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Executive Law Institute 2022

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I. NON-PROFIT BOARD OF DIRECTORS

In organizations of all kinds, good governance starts with the Board of Directors. The Board's role and legal obligation is to oversee the administration (management) of the organization and ensure that the organization fulfills its mission. Good Board members monitor, guide, and enable good management; they do not do it themselves. The board generally has decision-making powers regarding matters of policy, direction, strategy, and governance of the organization.

The Board of a well-governed nonprofit organization, like the Board of a well-governed profit-making company, will do all of the following:

- Formulate key corporate policies and strategic goals, focusing both on near-term and longer-term challenges and opportunities.
- Authorize major transactions or other actions.
- Oversee matters critical to the health of the organization— not decisions or approvals about specific matters, which is management's role—but instead those involving fundamental matters such as the viability of its business model, the integrity of its internal systems and controls, and the accuracy of its financial statements.
- Evaluate and help manage risk.
- Steward the resources of the organization for the longer run, not just by carefully reviewing annual budgets and evaluating operations but also by

encouraging foresight through several budget cycles, considering investments in light of future evolution, and planning for future capital needs.
- Mentor senior management, provide resources, advice and introductions to help facilitate operations.

Similar to for-profit corporations, the power to control and oversee the management of the affairs and concerns of a nonprofit corporation is set forth in its corporate charter. Generally speaking, state law permits both kinds of corporations to self-direct significant allocations of power and responsibility, and then requires them to follow their own corporate governance and operational policies. The familiar fiduciary duties of care, loyalty, and – sometimes – obedience, undergird these requirements in both sectors.

In a well-governed organization of either the for-profit or nonprofit kind, the board does not permit executives to run and dominate board meetings, set agendas, or determine what information will be provided to board members. Under the leadership of an active and functioning board chair, there is adequate opportunity at board meetings for members to receive and discuss reports from not only the chief executive, but all relevant parties.

"A good board governs; the staff manages."

A. Legal Developments Affecting Non-Profit Organizations

1. Protection For Research Published In Nonprofit Journals

A *JAMA* article concluded that results of a clinical trial "added to" or "confirmed" the "growing body of evidence" that hip-protection devices were not effective in preventing hip fractures among nursing home residents. The court concluded that these statements "were not false," and the article "plainly acknowledged possible flaws and limitations with the methodology that was used in its own clinical trial and suggested that further studies be conducted to evaluate the efficacy of hip protectors." *HipSaver Inc. v. Keil (Mass. Sup. Ct. 2013).*

2. Volunteer Protection Laws Being Applied

Real estate transaction gone bad - *Industrial Development Board of the City of Montgomery v. Russell (Ala. Sup. Ct. 2013)*
Breach of fiduciary duty as nonprofit Board member - *Kashani v. Rochman (Cal Ct. App. 2013)*
Personal injury at event sponsored by nonprofit - *Sweeney v. Friends of Hammonasset (Conn. App. 2013)*

B. Board Orientation

Often, the culmination of one's personal and/or professional career is recognition of the individual by his membership organization as an officer or member of the Board of Directors. However, while certainly an accolade for the individual, such distinction

carries with it significant duties and obligations.

The potential liability of officers and directors is a topic to which numerous books, articles, and speeches have been dedicated. All of the myriad legal rules, exceptions to those rules, and seemingly infinite applications of those rules cannot be covered in a single presentation. Indeed, even if there were sufficient time, it is not clear that a law school course would be of much value. The approach, then, of this presentation is to set forth some basic rules for officers and directors that are not amorphous legal principles but, rather, are practical guidelines for conduct.

1. **THE BUSINESS JUDGEMENT RULE**

The starting point for any discussion of the potential liability of officers and directors is the so-called “business judgment rule." Pursuant to this rule, courts will not second-guess legitimate business judgments of officers and directors even if those judgments turn out to be wrong or costly to the organization, as long as they were made in good faith, with the intent of benefiting the organization, and after due consideration.

The business judgment rule is an important protection for officers and directors and allows them to, in essence, make mistakes; so long as those mistakes are, nevertheless, based on best efforts.

2. **FIDUCIARY DUTY**

Although discussed infra, as part of the “Nine Rules”, a discussion of Board duties, obligations and best practices would be remiss without special attention being drawn to an individual’s “fiduciary duty”.

As a result of voluntarily assuming a role on the corporation’s Board of Directors, an individual legally has “agreed” to be held to a higher standard of duty and care, the duty of being a fiduciary.

As a fiduciary, without any written or even oral acquiescence, the Board member is obligated to put the interests of the corporation before her own (e.g., her own personal interests, her own business interests), act responsibly and in the best interests of the corporation and, if ever an issue or conflict were to arise, to disclose such and not participate in any Board action regarding such.

