Duties and Responsibilities of a Nonprofit Board of Directors

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Today’s Agenda

- Overview of the Board’s legal and fiduciary responsibilities
- Understanding the important role of bylaws
- Defining the Nonprofit Revitalization Act
- Overview of the Board’s policy and monitoring functions
- Considerations for building an effective committee structure
The Mission

• The tax-exempt purposes for which resources are to be devoted
  – Exempt activities flow from mission
  – Define scope of activities & who you serve
  – Unrelated Business Income Tax (UBIT)
  – Public support test

• Official statement is in your Certificate of Incorporation (filed with Dept. of State) and/or Charter (registered with Dept. of Education)
  – Check IRS application & IRS Form 990
Board Members are Fiduciaries

- Fiduciaries act for someone else’s benefit;
- Fiduciary responsibilities exist in connection with the administration, investment & distribution of someone else’s assets.
- The duty of the fiduciary consists of the Duties of Care, Obedience & Loyalty
The degree of competence & care expected to advance the mission & avoid reasonably foreseeable harm.

Carrying Out Duty of Care:

- Be Reasonable – Not Reckless!
- Be prepared for, attend & actively participate in meetings
- Deliberate, ask questions & inquire
- Vote your opinion
- Ensure documentation shows exercise of care and proper conduct in decision-making & actions
Duty of Obedience

• Compliance with the laws & regulations that govern the organization's actions including:
  – Federal, State & Local Laws
  – The Bylaws
  – The Certificate of Incorporation/Charter & any Amendments
  – Contractual Obligations

• Board decisions & policies
  – Respect process
  – Understand & support duly made decisions
Duty of Loyalty

- Faithfulness/Allegiance to position & organization
  - Be publicly supportive of organization
  - Follow the established chain of command

- Make decisions in the best interest of the mission & the nonprofit without being compromised by private gain or other interests
  - Minimally, adhere to law & applicable regulations
  - Consider higher standard such as non-financial conflicts and those that are “perceived”
Manage Your Risk: Board Members are Responsible for:

- Error or Neglect under NYS Immunity Laws
  - *Gross* error or neglect of fiduciary, legal & financial responsibilities (if a volunteer)
  - Neglect of fiduciary, legal & financial responsibilities (if paid)
- Violations of law, including employment related claims
- Operating outside of the bylaws
- Misappropriation of assets
- Unpaid payroll & other taxes
- Unsatisfied corporate debt
Board Members Are Protected By:

- **Immunity Laws:** Protect volunteers of 501 (c)(3) nonprofit organizations from lawsuits
  - ✔ No protection for the nonprofit itself
  - ✔ No protection for allegations of gross negligence
  - ✔ Defense expenses still incurred

- **Appropriate Insurance Coverage:** *Directors and Officers Liability Insurance* provides coverage in case of lawsuits

- **Good Risk Management:** Includes regular review of bylaws and personnel policies, engaged participation, respecting chain of command, etc.
Clearly define the decision-making, monitoring, reporting responsibilities at the board & management levels in order to know:

✓ Who is responsible for what,
✓ Who makes what decisions,
✓ Who is accountable to whom, and
✓ How and in what ways?
Bylaws, Policy-making & Oversight

Board of Directors

ED/CEO

Staff & Volunteers

Roles that Board Members May Play

- Spectators
- Cheerleaders
- Rubber-Stampers
- Leaders
- Policymakers
- Watchdogs
- Micro-managers

Operating Policies

Implementation

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The Bylaws-Policy-Procedure Flow

Bylaws
- “Sustainable” Legal Obligations Established by Board (and/or Membership)
- Flows from Certificate of Incorporation or Charter
- Change usually requires advance written notification

Policies
- Parameters Established by the Board
- Subject to change without advanced notice (board or executive committee)
- Budgets & Financial, Personnel, Grant Making, Risk Management, ED Job Description, etc.

