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SCHOOL OF LAW

BEST PRACTICES FOR BOARD DEVELOPMENT & ENGAGEMENT

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Board Development

Subject/Title:

Best Practices for Board Development and Engagement

My suggestions for a title:

“Legal Obligations of Non-profit Boards and Board Members – Doing the Job Right to Attract and Retain Good Productive Board Members” or, more simply, “Boards Should Ask Lots of Questions”

Duties

Board Members Should Understand the Legal Duties of the Board –
"The 3 D's and the Most Important F"

Duty of Care
Duty of Loyalty
Duty of Obedience
Fiduciary Duty – Touches on all of the above

Credit to https://boardsource.org/resources/legal-duties-nonprofit-board-members/ for definitions.

Duty of Care

Duty of Care

The duty of care describes the level of competence that is expected of a board member and is commonly expressed as the care that an ordinarily prudent person would exercise in a like position and under similar circumstances. This means that a board is expected to exercise reasonable care when they make a decision on behalf of the organization, as they would in their personal and professional life.

Duty of care requires that you pay attention to the organization's activities and operations. Board members are expected to make decisions with the organization's best interest in mind.

Examples of a breach of the Duty of Care include:

Excessive meeting absences.

Failure to ask questions about a proposed action.

Put simply, a board member can only do their job effectively if they have been present at board meetings and received and digested the information required to make informed decisions.

Duty of Loyalty

Duty of Loyalty

Duty of loyalty means board members are expected to put the interest of the organization before their own personal and professional interests. It is a conflict of interest policy embedded in the nonprofit law regarding charitable board members. This duty is intended to make sure that the organization is foremost in decision-making by board members. That includes an expectation that board members recuse themselves if there is a vote that could benefit them or their family or with which you have a conflict. The laws set an expectation of loyalty to the organization first and foremost.

Please note, it is still a best practice for organizations to have a formal conflict of interest policy. Board members should complete a form each year disclosing conflicts, and a committee or subcommittee of the board then reviews those forms and makes a recommendation of how the board should move forward.

Duty of Obedience

Duty of Obedience

The duty of obedience requires board members to comply with the applicable federal, state, and local laws, adhere to the organization’s bylaws and policies, and serve as guardians of the organization’s mission. It also includes honoring donor intent. Some states have additional requirements or different titles. We encourage you to look up the laws of your own state.

Examples of a Breach of Duty of Obedience

A few real-life examples would include:

Knowing that the homeless shelter is supposed to have multiple places for egress but allowing one exit to remain blocked.

Accepting a donation for a specific project but spending that money on something else.

Not following the financial policies requiring separation of duties when handling money.

Duties of care, loyalty, and obedience are part of providing oversight which is one of the three responsibilities of a board of directors.

Fiduciary Duty

Fiduciary Duty -

This overlaps and merges with the duties of Care, Loyalty and Obedience.

While the board is not usually involved in the day-to-day activities of the organization, it is responsible for managing the organization and making important decisions, such as adding or removing board members, hiring and firing key officers and employees (more specifically, the executive director), engaging auditors and other professionals, as well as authorizing significant financial transactions, investments and new program initiatives.

In carrying out those responsibilities, members of a board of directors must fulfill their fiduciary duties to the organization and the public it serves.

Fiduciary duties are often is thought of as the financial obligations of a board and as an example investments require taking the steps any other “”Prudent Person” would take and serving the best interests of the organizations with those decisions

Introductions

Conflict of Interest - What is your Conflict of Interest policy? IRS Examples?

The most common breach of the duty of loyalty is not disclosing or addressing a conflict of interest. Some real-life examples of this may be when an organization engages in potential conflicts without a bidding process, disclosure, or a board discussion.

For example choosing and hiring a company owned by a board member who has a professional stake or will receive a commission. For example, if the board hires an HVAC company owned by a board member who then receives pay from the organization for the work performed.

The above example may be acceptable if the conflict is disclosed ahead of time, a board discussion is held, and a proper and equitable bidding process is conducted. It is important to note that what may be allowable under the law may be different than what is considered appropriate in public opinion.

Conflicts are not an automatic no but require disclosure, consideration and voting.

Example Problem

For purposes of this problem assume that you are a new board member on the board for Save the Kitties and Puppies. You have found out that the former Board member that you replaced resigned her position at the same time as three other board members did so (only 8 positions on the board in total). You are a little uneasy with that knowledge. At the first meeting you attend, the STKAP CEO closes the door and tells the Board that she has uncovered the fact that an employee has stolen over $10,000.00 from STKAP over the last year. The annual budget is only $200,000.00. The CEO suggests that STKAP make arrangements to let the employee pay it back and keep the matter quiet since that employee has kids and a family to support. Other Board members speak up and want to turn the employee in to the local police for the theft and let them sort it out. What is your position?

But what if?

Do you try to keep the matter quiet and out of the local newspaper? Your personal business does a lot of advertising with the paper, and the editor would be nervous about losing your account, do you use that influence/threat?

But what if?

The Board is planning a major fund drive in the near future and investing over $20,000.00 in advertising and promotion of that goal. Would this theft information hurt the donations you expect from the fund drive?

But what if?

What if you kept it quiet initially but ultimately became aware that people around town were talking about that former employee having a major gambling problem and wondering how he supported it on only the salary of a non-profit agency like STKAP?

Final Thoughts and Questions

Final thoughts or questions?

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