

In Tough Times, Schools Look to Lawyer Trustees to Lead

BY PATRICIA E. SALKIN



AS ENORMOUS PRESSURES WEIGH on all of higher education and many schools fight for survival, the COVID-19 pandemic continues to deal economic blows to the sector. Most schools are heavily dependent on tuition revenues to cover budgeted operations. With enrollment at best uncertain and facing pressures to avoid increases and even cut tuition, thousands of schools face the prospect of severe deficits. Compounding the tuition shortfall are staggering revenue losses from the cancellation of athletic events along with lost lucrative television and other media contracts, tickets sales, and, without fans in seats, closed concession stations and a smaller demand for licensed team wear. Lost or reduced room fees for on-campus housing, cancellation of student charges for meal plans, the burden of canceled or postponed theater and other events that yield revenue from ticket sales, parking, and other related sources (e.g., philanthropic support and advertising) forces schools to grapple with ever more challenging financial and legal issues.

The last several decades have seen an exponential explosion of lawyers being appointed to college and university presidencies. Since the 1980s, the number of lawyer presidents has almost doubled every decade, starting with 47 in the 1980s and reaching a high of 289 in the 2010s (see graph 1). In the last 10 years, a noticeable more than 10 percent of lawyer trustees have claimed this post. Since the 1970s, 58 lawyer trustees were appointed to lead a college campus with more than half of these appointments occurring between 2010 to present (see graph 2). As the cascading repercussions of the pandemic make the economic thin ice under many institutions more precarious, it is reasonable to expect this trend to continue to grow.

The increase in legal talent both on campus boards and in c-suites makes sense. Lawyers are strategic and critical thinkers, trained to rely on evidence and data and to be skeptical of conventional wisdom and empty bromides. The best lawyers are creative problem-solvers and often leaders in the community. Attorneys are armed with the knowledge of laws and regulations, skilled at communication, adept at working with teams, and generally good business people who must quickly understand economic, legal, and regulatory challenges and how to assess and cope with the risk facing their clients regardless of the field of the client's enterprise. Lawyers are also sought after to serve on community nonprofit boards, assist with political campaigns, and serve in government. These are all important networks that campus leaders must tap into.



TAKEAWAYS

- Over the last 30 years colleges and universities have increasingly appointed lawyers to governing boards. Lawyers are strategic and critical thinkers, and their expertise provide governing bodies comfort as they face serious challenges today related to the COVID-19 pandemic, enrollment declines, and the business model.
- To efficiently maximize legal talent, governing boards should be aware of lawyer trustees' specialties and focus their time and energy on appropriate committees. If there is more than one lawyer on the board, then it may be useful to create a legal committee that works closely with the general counsel to enact the institution's legal strategies.
- Lawyer trustees are more important than ever before regarding assisting governing boards in navigating today's litigious environment. The deluge of lawsuits includes but is not limited to COVID-19-triggered litigation, legal complaints surrounding Title IX, Americans with Disabilities Act compliance, various civil rights claims, and free speech issues. Board members have a fiduciary duty to protect their institutions and lawyer trustees are especially essential in assisting their board in navigating these crises.

Litigation Floodgates Are Opening

More than 100 lawsuits have already been filed against colleges and universities stemming from decisions made in response to keeping campus communities safe during COVID-19. Litigation so far ranges from class-action suits seeking recovery of tuition for programs that pivoted to remote instruction from in-person to the refund of on-campus housing costs as well as a range of fees, including lab fees, athletic fees, and student activity fees. Lawsuits over flu vaccine requirements (and likely soon-to-be policies related to COVID-19 vaccines) and penalties for violating the code of conduct related to student behavior during the pandemic have also been filed.

The spate of COVID-19-triggered litigation comes on top of the proliferation of legal issues confronting the academy. Unfortunately, legal complaints against

schools have become routine for issues surrounding Title IX, Americans with Disabilities Act (ADA) compliance, other civil rights claims, and free speech, for example. In this litigious environment, a significant amount of resources is now spent on strategies to avoid or mitigate costly litigation. These strategies include the development of policies, language for handbooks and catalogs, and training. This not only rests on the shoulders of the campus counsel and compliance officers, but protecting the institution is also part of the fiduciary responsibility of board members.