Operational Policies
- Established By ED to Implement the Policies

Community Focus | Statewide Impact | National Network
Accountability Starts with Your Bylaws

- Is essentially your legislation - the board is legally bound to adhere
- Sets the rules; composition; nomination, election & removal process & procedures for the board & officers
- Distributes duties & powers to officers, committees, & executive leadership/management
- Defines your decision-making process
- Serves as a compliance & risk management document
Nonprofit Leadership is a Process that is...

- Defined by the mission, history, culture & services of your nonprofit
- A team experience where power & roles are distributed
- Influenced by position, personality, style, knowledge, & skills
The Executive Director/CEO

- At-will or contract employee
- Is accountable for all organizational performance & exercises authority as designated by the board
- Accomplishes expectations as established by board policies
- ED’s performance is significantly related to organizational performance, at both the board & operational level
- Lasting authority and limitations should be in bylaws
- Job description, performance and salary reviewed and approved annually by the Board
Key NPRA Reforms
Most became effective July 1, 2014

- Some electronic age updates for Board, Committee & Membership Meetings and for Filings with AG’s Office
- REQUIRED Conflict of Interest Policy – New Definitions & Significantly Stronger Requirements
- Higher Audit Thresholds & Increase Audit Oversight
- Required Whistleblower Policies (20 or more employees and $1M)
- Improved processes for Certificate Amendments, Mergers, Dissolutions & Consolidations, Real Estate Sales or Transfers
- Greater Authority for the AG
- Redesigned Committee Structures
- Definitions for “Entire Board”
- 2/3 Board must approve if staff serves as chairperson
Conflict of Interest

State Law

• Must have policy & procedures for disclosure
• Must consider alternatives & show that transaction is fair, reasonable & in best interest of org.
• Person with conflict:
  – Cannot be present/participate in deliberations or vote
  – Cannot make any attempt to improperly influence
• Must document disclosure, deliberations, reasons & resolution to approve in minutes
• Must have signed annual disclosures (from Secretary to board chair or audit committee chair)
New Rules on Committees

Committees of the Board
- Can “bind” the Board
- Comprised only Board members (at least 3)
- May include non-Board members in advisory capacity
- Appointed by majority of Board
- Cannot:
  - Fill vacancies
  - Fix compensation of board or committee member
  - Adopt or amend bylaws
  - Amend or appeal board resolution

Committees of the Corporation
- Cannot bind the board
- May include non-board members
- Are to be appointed or elected the same as officers as stated in the bylaws
- Can be accountable to the Board, Membership, or the Executive Director/staff
Voting Without a Meeting: Unanimous Written Consent

- Cannot be combined with voting during a meeting (e.g. voting before a meeting, sending vote to President or Exec. Dir.)
- Questions arising from clarification of meaning may be immaterial, but should be shared with all board members.
- Questions arising from lack of clarity about the impact, outcome, or consequences of a decision may be material and should be considered by all Board Members prior to voting.
  - Best practice: seek input or feedback prior to calling a vote
- Cannot be used to address conflict of interests, including some related party transactions
- If a Board Member wants to take a sabbatical or leave of absence… Best practice: resign
Whistleblower Considerations

• The Act requires nonprofits to protect Directors, Officers, employees & volunteers who, in good faith, report suspected acts that they reasonably, & in good-faith, consider to be illegal, fraudulent, improper, unethical, immoral &/or in violation of any adopted policies/procedures

• Whistleblowers cannot be subjected to intimidation, harassment or other retaliation as a consequence of disclosure
Whistleblower Policies (Consider a Best Practice)

- Required if with 20 employees + and over $1M
- Policy must:
  - Have procedures for reporting suspected violations & preserving confidentiality
  - Designate an employee or, officer directors to administer and report to board or committee with independent directors
  - Be distributed to all directors/trustees, officers, employees and volunteers providing “substantial services”
Major Governance & Policy Areas

1. Board Management & Development
2. Audit, Finances & Fixed Assets
3. Personnel - HR
4. Resource Development
5. Stakeholder & Community Relations
6. Mission Impact - Programs & Services
   - Quality Assurance (if applicable)
   - Facilities and Collections Oversight (if applicable)
7. Strategically Planning for the Future

