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Non-Profit Series

SESSION 4: BOARD ISSUES

PRESENTERS



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TOPICS COVERED



Director Rights and Obligations



Governing Documents



Conducting Meetings and Best Practices



Director Rights and Obligations

DIRECTOR RIGHTS AND OBLIGATIONS

Overview

- Goal: Avoiding Personal Liability
- Common Law Duties
- Statutory Standards of Conduct
- Conflicts of Interest

DIRECTOR RIGHTS AND OBLIGATIONS

General Information Regarding Directors

- Directors set policy for the organization and oversee its affairs, but actual implementation and day to day management is left to officers and employees.
- When legal action ensues, it is often traceable to an inattentive, passive, or captive board.

DIRECTOR RIGHTS AND OBLIGATIONS

Common Law Duties

- **Duty of Loyalty**
- **Duty of Care**
- **Duty of Obedience**

DIRECTOR RIGHTS AND OBLIGATIONS

Common Law Duty – Duty of Care

- Be reasonably informed about activities.
- Participate in decision making.
- Use the care of an ordinarily prudent person in comparable circumstances.
- Prepare for meetings, attend meetings, obtain information before voting, and use independent judgment when voting.
- Act as a guardian of the organization's assets.

DIRECTOR RIGHTS AND OBLIGATIONS

Common Law Duty – Duty of Loyalty

- Place the organization's interest before personal and professional interests.
- Avoid use of corporate opportunities.
- Protect the organization's confidential information.
- Be objective, unselfish, honest, and trustworthy.
- Adhere to conflict of interest policies.
- Act for the good of the organization.

DIRECTOR RIGHTS AND OBLIGATIONS

Common Law Duty – Duty of Obedience

- Comply with applicable federal, state, and local laws.
- Comply with governing documents.
- Honor the organization's mission.

DIRECTOR RIGHTS AND OBLIGATIONS

Statutory Standards for Directors

- Neb. Rev. Stat. § 21-1986 - A Director shall discharge his or her duties as a Director, including his or her duties as a member of a committee:
 - In good faith;
 - With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
 - In a manner he or she reasonably believes to be in the best interests of the corporation.
- Codification of the duty of care and duty of loyalty.
- No liability if a director acts in compliance.
- Entitled to the organization's information as needed to perform these duties and standards.
- Proxy voting (or other voting when not present) is not allowed unless otherwise expressly authorized.

DIRECTOR RIGHTS AND OBLIGATIONS

Statutory Reliance on Others

- Can rely on information, opinions, reports, or statements prepared or presented by:
 - Officers or employees whom the Director reasonably believes to be reliable and competent in the matters presented;
 - Legal counsel, public accountants, or other persons as to matters the Director reasonably believes are within the person's professional or expert competence; and
 - 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.
- A Director is not acting in good faith if he or she has knowledge that makes reliance unwarranted.

DIRECTOR RIGHTS AND OBLIGATIONS

Statutory Standards for Officers

- Each officer has the authority and shall perform the duties as set forth in the bylaws, resolution, or officer direction (Neb. Rev. Stat. § 21-1991).
- Essentially the same standards as Directors (Neb. Rev. Stat. § 21-1992).

DIRECTOR RIGHTS AND OBLIGATIONS

Conflicts of Interest – Applicable Rules and Laws

- Nebraska State Law; Federal Tax Law; Bylaws
 - All apply simultaneously
 - Neb. Rev. Stat. § 21-1987
 - IRS (Sample Conflict of Interest Policy)
- Differences in:
 - Who it applies to;
 - What constitutes a conflict of interest;
 - The level of participation by the interested person; and
 - How it is approved.

DIRECTOR RIGHTS AND OBLIGATIONS

Conflicts of Interest – Defined

- Nebraska
 - A transaction with the corporation in which the Director has a direct or indirect interest.
 - Technically applies only to Directors.
 - Indirect Interest:
 - Another entity in which the Director has a material interest or in which the Director is a general partner is a party to the transaction; and
 - Another entity of which the Director is a Director, officer, or trustee is a party to the transaction.
 - Has to be a bilateral arrangement (Glad Tidings, 273 Neb. 960).

DIRECTOR RIGHTS AND OBLIGATIONS

Conflict of Interest - Nebraska Procedure for Approval (Method 1)

- Approved in advance by a vote of the Board (or a committee) if:
 - The material facts of the transaction and the Director's interest are disclosed or known to the Board or committee of the Board; and
 - The Directors approving the transaction in good faith reasonably believe that the transaction is fair to the corporation.
- Requires affirmative vote of a majority of the Directors on the Board or on the committee who have no direct or indirect interest in the transaction (more than one).
- Presence of or votes cast by interested Director do not affect validity.

DIRECTOR RIGHTS AND OBLIGATIONS

Conflict of Interest - Nebraska Procedure for Approval (Other Methods)

- Obtaining approval in advance from:
 - Attorney General; or
 - The district court (Attorney General must be a party).
- Back Up Plan: It was fair at the time it was entered into:
 - Even if not approved, the transaction is not voidable if fair at the time entered.
- NOTE: Loans or guaranties from the corporation to a Director or officer are always prohibited (Neb. Rev. Stat. § 21-1988).