2. **NINE RULES**

a. Attendance. Directors who do not attend meetings are nevertheless bound by actions taken at those meetings and will be held responsible if any such actions are deemed negligent. In addition, the act of failing to attend meetings may itself be deemed to be negligent behavior. That is, a court may find that had a director attended meetings on a regular basis, he or she might have discovered or prevented wrongful conduct. Ignorance will not be acceptable as an excuse.

b. Delegation-Abdication. Certainly boards of directors have to delegate their authority to others; this is commonplace. Delegation is typically to committees (e.g., finance committee) and of course to the staff of the organization. But while such delegation is a legitimate business practice, abdication of' the board's responsibilities is not. Boards must monitor the activities of their committees and of the association employees. Typically, this is completed through regular reporting at board meetings.

c. Participate. The minimum level of participation required of directors is that they read all relevant materials (e.g., committee reports) and ask questions about any matter they do not understand or that troubles them.

d. Fiduciary Duty. Encompasses the duty of good faith and fair dealing. Derived from the Roman law, it means, as a noun, a person holding the character of a trustee requiring trust and confidence. A person assumes this duty, created by their own undertaking, and is required to act primarily for the benefit of the organization in matters connected with it. This "rule" can be summed up in 3 simple steps:

> a. Always be guided by the organization's mission. To be even safer, what it says, not what you interpret it to say.
> b. Always vote with "clean hands" acting in a way you believe best serves the organization; not how you think it best serves your interests.
> c. NEVER take advantage of your position in the organization, via a vote or board action, to advance your own interests.

e. Conflict of Interest. Conflicts of interest should be easy to avoid, but for some reason they continue to arise. While each state law is different, the general rule is that any director with a potential conflict of interest should disclose that interest to the board and recuse himself or herself from consideration of, and voting on, the conflict-affected matter in the non-profit area, this arises most often when directors or officers also serve as consultants to the organization. This is not wrongful necessarily, but there should be a written conflict of interest policy regarding such arrangements, as well as generally.

f. Finances. Mismanagement of finances is the most common source of lawsuits. As a corollary to number 3, therefore, it is vitally important that directors review all financial statements and ask questions with respect thereto. If financial information is presented in a manner that cannot be understood, the directors should educate themselves on how to read financial statements or require a different format. Presently, one of the most important questions is how finances are being invested and how diverse and safe are those investments. Periodic consultations with a professional investment advisor may be prudent. Independent auditors are a necessity.

g. Professional Review. Protecting the association by ensuring proper investments has already been discussed. This element requires the use of financial professionals (i.e., auditors). Another area in which directors must be diligent is possible exposure to lawsuits. Adequate insurance is a must, of course, but the board should also have an

attorney review the association activities to ensure that the association is not exposed to undue risks of liability. This will assist in protecting the directors by helping to prevent them from being named in lawsuits and also will help avoid allegations of negligence or mismanagement in protecting the assets of the organization.

h. Paper Trail. Documentation is essential for a board to have a historical path to chart future decisions as well as to provide it with the "ammunition" necessary to defend itself if challenged. This includes, but is not limited to: board meeting minutes, committee meeting minutes, contracts, and financial information. In addition the board should adopt an appropriate document retention policy.

i. Board and Employee Responsibilities. As implied throughout this document, the Board is the decision making body for the entity (in fact, it is legally obligated to be so and it carries all the possible legal liability for it). While the discussion regarding exact duties between the Board and staff could take significant time, delineating what is appropriate for a Board and what would otherwise be considered a staff function, suffice it to say that a Board is traditionally strategic and staff is tactical within the parameters of a defined strategy.

Although not specifically one of the "rules", Board members need to be cognizant of the unique policies of the organization that they now serve. These can include: Board confidentially statements, gift policies, Intellectual Property policy, meeting attendance, etc.

Finally, a word about Board action. The foregoing nine rules assume appropriate board action has occurred. By way of example, "appropriate" board action occurs where: there is a meeting duly called in accordance with the bylaws of the organization, with notice and adequate time being provided to all that are entitled to such; there is a meeting that is conducted by unanimous consent (if all parties entitled to vote agree, then adequate time and notice is not necessary); or if entitled parties voluntarily waive their right to notice of a meeting. Generally speaking, board action requires a majority vote of those parties present and entitled to vote. An official board meeting cannot take place unless a quorum, generally defined as a majority, of the members of the board are present.

Although Boards can ratify action subsequent to its occurring, unilateral decisions by board members is discouraged accept in the most extreme case and upon consultation with others within the leadership and, if necessary, legal counsel.

