March 3, 2014

Dr. Tommy French, Chairman
Dr. Joe Aguillard, President
Louisiana College
1140 College Dr.
Box 583
Pineville, LA 71359

Dear Dr. French and Dr. Aguillard:

The purpose of this letter is to seek clarification on two important matters: the first concerns our legal duties and responsibilities as trustees of the Louisiana College Board of Trustees; and the second concerns the final resolution of findings in the recent independent audit of Louisiana College by the firm of Payne, Moore & Herrington.

Regarding the first matter, I am concerned that some of the legal counsel we were provided at our last board meeting on December 3, 2013, may not have been entirely accurate. As you will recall, the board's attorney answered questions during our discussion about the definition and scope of each board member's fiduciary duties to the institution. Since that time, I have reviewed the relevant law on point and consulted with outside counsel on the general legal question of what responsibilities and liabilities are associated with a director of a non-profit. It is my conclusion that the information we were presented on December 3 was in error.

The term *fiduciary* is a commonly misunderstood word. According to BLACK'S LAW DICTIONARY, "[T]he term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. Thus, a person is a fiduciary who is invested with rights and powers to be exercised for the benefit of another person. As an adjective it means of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust." As noted by the Cornel University Law School's Legal Information Institute, "A fiduciary duty is the strictest duty of care recognized by the U.S. legal system."

The United States Supreme Court and the Louisiana Supreme Court have long established what this concept means for those who serve as directors of corporations and institutions, and the statutory law and jurisprudence make clear that the burden is on each individual director to fully understand his duties. "To say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry... What obligations does he owe as a fiduciary?'' *Skilling v. U.S.,* 30 S.Ct. 2896, 2936 (2010) (*quoting SEC v. Chenery Corp.,* 318 U.S. 80, 85–86 (1943)). "As we have said in the past, the first place one must look to determine

the powers of corporate directors is in the relevant State's corporation law." *Burks v. Laster,* 441 U.S 471, 478 (1979).

In Louisiana, the responsibilities of a non-profit director/trustee are outlined by Title 12 of the Revised Statutes. For example, LSA-R.S. 12:226 is entitled, "Relation of directors and officers to corporation and members; liability of officers and directors," and provides that "[o]fficers and directors shall be deemed to stand in a fiduciary relation to the corporation and its members and shall discharge the duties of their respective positions in good faith, and with that diligence, care, judgment and skill which ordinarily prudent men would exercise under similar circumstances in like positions." The statute specifies that any officer or director "who knowingly, or *without the exercise of reasonable care and inquiry*" votes to consent to actions that are later found to be unlawful "shall be liable jointly and severally to the corporation and any person who suffers any loss or damage as a result thereof."

One of the leading legal treatises on this subject in Louisiana explains that the law on fiduciary relationships "is usually said to give rise to three principal duties. The first is a duty of loyalty—a duty to act for and on behalf of the person or entity to whom the duty is owed, and not to take advantage of, or injure, him or it. The second is a duty of obedience—the duty to act within the bounds of the authority or trust that has been extended. The third is a duty of care—the duty to act prudently. Sometimes a duty of disclosure of all material information is said to be a fourth duty; at the least, it is a necessary corollary of the other three duties and this duty extends to the disclosure by the fiduciary of material facts." *See* "Identifying Breaches of Fiduciary Duties," Charles E. Hamilton, II, Esq. (2004).

It is a matter of common sense and a self-evident truth that the said "prudence, diligence, care, judgment" and "scrupulous good faith and candor" require a director to make inquiries and seek specific answers to any problems he sees or suspicions he has about the management of a corporation or its various affairs. This is particularly true when a corporation has experienced recent controversy or jeopardy, as in the case of a whistleblower investigation or financial or other troubles. Indeed, it is a well-established principle of law that the degree of "prudence, diligence, care and judgment" required of a corporate director is elevated in times of crisis. As summarized by the Hamilton treatise, a director or officer's "greater familiarity with the organization's affairs may result in a greater potential for liability."

The concern I have is that it was stated and implied at our meeting on December 3 that trustees of our board are not permitted to make any inquiry or seek any answer or information to a question or concern (even from the board's own legal counsel) outside the scope of a duly called meeting of the full board (or one of its committees). *This is simply not what our law provides,* and the enforcement of such a policy would eviscerate the fiduciary obligations described above and make it impossible for our trustees to faithfully and reasonably perform their duties and fulfill their lawful obligations.