DIRECTOR RIGHTS AND OBLIGATIONS

Conflicts of Interest - Defined

- IRS
 - A direct or indirect financial interest through business, investment, or family if a person has:
 - An ownership or investment interest in any entity with which the organization has a transaction or arrangement;
 - A compensation arrangement with the organization or with any entity or individual with which the organization has a transaction or arrangement; or
 - A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the organization is negotiating a transaction or arrangement.
 - Applies to Directors, officers, and committee members.

DIRECTOR RIGHTS AND OBLIGATIONS

Conflict of Interest - IRS Procedure for Approval

- Duty to disclose all material facts.
- After discussion with the interested person, he or she must leave the meeting while it is determined if there is a conflict of interest (by vote).
- The interested person may make a presentation, but must leave the meeting during the discussion of, and vote on, the transaction or arrangement.

DIRECTOR RIGHTS AND OBLIGATIONS

Conflict of Interest - IRS Procedure for Approval (Continued)

- Board/committee must determine whether the organization can obtain, with reasonable efforts, a more advantageous transaction or arrangement elsewhere:
 - If appropriate, appoint a person/committee to investigate alternatives; and
 - Requires exercising due diligence.
- If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, then determine by a majority vote of the disinterested Directors whether the transaction or arrangement is in the organization's best interest, for its own benefit, and whether it is fair and reasonable.

DIRECTOR RIGHTS AND OBLIGATIONS

Conflict of Interest - Other IRS Requirements

- Documentation
- Requires annual statements affirming:
 - Received a copy of the conflicts of interest policy;
 - Read and understands the policy;
 - Agreed to comply with the policy; and
 - Understands the organization is charitable and in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.
- Requires periodic reviews:
 - Are arrangements reasonable, based on competent information, and the result of arm's length bargaining?
 - Do arrangements conform to policies, are properly recorded, further charitable purposes, do not result in inurement or impermissible private benefit?

DIRECTOR RIGHTS AND OBLIGATIONS

Conflict of Interest - Best Practices

- Comply with the Most Stringent Requirements
- Over Disclose and Document



Non-Profit Governing Documents

NON-PROFIT GOVERNING DOCUMENTS

Nebraska Statutes - Required Documents

- Articles of Incorporation -- required by Neb. Rev. Stat. 19-1921.
- Bylaws – "[t]he incorporators or board of directors of a corporation shall adopt bylaws for the corporation." Neb. Rev. Stat. 21-1925.

NON-PROFIT GOVERNING DOCUMENTS

Articles of Incorporation - Required Contents

- (1) Name;
- (2) One of the following statements:
 - (i) This corporation is a public benefit corporation;
 - (ii) This corporation is a mutual benefit corporation; or
 - (iii) This corporation is a religious corporation;
- (3) Registered Office and Registered Agent;
- (4) The name and street address of each incorporator;
- (5) Whether or not the corporation will have members; and
- (6) Provisions not inconsistent with law regarding the distribution of assets on dissolution.

NON-PROFIT GOVERNING DOCUMENTS

Articles of Incorporation - Permissive Contents

- (1) The purpose or purposes for which the corporation is organized;
- (2) The names and street addresses of the individuals who are to serve as the initial Directors;
- (3) Provisions not inconsistent with law regarding:
 - (i) Managing and regulating the affairs of the corporation;
 - (ii) Defining, limiting, and regulating the powers of the corporation, its Board of Directors, and members (or any class of members); and
 - (iii) The characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members
- (4) Any provision that under the Nebraska Nonprofit Corporation Act is required or permitted to be set forth in the bylaws.

NON-PROFIT GOVERNING DOCUMENTS

Bylaws - Contents

- The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the Articles of Incorporation. Neb. Rev. Stat. 21-1925.
- Common Provisions:
 - Appointment of Directors
 - Committees
 - Meeting procedure
 - Notice procedures
 - Remote attendance
 - Officers
 - Authorized Signatories / Bank Resolutions
 - Mission Statement

NON-PROFIT GOVERNING DOCUMENTS

Emergency Bylaws

- Neb. Rev. Stat. 21-1926 "the directors . . . may adopt, amend, or repeal bylaws to be effective only in an emergency . . . [which provide] special procedures necessary for managing the corporation during the emergency, including:
 - (1) How to call a meeting of the board;
 - (2) Quorum requirements for the meeting; and
 - (3) Designation of additional or substitute directors."
- Corporate action taken in good faith in accordance with the emergency bylaws: (1) Binds the corporation; and (2) May not be used to impose liability on a corporate Director, officer, employee, or agent.
- An emergency exists for purposes of this section if a quorum of the corporation's Directors cannot readily be assembled because of some catastrophic event.