In summary, the Board is truly a representative body and should act as such. A board properly convened, and following the nine rules set forth above, will accomplish the goals of the organization as well as avoid unnecessary risks or legal challenge.

II. CONTRACTS

A. Elements:

1. Offer
2. Acceptance
3. Consideration

Very little is "Boiler plate"

B. Specific Contracts

1. Hotel Agreements

a. Lowest Rate available?
b. Attrition – include F&B? Hotel mitigate damage
c. Cancellation – Hotel Mitigate?
d. Force Majeure:

The performance of this Agreement by either party is subject to acts of God, war, terrorism, government regulation, disaster, extreme weather, fire, strikes, civil disorder, curtailment of transportation facilities preventing or unreasonably delaying at least 25% of meeting/convention attendees and guests from appearing at Association's meeting/convention, or other similar cause beyond the control of the parties making it inadvisable, illegal, or impossible to hold the meeting/convention or provide the facility. This Agreement may be terminated without any penalty for any one or more of such reasons by written notice from one party to the other and all deposits, money advanced, shall be returned. If for any reason beyond the control of Association the facility shall not be available, or shall not be in acceptable condition, this Agreement may be terminated without penalty by written notice from Association to vendor.

2. IT/Publisher/Vendor Contracts

a. Control the $$
b. IP issues (work for hire)

III. EMPLOYEMENT LAW

The Facts:

- 80% of business legal cases are with employees.

- 21% are for age discrimination. (Juries are sympathetic. These are claims that you want to settle before going to court. How old is old? 40!)
- 1 in 4 companies will be sued this year.
- 50% of the settlements will cost over $100,000.00
- 10% of the settlements will cost over $1,000,000.00
- 90,000 sexual harassment complaints were filed with the EEOC last year.

Employee Handbooks

- You cannot say that you will terminate a person at the end of a term (90 day trial or probationary period) for any or no reason.
- Tell them that no benefits will vest until after this time period.
- Don't say, "I have read and agree to there terms." on an offer. This can make it a contract.
- Avoid strict, static progressive discipline policies. Employers should reserve the right to follow the policy, go out of order, or jump ahead, depending upon the nature of the infraction.
- Disclaimer language in employment manuals, indicating that an employment contract is not intended, has been given effect by the courts, provided the disclaimer is clear, it is properly communicated to employees, and no other communications negate the effect of the disclaimer.
- Absolute discretion to amend.

Employee Annual Review

- Do NOT do annual reviews—
- Do NOT do them unless you can be 100% honest and direct.
- Alternatively (or complimentary) maintain contemporaneous writings to document an employee's performance.
- Annually address employees to discuss wages.
- Keep notes on file of good/poor performance.
- Employees have a right to review all records on file.
- NO requirement to have employee sign.

Comp Time

- Only non-exempt employees get this.
- Salaried employees do not get overtime or comp time.
- Exempt employees are not covered by the Fair Labor Standards Act but they can negotiate their own benefits.

Discipline

- Protect your right to digress from progressive discipline.
- Have a contract signing policy.
- Have an internet email privacy policy.
- Have a cell phone policy.

Termination

- Use Dignity
- Treat them with Respect
- Explain why the action is being taken.
    - If you give an explanation only 2% will retaliate.
    - If you don't 20% will retaliate.

Severance Agreements

- If there is a risk, offer a buy out package.
- Get a signed release and give them something extra. (There has to be quid pro quo and it has to exceed whatever they are entitled to.)
- Make sure the agreement is legal and valid.
- Only offer this if you think there is a concern.

Employment-At-Will Doctrine

1. The principle that employers may discharge employees at any time without cause or reason where there is no employment contract or statutory prohibition.

2. Do not accept the idea that you can terminate an employee for any reason (other than the Title VII protections of race, creed, religion, sex, or age). Courts are frequently overturning the employment-at-will doctrine.

Questions <u>Not</u> to Ask When Hiring

1. Age or date of birth.

2. Own or rent a home.

3. How long resided at present address.

4. Previous address and length of residence there.

5. Religion, church attended, or name of minister.

6. Father's surname or maiden name.

7. Whether married, divorced, separated, etc.

8. Number of children, ages of children and child-care arrangements.

9. Own a car (unless a car is required in performing the job).

10. Place of employment of spouse or parent.

11. Name of bank and/or information on loans outstanding.

12. Whether have had wages garnished or have declared bankruptcy.

13. Ever been arrested (can ask about felony convictions, but even then, preferably only when job has responsibility for money or security).

14. Clubs, political organizations or religious associations membership.

15. Whether served in armed forces of another country.

Firing

As "at-will" is becoming more and more a "legal fiction", in the sense that despite the legal theory allowing for termination for no reason at all, employees to protect themselves should always have a well documented business reason, terminations should be done discretely, with dignity and giving the employee the business reason.

