

Responsibilities for Nonprofit Board of Directors

NIFLA Summit 2019

By H. Robert Showers, Esq.
Simms Showers, LLP

Discussion Outline

- Three “Legs” of a Great Nonprofit Board of Directors
- Top 10 Fundamental Roles of the Board
- Legal and Liability Concerns
- Creating the IDEAL Board
- Questions/Comments?

Three “Legs” of a Great Board

- The Board is the Policy-Maker/General Overseer of the Organization.
- The Board Members are the Cheerleaders and Ambassadors of the Organization.
- The Board Members are the key Resource and Development Officers of the Organization.

Policy-Makers/Overseers

- The Board is responsible for *governance*, not management.
- Focus should be on strategies and policies to achieve the entity's overall mission and goal.
- If mission/goals not being achieved, do strategies or goals need to change?
- Develop/Adopt policies for effective management, financial accountability, etc. for staff/volunteers to carry out.
- Hold top executive staff accountable-annual SMART”
(Strategic – Measurable – Attainable – Relevant – Timely)
goals and evaluation.

Oversight vs. Management

- Nonprofit Board Goals:
 - Maintain substantial degree of board independence from management and other problematic relationships.
 - Avoid ineffective/dysfunctional governance.
- KEYS: Independence and Structure.

Cheerleaders/Ambassadors



- Board members are the initial support network of the entity and executive staff.
- Board members should praise executive staff when goals are achieved (i.e. programs succeeding; major donations/donors secured; etc.).
- Board members should be able to enthusiastically share the mission of the entity with others, especially donors and potential Board members.

Resource/Development Officers

- Especially in the entity's initial or lean years, the Board will be its key source of fundraising **revenue-giving and getting**.
- Serve as the bridge between donors and the entity.
- Hold executives accountable for developing and maintaining donor relations.



Top 10 Fundamental Roles

- Determine mission and goals.
- Select CEO and evaluate performance (at least annually).
- Ensure effective planning and strategy.
- Ensure adequate resources-financial and other.
- Manage those resources effectively/efficiently.

Top 10 Fundamental Roles (cont.)

- Determine, monitor, & strengthen programs and services.
- Enhance the entity's public standing.
- Ensure legal & ethical integrity & maintain accountability.
- Recruit and orient the right new Board members (passion for the mission who are affluent and/or influential).
- Assess Board performance on a regular basis (short board evaluations and assessment).

Legal/Liability Concerns

- Fiduciary Duties
 - Care
 - Loyalty
 - Obedience
- Accountability
 - Government – IRS and State/District
 - Donors and Grant-makers
 - Program Stakeholders
- Personal Liability?

Fiduciary Duty of Care

- Active oversight through Board participation = “The Buck Stops Here.”
- Legal Standard – “reasonably informed.”
- Need to show up and actively read what is presented.
- Know when and what to delegate.

Delegation within Duty of Care

- Revised Model Nonprofit Corporation Act:
 - *A director fulfills his or her duty of care by acting “in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interest of the corporation,” which allows him or her to “**rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:** (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented; (2) legal counsel, public accountants or other persons as to the matters the director reasonably believes are within the person’s professional or expert competence; [and] (3) a committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence.” (emphasis added)*

Duty of Loyalty

- Misuse of position of trust for personal advantage, at the entity's expense.
 - Conflicts of interest; (Transaction w/interested parties)
 - Misuse of corporate information;
 - Misappropriation of corporate assets.
- Question: Service on other organizations or employment – potential conflict?

Duty of Obedience

- Board's Role:
 - Know entity's mission.
 - Stay true to that mission (Mission Drift common).
 - Change mission carefully, strategically.



Personal Liability?

- Review/Be knowledgeable of the following:
 - Corp. Documents
 - Supervision of charitable services
 - Internal financial controls
 - Management of financial assets
 - Employment practices
 - Whistleblower
- Be aware of potential conflicts of interest and speak up.