NON-PROFIT GOVERNING DOCUMENTS

Board Policies

- It may be advisable to have separate written policies that have been adopted by the Board regarding important topics:
 - Compensation Policy
 - Conflict of Interest Policy
 - Delegation of Authority
 - Anti-Discrimination Policy
 - Statement of Director Responsibilities
 - Investment and Spending Policy

NON-PROFIT GOVERNING DOCUMENTS

Amendment

- Be aware of current amendment procedures in articles and bylaws.
- Generally, amendments to the articles or bylaws are approved by the Board.
- If a non-profit has members, the default statutes require member approval of major amendments.
- The articles also may require an amendment to the articles or bylaws to be approved in writing by a specified person or persons other than the Board. Such an article provision may only be amended with the approval in writing of such person or persons.

NON-PROFIT GOVERNING DOCUMENTS

Other Corporate Documents

- Biennial Report filed with Secretary of State (odd-numbered years)
- Meeting Minutes
- Form 990
 - IRS regulations urge Boards to share the form 990 with each Board member before its submission to the IRS.
- 501(c)(3) approval
- List of Officers and Directors.



Conducting Meetings and Best Practices

CONDUCTING MEETINGS AND BEST PRACTICES

Purpose of Boards

A strong, well functioning Board can make an organization truly great. Great Boards provide

- good governance;
- hold themselves accountable for the overall health of the organization; and
- use their expertise to provide advice and support the organization's work.

They enable the organization's staff to focus on effectively implementing its mission and managing the organization.

CONDUCTING MEETINGS AND BEST PRACTICES

Legal and Moral Obligations

- The Board's *legal* obligation is to *govern*.
- The Board's *moral* obligation is to *support*.

CONDUCTING MEETINGS AND BEST PRACTICES

The Board's *legal* obligation is to govern - do so as a collective body

- Oversight of programs - establish strategic goals, benchmark goals and follow through on evaluation.
- Oversight of finances - determine budget assumptions, guide process, approve & monitor.
- Oversight of the chief executive - the entire Board acts to oversee "one employee".

CONDUCTING MEETINGS AND BEST PRACTICES

The Board's *moral* obligation is to support - do so as individuals and in small groups working at the direction and discretion of the CEO

- Boards provide organizational support through fundraising - 100% support ideal.
- Advice to staff on matters within expertise.
- Ambassadors for the organization in the community.
- Volunteer.

CONDUCTING MEETINGS AND BEST PRACTICES

Governing Model

- Shared expectations - understand each other's roles and strategic goals.
- Cooperative Planning - strategic (Board driven) and operational (staff driven) planning.
- Collaborative Evaluation - regular and systematic evaluation of Board, CEO, and organization.
- Effective Relationships - trust and respect.

CONDUCTING MEETINGS AND BEST PRACTICES

Board Member Recruitment

- Board and CEO evaluation of strengths and weaknesses of Board.
- Active and ongoing recruitment of new Board members.
- Term Limits.

CONDUCTING MEETINGS AND BEST PRACTICES

Board Member Orientation - not just for new Board members

- Have a comprehensive Board manual:
 - Organizational documents
 - Policies
 - D&O insurance policy
 - Responsibility expectations
 - Board directory
 - Board structure, including committees
 - Staff and organization structure
 - Financial and informational information on organization
- Ongoing mission information through multiple ways of communicating - Board meetings, tours, newsletters, etc.

CONDUCTING MEETINGS AND BEST PRACTICES

Meetings and Communications

- Purposeful, productive and well-managed.
- Frequency - determined by needs of organization - at least quarterly (with committee meetings in between), but trend is 5-6 a year.
- Agenda - follow a regular agenda, uses consent agenda where appropriate, focus on strategic items, use a mission moment.
- Governance - toss out Robert's Rules of Order and adopt ABA The Modern Rules of Order.
- Operations - effective Boards create inclusiveness and openness for collective decisions.

CONDUCTING MEETINGS AND BEST PRACTICES

Board Structure and Committees

- Shape the Board structure to fit the needs of the organization.
- Standing Committees - set forth in bylaws and the purpose is to fulfill governance functions: executive, finance, program, and marketing and development. Also, audit, nominating, and investment.
- Ad Hoc Committees - organized to fulfill short-term tasks: capital campaign, strategic planning, and events
- Expectations:
 - Develop policy options for the Board;
 - Recommend actions for consideration and approval of the full Board;
 - Operate at the Board level, not at the staff level;
 - Members are aware of the role of the committee and never supplant the responsibilities of the Board, of the chief executive and of the staff;
 - Make a contribution to the Board's deliberation and decision-making, but they do not replace the responsibilities of the Board or of the staff; and
 - Lead the Board in making informed judgments about current operations and the future of the organization.

CONDUCTING MEETINGS AND BEST PRACTICES

Adding Value

- Boards are not effective and do not add value to the organization if they duplicate, compete with, or simply review the work of the staff.
- To add value, Boards should:
 - Discover and determine the issues the organization must handle;
 - Provide leadership in thinking and actions;
 - Create a forum in which the CEO can explore ideas in a safe and secure environment;
 - Determine priorities; and
 - Monitor progress and assess results.

QUESTIONS?

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