In cases where there is any doubt or question, employers may wish to consider a severance agreement (a general release to the employer of all liability). However, in order to be valid the employer must give the employee something he/she is otherwise not entitled to under the law or the policy manual.

1. No employee should be terminated unless a conference indicating the association concerns is held with the employee prior to termination.

2. It is critical to have good documentation of complaints on any employee before termination proceedings begin.

3. It is advisable to have periodic reviews of job performance rather than an annual review.

References

Employers should have a policy of who on staff can access employee files, as well as provide a reference, and due to the increased litigation as a result of too negative a reference (and even too positive), past employers should stick to providing basic information: confirming employment and dates of employment.

DISCRIMINATION

A. Age Discrimination

The Age Discrimination in Employment Act (ADEA) of 1967 Prohibits employers of 20 or more employees from engaging in age-based

discrimination against individuals who are age 40 or older, unless age is a bona fide job qualification reasonably necessary to the normal operations of the business. The law also covers employment agencies and labor organizations.

The law impacts every aspect of the employment relationship (hiring, advancement, review, termination).

Tips to try and avoid include:

1. Watch your comments to employees;
2. Justify all of your business decisions (despite the fact that "at-will" employment is the presumption);
3. Try to avoid replacing every terminated employee over 40 with a younger employee out of the class.

B. Americans with Disabilities Act (ADA) of 1990

Mandates elimination of discrimination against people with disabilities in employment, access to public facilities and services, transportation, and telecommunications. Title I prohibits employers with 15 or more employees from discrimination against qualified applicants and employees with disabilities in hiring, promotion, discharge, pay, job training, fringe benefits, and other aspects of employment. Individuals who are regarded as having a disability, when in fact they do not, and people who are associated with individuals with disabilities are also protected. Covered employers must provide qualified applicants and employees with disabilities with reasonable accommodations that do not impose undue hardship. The law covers most private employers, state and local governments, employment agencies and labor organizations.

Title II requires that state and local government services, programs, and activities must be accessible to and usable by individuals with disabilities. Auxiliary aids and services and reasonable accommodations needed to participate in or benefit from a public entity's programs or services must be provided to qualified individuals with disabilities at no extra cost.

C. #MeToo….

IV. INSURANCE

A. General Liability Insurance: Is intended to be the umbrella protection for the association. If someone injures themselves at a Chapter event, if there is alleged breach of contract, accidents, torts, these are the type of claims that can be covered by such a policy (however these policies and their coverage are highly dependent upon the language of the contract).

B. Event Cancellation Insurance: Event cancellation insurance provides a buffer for an organization if it is dependent upon the income form an event (the registration fees/revenues) if it is cancelled due to no fault of the parties (e.g., earth quake, war, strikes). Under this policy, the Chapter would receive under the policy the profit it intended to make from the event even though the event did not occur. This could be significant for an organization whose budget for the year is dependent upon the even and the event does not happen. It could mean the difference between a normal, successful year and possible failure and insolvency.

C. Liquor Liability: Every reasonable precaution will be taken to avoid finding the chapter as the negligent contributor in liquor related accidents. It is noted that the key issue in litigation of liquor liability cases is often who has the control of the Function, who is the server, and who is supervising.

Whenever possible, liquor liability insurance coverage will be a part of the hotel or facility agreement wherever liquor is supplied at an Association social event. Individuals making arrangement for the scheduling of events will request to see the hotel or facility insurance indemnification clause prior to the event. All contracts entered into for use of a premise will specify: That a current license exists to dispense alcoholic beverages.

1. That the owner assumes control of alcohol sales and service.
2. That bartenders will be trained and instructed to identify and refuse service to intoxicated guests.
3. In addition, it would benefit a chapter to include a LIQUOR LIABILITY INDEMNIFICATION CLAUSE in any contract. This clause could read:

The hotel/facility agrees to carry a minimum of one million dollars in liquor liability insurance and further agrees that all of its employees and agents performing services under this agreement shall at all times comply with all federal, state, and local laws pertaining to the sale, service or furnishing of alcoholic beverages.

Hotel/facility employees and agents shall not sell or serve alcoholic beverages to anyone attending the meeting who is under twenty-one years of age or to anyone, regardless of age, who is visibly intoxicated.

Hotel/facility agrees to indemnify and hold _____ harmless with respect to any and all claims, losses, damages, liabilities, judgments, or settlements, including reasonable attorney's fees, costs, and other expenses incurred by _____ on account of any liquor related activities conducted by the hotel/facility pursuant to this agreement.