I believe the advice we were given on December 3 may have confused the issue at hand. While it is true that Louisiana law requires a board meeting with a duly constituted quorum *to transact official business of the board* (LSA-R.S. 12:224(E)(7)), that rule does *not* in any way prohibit *individual board members* from acting on their own to seek the necessary answers to

their various questions.[1] In fact, they <u>MUST</u> engage in that independent thought and activity if they are to fulfill their fiduciary duties under the law.[2]

The attached guideline document, "Fiduciary Duties of Georgia Nonprofit Directors," was produced for the Pro Bono Partnership of Atlanta by the law firm of Alston & Bird, LLP. Its principles apply equally to Louisiana law. As it summarizes under the "Duty of Care" paragraph (emphasis added): "In discharging this duty, the director should participate actively in the management of the organization *and inquire reasonably into fundamental matters involving the operations of the organization.* Active participation will typically include attending periodic meetings of the board, evaluating reports, reading minutes, and reviewing the performance of the chief executive officer. *Reasonable inquiry may also include requesting and reviewing information from the organization's management or agents (e.g., accountants, lawyers and consultants).*"

Under the heading "Minimizing the Potential for Director Liability," the Alston & Bird document provides the following wise counsel (emphasis added):

> **1. Analyze.** The standard for liability in most cases is what the director knew or should have known. *Therefore, a director should critically analyze reports, financial data and other available information about the management and operation of the organization.*
>
> * * *
>
> **6. Question and Investigate.** Question reports when obvious inconsistencies appear. Take steps to investigate and rectify problems. *If a director suspects improprieties, he or she should pursue the information. Potential problems should not be ignored.*
>
> **7. Communicate.** The board should have open communication with more than one staff member. It is very important that staff or a subgroup of the board not control information flow. *If all information filters through one person, then the board might not get key information, particularly on issues regarding that staff member.*

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[1] It is worthy of note that while "[g]enerally, directors possess authority to act as a board only at regularly assembled meetings, [even that] rule admits of exceptions." *New Founded Indus. Missionary Baptist Ass'n v. Anderson*, 49 So.2d 342, 345 (La. 1950).

[2] Any corporate bylaw that contravenes state law is invalid and unenforceable. While Louisiana law allows a corporation to enact its own governance rules, such rules can never deviate from the strict requirements of our statutes (such as those that define the fiduciary obligations of directors). *See* LSA-R.S. 12:224(E) (emphasis added): "The number, classification, qualifications, compensation, terms of office, manner of election, time and place of meeting, and powers and duties of the directors, may, ***subject to the provisions of this Chapter***, be prescribed by the articles or the bylaws."

8. Seek Advice. *When dealing with complex matters, seek expert advice.* The board can rely generally on conclusions of reputable experts.

9. Ensure Accuracy. Ensure that accurate minutes are made, discussions and votes are recorded. *This is particularly important on controversial or divisive topics, so that it is clear that the process leading to the decision was proper.*

Other frequently cited guideline documents echo these legal recommendations. For example, THE GUIDE TO NOT-FOR-PROFIT GOVERNANCE, 2012 (also attached), includes many important caveats for persons in our position and advises (p.5-3), "Directors should be able to exercise objective judgment – they should be 'independent-minded.'" Under "Due Care" it further recommends (emphasis added): "Directors are expected to exercise appropriate diligence in providing managerial oversight and decision-making, and are expected to: 1. Attend and participate actively at all Board and committee meetings, preferably in person; 2. Review meeting materials and agendas in advance; 3. *Request other information from management and trustworthy and reliable experts where appropriate before making decisions or taking actions*; and 4. *Be sensitive to indications of potential problems or concerns and make further inquiry until reasonably satisfied that management is dealing with those concerns appropriately*."

It is not my objective here to provide an exhaustive legal treatise on this issue. Rather, I would hope to appeal to our common sense, and request that it be made clear to our trustees by the administration and our attorney what the true scope of each trustee's heavy responsibility and liability is with regard to their fiduciary obligations and the need and authority to properly fulfill them. The law on this is quite straightforward, and of course, the jurisprudence directly affirms and is consistent with our greater stewardship responsibilities to the Lord and to the fine people of our Louisiana Baptist Convention.

Finally, in Dr. Aguillard's email to the board dated December 4, 2013, he stated, "I can't articulate the power of the load off Judy and my shoulders with the proof of being exonerated totally and completely by the Whistleblower charges: charges unfounded and without merit." While I do hope that will be the final outcome, that conclusion is not supported by the independent audit of Payne, Moore & Herrington (PM&H).

Finding 2013-02: Use of Restricted Funds, PM&H, (2013 July), Louisiana College, Pineville, (p. 50), was the primary issue in the whistle blower complaint brought before the board of trustees. Ms. Ingrid Johnson implied at the December board meeting that new information received from the investigation of the law firm of Kinney. Ellinghausen, Richard & DeShazo regarding the whistle blower complaint would negate this finding. As of this date, that information has not been forthcoming. Will that information be shared with the full board? If so, will that information also be given to PM&H for the purpose of amending its audit report to remove the original finding?

I am formally requesting that these two items be placed on the agenda of the next regularly scheduled board meeting, and/or that a written response be provided to the full board before that next meeting.

Thank you in advance for addressing these material issues. I will await your response.

Sincerely,

Tony Perkins

Copy to: Board of Trustees

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C. Crenshaw
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Mr. Ferguson
S. Folmar
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