

The duty of loyalty also must be evaluated in determining whether a Trustee has acted in good faith and consistent with his or her fiduciary duties. Generally, the duty of loyalty requires loyalty to the corporation's overall interests, the whole entity, and not to any constituent part of the entity, even if the Trustee may have some relationship or allegiance to the constituent part. Sections 2.3.1 of the Bylaws of the Antioch University Corporation provides that "Trustees shall serve at large." We are concerned that during some of the more recent Board calls the discussions have not involved the statutorily required consideration of the purposes of the corporation or the discretionary considerations, including the consideration of the interests of all employees, suppliers, creditors and students, the economy, the community and societal considerations, or the long term and short term best interests of the corporation. Rather, the discussions have tended to focus almost entirely on "saving" the College, without due consideration of the impact of any decision on the University as a whole, its mission and purpose, and the long term, as well as the short term, effects of the decision. Moreover, the A3C proposal under consideration contemplates a board which is primarily devoted to the governance of the College. Under the proposal, a committee would be created to address the balance of the University. Depending upon the powers, duties and responsibilities of such a committee, and its relationship to the board, this arrangement could violate the obligations of all trustees to be fiduciaries of the whole corporation.

Conclusion

Courts generally recognize a presumption that, in making a business decision, the directors have acted on an informed basis, in good faith, and with the honest belief that the action taken was in the best interest of the corporation or not opposed to the interests of the corporation. Any party challenging the decision has to be able to prove, by clear and convincing evidence, a violation of the duty of care or the duty of loyalty. The best defense is not to rely upon the presumption, but to rather make certain that all decisions are taken after being fully informed, after considering the purposes of the corporation and any other factors which each Trustee believes to be relevant or material, and after careful deliberation.

CONFIDENTIAL
QUESTIONS RAISED BY MEMORANDUM OF APRIL 28, 2008

1. Balanced Board

If the current proposal is truly a "balanced board," are there issues which are likely to come before the Board in the near term or long term which present the possiblity of deadlock within the Board? If the Board is not truly a "balanced board," then is control being ceded to the new Board members? How is "balance" for the existing board members to be defined and how is the selection process to be conducted so it can be achieved?

2. Power of New Board

What is meant by the proposed agreement that "the newly reconstituted Board of Trustees would be empowered to decide which of the vacated seats will be filed by each of the new Trustees?" If all board members serve "at large," what is meant by this provision?

3. A3C Representation

While many of the individuals proposed by A3C to serve on the new Board are known to the existing Board, what level of due diligence needs to be done with respect to individuals not known? What are the implications of service on the reconstituted Board by an individual who previously was asked to resign from the Board? Do any of the proposed new Board members have personal interests which may give rise to a possible conflict?

4. Selection of 4 Board Members

Why does A3C get to "designate" the two people which purportedly are to be designated by the existing Board and then "accepted" by A3C?

5. Restriction on the Funds

What, if any, restrictions will be placed on the $8.5 million dollars to be contributed? Who will decide how and when the $8.5 million dollars will be utilized? What portion, if any, of the $8.5 million dollars will be available to fund operating deficits at the College?

6. Additional Funds

When will the first $1 million dollar installment be paid to the University? What, if any, restrictions will be placed upon any of the installments to be contributed? Who will decide how and when the $1 million dollar installments will be used?

7. Capital Campaign

When will the capital campaign begin? Who will lead the capital campaign?

8. New Board Committee

Is the new Board committee which is to be devoted entirely to the academic and financial needs of the other campuses being created so other board members do not have any responsibility for (or interest in) the other campuses? Why is this committee necessary? Who will serve on this new committee? What will be the authority of the committee? How does this committee function within the context of the possible new governance structure, and as part of the fiduciary board of the University? Is the proposed new committee, in essence, a delegation of authority with respect to each of the other campuses?

9. McGregor

What is meant by the proposal that "any arrangements of separation will be undertaken in a manner to insure that McGregor can continue its effective operations, in accordance with the plan and vision by the Governance Committee?" How can the Trustees act upon this proposal without having the benefit of what is envisioned by the Governance Committee? What is envisioned by the Governance Committee with respect to McGregor? What has been communicated to A3C on this issue?

10. Separation

Why is separation of Antioch College from Antioch University necessary, or appropriate, under this structure? What happens to the A3C designated Board Members if there is separation of Antioch College and Antioch University? If there is separation, who serves on the University board after separation? Who determines the terms and conditions of the separation? "

11. Failure

What happens if the capital campaign for the College fails? What happens if the $8.5 million dollars is not sufficient to cover operating deficits in the first or second year? What happens if the proposed separation of the College from the University is not acceptable to OBR or NCA? What happens if the proposed separation of the College from the University is not acceptable to the University's bonding authorities, bond trustees or letter of credit banks?