Board Composition Suggests Increasing Number of Professionals (Including Lawyers)

Typically, people are appointed as trustees because they are leaders in the community; they may be major donors to the institution

Maximizing Legal Talent on the Board of Trustees

Be aware of the practice areas where lawyer board members focus their time and energy and put them to use on appropriate committees. For example, labor and employment lawyers may be good candidates for the personnel committee; business lawyers and those with mergers and acquisitions backgrounds may be most effective in the finance committee; and real estate lawyers may be most helpful with facilities and real estate committees.

Where there is more than one lawyer board member, create a legal committee and use it to work closely with the general counsel and compliance offices to develop the preventive law and legal strategies.

Don't wait to consult lawyer board members for advice and possible referrals. Early input into legal strategy may best shield the institution from major liability.

As seats open up for membership on the board, don't overlook consideration of legal talent that can assist in areas of unique interest or need of the institution. Remember, most lawyers are not general practitioners but rather possess in-depth knowledge in several key areas.

When selecting a campus president, consider qualified candidates who may have campus board of trustee experience anywhere in higher education. These candidates offer a unique firsthand understanding of how boards and presidents can work most effectively and efficiently together.

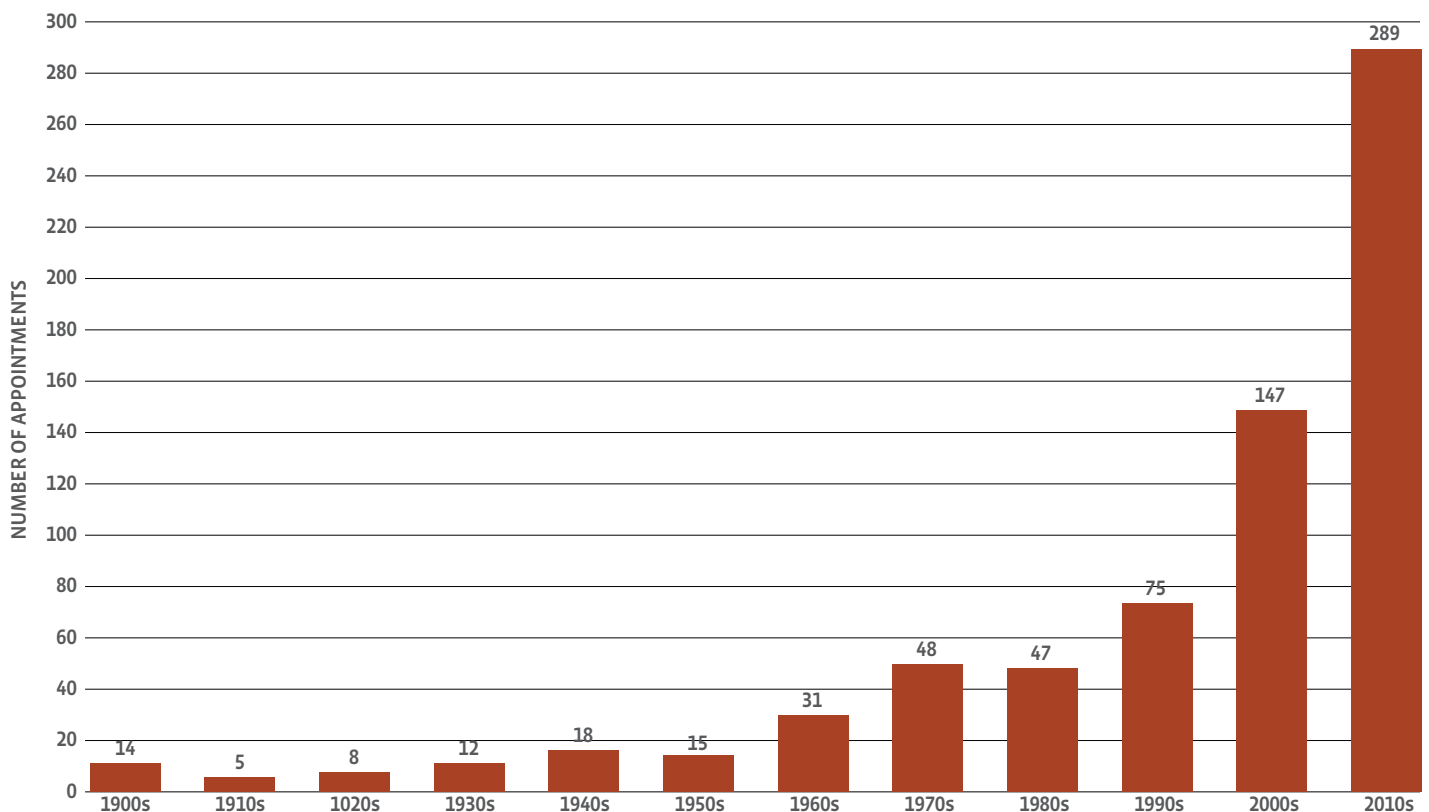
or have the capacity to do so; they are business-savvy individuals who can advise the campus president on critical issues related to real estate, financing and budgeting, and human resources; or they may have important networks in the public sector and corporate world.