Community Focus | Statewide Impact | National Network
Board Development is the process of creating, maintaining & improving the functioning, effectiveness & productivity of board leadership & governance.
Board Engagement Tools

• Board Meeting & Committee Calendar
• Board Manual
• Board Oversight Calendar
• Annual Retreat
• Routine Board Assessment & Training
• Regular Board Meeting “In-service”
• Strategic Meeting Agenda & Effective Meeting Facilitation
• Keep Well-informed – “No Surprises”
The Board’s Role
Audit, Finance & Fixed Assets

• Review & approve budget, reviews financial statements and year end projections, and oversees cash flow
• Adopt financial policies & internal controls
• Ensure investments and fixed assets are managed prudently
• Ensure adequate liability insurance coverage
• Must have the full board OR a designated audit committee comprised solely of “independent directors” oversee the accounting, financial reporting processes, conflict of interest, whistleblower policy, and audit
Auditing Requirements if Over $1M in Revenue
(Consider a Best Practice)

• The board, or audit committee must:
  – Review with auditor the scope & plan prior to start
  – Upon completion
  – Annual evaluation performance & independence
  – If committee – report to board on activities
  – Oversee conflict of interest & whistleblower policy (if not delegated to another committee)
  – Controlling/Parent Corporations can perform functions of affiliates
The Board’s Role
Personnel Oversight

• **Remember** - The Board, as a collective body, is the “employer”

• Ensure compliance with all pertinent laws, regulations & obligations

• Establish & ensure consistent application of personnel policies, including compensation practices

• Establish authority for hire, supervise, evaluate & sets reasonable compensation for ED/CEO

• Follow lines of authority on personnel matters
Delicate Balance of the Board Leadership – ED/CEO Relationship
The Board’s Role
Resource Development

• Ensure the organization has the resources it needs to meet obligations & pursue mission
• Approve fund development plan & related policies including donor confidentiality, gift acceptance, etc.
• Establish policies regarding board participation, solicitation, compliance confidentiality, etc.
• Represent the organization to funders, donors, government officials & other constituents
• Ensure compliance with NYS Charities Bureau and IRS regulations, notifications, and filings
• Identify how board members can serve as ambassadors, advocates, and possibly askers
The Board’s Role
Stakeholder & Community Relations

• Serves as “Ambassador” & representative of organization to the community, constituents & other stakeholders

• Brings issues, community needs, opportunities, etc. to the board & ED/CEO

• Works to enhance the organization’s public image

• *Serves as an Advocate* - exercises influence that promotes the organization’s interests
The Board’s Role
Strategically Planning for the Future

• Create & foster a strategic culture throughout the organization
• Adopt & embrace a positive and achievable “stretch” vision or intent for mission success, sustainability &/or growth
• Develop a plan with strategies & accountabilities for achievement
• Generate enthusiasm for organizing & putting action into the plan
• Monitor ongoing progress on “live” plan and revise course as needed
Strategic Planning is a Tool

- **An internal tool** – To motivate, unify & get everyone on the same page!
- **A creative tool** – To think & strategize out of the box!
- **An external tool** – To improve competitive position & investment in your future!
- **A monitoring tool** – To enhance accountability & demonstrate results!
The Board’s Role
Mission Impact - Programs & Services

- Prioritize programs in resource allocation/budgeting
- Approve program policies
- Oversee & ensure consumer protection, contractual & regulatory compliance
- Monitor & ensure that services produce demonstrable mission-based outcomes
  - Review programs at least annually
- Ensure quality assurance policies and practices are in place
Committee Fundamentals

- Establish committees when it's apparent that issues are too complex and/or numerous to be handled by the entire board.
- Committees make full use of board members' expertise, time commitment, and diversity of opinion.
- Think one committee per person (officers may serve on more)
- Committees may be relied upon to perform the due diligence functions of the Board but do not supplant the responsibility of each board member.
- Committee authority is prescribed and limited by the Board.
- Committees may expand opportunities to engage experts or stakeholders.
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