The “IDEAL” Board

- **Informed**
- **Diligent**
- **Effective**
- **Accountable**
- **Learning**

Informed

- Orientation
- Mentoring
- Board Manual
- Continuing Education
- Updated Financial and Operating Reports
- Subject Matter Experts

Diligent

- “Done with careful, steady effort; painstaking.”
- Regular board meetings (legal requirement is annual; best practice would be 3-4/year).
- Effective use of committees.
- Deliberate decision-making – reasonable review time

Effective

- Find out what matters.
- Act on what matters.
- Organize around what matters.
- Focus meetings on what matters.

Accountable

- Expect loyalty.
- Focus on exempt purposes.
- Be sensitive to potential conflicts of interest.
- Not a representative body for various interest groups.
- Set performance expectations.
- Member performance against expectations.

Learning

- Continuing education.
- Monitoring and responding to relevant trends.
- Assuring freshness by encouraging new blood, appropriate diversity.

Risk Management Quiz

- Even though it may not be advisable, are nonprofit boards generally free as a matter of law not to adopt a budget process?
- The Board Chairman of a nonprofit has written a book. May the nonprofit decide to buy 2000 copies and distribute as gifts to large donors as long as the subject matter is related to the nonprofit's exempt purposes?
- Is the executive committee the most important committee in maintaining accountability on a well-run board?
- Written policies regarding conflicts of interest and related party transactions are more important for nonprofit boards than for-profit boards.

Risk Management Quiz

- If a board member provides a better-than-market-rate contract for services to the nonprofit, can the organization later void the contract because of a conflict of interest?
- May a nonprofit board choose not to have term limits or rotation requirements in its bylaws?
- Since nonprofits don't typically compete, can a board member generally be comfortable in avoiding conflicts of interest even though serving on two nonprofit boards?
- Does a well-run board avoid micromanaging issues like opening bank accounts?
- Should a board member personally review employee performance appraisals and instruct employees on job performance?

Risk Management Quiz

- Must nonprofits pay their volunteers minimum wage under some circumstances?
- Are religious nonprofits with 15 or more employees, exempt from making their facilities available to and usable by handicapped individuals under the Americans With Disabilities Act?
- Many states limit lawsuits against directors and officers of nonprofit organizations. Is this protection generally extended to the CEO and to all volunteers working with the nonprofit?
- Can a volunteer be held personally liable for harms caused by actions taken while working for a mission organization if the volunteer's actions are not considered to be willful or wanton misconduct?
- Can the nonprofit be held liable for the volunteers' negligence?

Risk Management Quiz

- Can the CEO or directors be held personally liable for money owed by their organization to the IRS from unpaid withholding and FICA taxes?
- Can a director assure himself that he will avoid liability for acts of directors if he abstains in the face of wrongful conduct by other directors?
- Is it proper for the CEO of a nonprofit to engage the organization's auditors, receive the audit report, and conduct the exit interview?
- May a nonprofit rent its mailing list to a credit card company to establish an affinity credit card program for its supporters and friends?

Risk Management Quiz

- May a struggling nonprofit agree to give up its mailing list to a fundraiser that will then bear all the up-front costs for an aggressive donor development campaign?
- If a director publicly endorses a political candidate on letterhead of her organization because of the candidate's stand on moral issues (e.g., pro-choice, free speech, etc.), could the organization lose its tax-exempt status for impermissible political activities?
- Can a 501(c)(3) nonprofit lose its tax-exempt status for even minimal lobbying activities?
- As long as the nonprofit's bottom line is healthy and it is growing, does a nonprofit board have any duty to scrutinize the financial and personal activities of its Executive Director?

Questions?

Robert Showers, Esq.

Simms Showers, LLP

305 Harrison St. SE, 3rd Fl.

Leesburg, VA 20175

(703) 771-4671

hrs@simmsshowerslaw.com