Other challenges facing higher education in the 21st century have also demanded the expertise of lawyers. General counsel advise the campus on matters related to regulations and statutes from Title IX to the Clery Act, free speech and academic freedom, intellectual property, privacy, contract and union disputes, personnel issues (including discrimination), disability and veteran rights, religious freedom, exploding compliance requirements, and other issues involving change, uncertainty, risk, and campus controversies that could have long-term economic and reputational consequences for the institution. While there is no specific longitudinal study that has tracked the increasing number of lawyers appointed to boards of trustees, the last AGB survey on board composition, published in 2015, revealed that the percentage of independent college board members with business backgrounds increased from 47.9 percent in 1997 to 54.9 percent in 2015, and professional service (which include lawyers) also increased from 16.7 percent in 1997 to 21.8 percent in 2015.

Why Boards of Trustees Are Turning to Lawyers (and Lawyers with Trustee Experience) to Lead Their Campuses

In such tumultuous times, understandably governing bodies have a comfort level about their trustee colleagues who are already intimately knowledgeable about the operation of the school, especially when the school may be facing serious challenges. Boards may similarly look favorably upon candidates who have experience as trustees at other institutions. This is because effective board members must work in partnership with the campus president and truly have a handle on major economic, policy, and business operations of the school, more so that anyone else outside of the enterprise. AGB President and CEO Henry Stoeber explained, “As fiduciaries, board members are accountable for everything that happens or fails to happen within the institution or foundation. It is important to know that, from a technical leadership perspective, while accountability cannot be delegated, responsibility can be delegated. Ultimately, board members’ primary and ultimate fiduciary duty is to be accountable for the institution’s long-term reputation and vitality spanning reputation, financial health, academic quality, student success, workforce preparation, risk oversight, and much more.”

GRAPH 1: Appointment of lawyer presidents by the decade, 1900s through 2010s



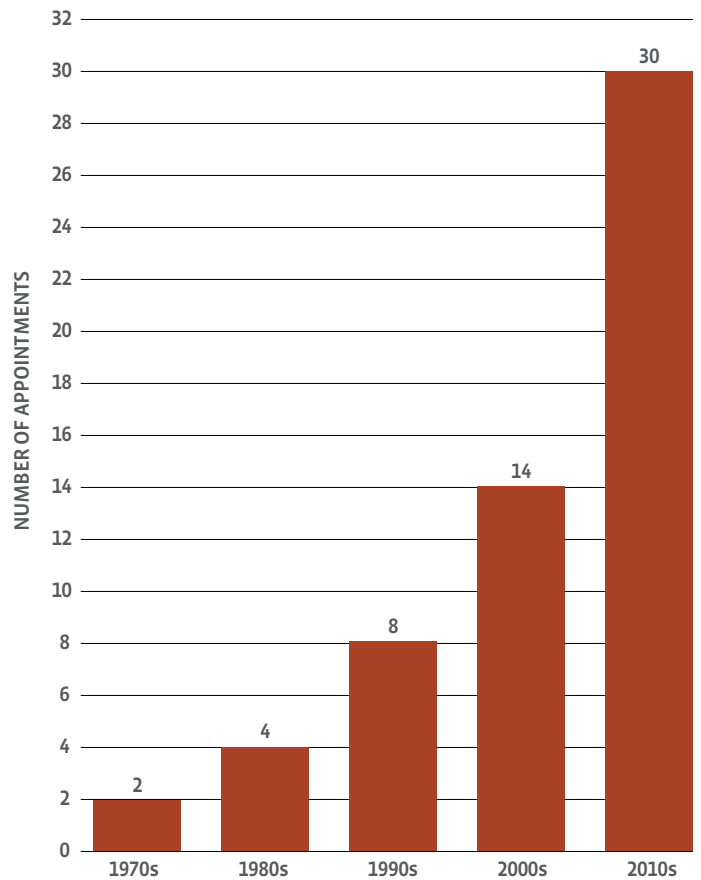
*Two lawyer trustees were appointed in 2020.

In 2013, Walter Dalton, former Isothermal Community College board of trustees chair and a lawyer, was named the institution's president. Dalton had another common characteristic of lawyer presidents: he has extensive background as a government lawyer having served most recently as lieutenant governor of North Carolina and prior to that as a state senator where he chaired the North Carolina senate education and appropriations committee. Such was the case when Chicago State University appointed former Board Vice Chair Zaldwaynaka "Z" Scott as president in 2018, who had served as an assistant U.S. attorney and the first inspector general in Illinois for the Agencies of the Governor and Public Universities. When the board of Valparaiso University (Valpo) announced that effective January 1, 2021, José D. Padilla would its next president, the press release pointed to, among other things, his superior business acumen, his prior board service (not at Valpo but at St. Thomas Aquinas), and that he is a dynamic innovator, thinker, and natural leader, bringing "many skills, experiences, and accomplishments in higher education which are ideally suited to the university's needs today and in the future." Of course, in his last two roles in higher education, his responsibilities including service as general counsel.

Following 10 years of service on the board of trustees, the board of Lesley University appointed lawyer Janet Steinmayer as campus president in 2019. While Steinmayer had experience as the president of Mitchell College immediately prior to the appointment, the board chair noted among her many other qualifications: "Janet's extensive knowledge of and devotion to Lesley..." That same year, Miles College Trustee Bobbie Knight was tapped to lead the campus after first being named interim president. Another characteristic common in lawyer presidents is also shared with Steinmayer and Knight—they both had prominent successful careers in the corporate sector, typically another desired qualification for board service.

Some lawyer trustees, like Steinmayer, have extensive non-board-related experience in higher education. For example, Paul Lowell Haines, who served on Taylor University's board of trustees for 15 years prior to his appointment, also served as a vice president for student development prior to his 15-year career as an education lawyer in the private sector. When Haines stepped down as president, the board of trustees again looked to their own and appointed trustee lawyer Paige Comstock Cunningham as interim president in 2019. In 2017, Bowdoin College looked no farther than trustee lawyer Barry Mills, who ironically started out as chair of the search committee for a new campus leader. Mills left a partnership at the prestigious Manhattan law firm of Debevoise & Plimpton LLP for higher education, and the Bowdoin newspaper reported: "Mills demonstrated what many describe as a shrewd analytical prowess, honed by his time in corporate law. But Mills was no longer catering to clients and their problems; he was solving the problems of the College, ones he truly cared about." Following service as chair of the University Council at the State

GRAPH 2: Appointments of lawyer president with prior higher education trustee experience*



University of New York at Albany (the body charged with recommending a new campus president), lawyer George Philip was appointed as interim president, and following a multiyear search estimated to cost \$300,000, he was appointed campus president. He, too, previously served in government as the executive director of the New York State Teachers' Retirement System and as the chief financial officer.

Despite the appearance of a potential conflict of interest when a board of trustees appoints one of their own to the top campus post, nearly every time the selection occurs through a competitive national search or after the appointment of the lawyer trustee to the role on an interim basis for stability pending the comprehensive search. Lawyer trustees appointed at first blush as an interim president may be in effect auditioning for the role. There has been little public criticism in these appointments because the reality has been that nearly all of these former lawyer trustees have, and continue to, serve their institutions well. ■

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