ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.℠

Governance for Non-Profits and Associations

Phil Feigen

Greg Jacobs

Erum Mirza

Rawle Andrews Jr.

September 28, 2022

Presented by

Philip G. Feigen, Shareholder
pfeigen@polsinelli.com
W: (202) 626-8330
C: (301) 537-5891

Gregory S. Jacobs, Shareholder
gjacobs@polsinelli.com
W: (202) 626-8368
C: (202) 277-1621

Agenda

- Responsibilities of Board and Management
- Expectations
- Legal Considerations
- Final Thoughts

Purpose and General Directive, Responsibilities, and Expectations

Board Responsibilities*

- Establish a strategic plan, annual goals, and objectives.
- Determine association policy.
- Allocate resources through the budget.
- Monitor progress.
- Promote the association.
- Oversee the executive director, counsel, and CPA.
- Manage risks effectively.
- Maintain integrity and accountability.

Board Expectations

- Attend and prepare for Board meetings by reviewing the agenda and supporting documents.
- Study and understand the mission statement, bylaws, and strategic plan.
- Promote the association to others **(though the Board cannot speak for the association without authority).**
- Recruit future leaders to help govern the association.
- Stay current on issues and trends impacting the association and the membership.
- Volunteer for committees.
- Readily communicate with staff for necessary information and assistance.

Responsibilities of Employees

- Act in best interest of the association.
- Implement the policies set by the Board.
- Carry out directives of Executive Director/CEO.
- Employees report to Executive Director/CEO.
- Only the Executive Director/CEO reports to the Board.
- If Board or Committee members reach out to employees, the Executive Directors/CEO should approve any assignment or resolve any conflict.

Role of Members

- Support the mission.
- Elect Board.
- Approve changes to corporate documents.
- Membership is a privilege – based on bylaws it can be suspended or taken away by Board, with due process.

What Can You Do?

- Stay current.
- Be consistent.
- Review corporate documents.
- Have a training session for your Board and others.

Legal Considerations

Legal Considerations - Board Authority

- The Board authority:
  - The Board must have a quorum to act.
  - The Board may delegate authority to committees or individuals.
  - **Individual Board members lack authority to act on their own unless authorized by the Board.**
- Board members may expose themselves or the organization to liability if they act outside of their scope of authority.
- **Where a board of directors fails to act on repeated incidences of directors exceeding the scope of their authority, the board may be deemed to have passively condoned such behavior and may be held liable**.

Officer Authority

- Officers have four main sources of authority (in order of precedence):
  - State law;
    - But – may also include restrictions, such as the ability to hold multiple officer roles at the same time.
  - Articles of Incorporation;
    - The most common approach is for Articles be silent on officer authority, or else to specifically delegate such provisions to the Bylaws.
  - Bylaws; and
  - Authority granted by Board resolution.

Examples

<u>Example 1</u>: A director is at a meeting, on behalf of the association, with policy advisors to discuss a matter that is important to the association's members. During conversations, a separate topic – a controversial political issue, for which the association has not taken a position – comes up. What should the director do?

Examples

Example 1: A director is at a meeting, on behalf of the association, with policy advisors to discuss a matter that is important to the association's members. During conversations, a separate topic – a controversial political issue, for which the association has not taken a position – comes up. What should the director do?

Examples

Example 2: A director has a very active social media account, which mentions that he is a member of the association Board of Directors. The director uses the social media page to engage with political groups advocating for a change in health care laws, which is an issue important to the association. Is the director acting outside their scope of authority?

Examples

Example 2: A director has a very active social media account, which mentions that he is a member of the association Board of Directors. The director uses the social media page to engage with political groups advocating for a change in health care laws, which is an issue important to the association. Is the director acting outside their scope of authority?

Fiduciary Duties

- **Duties are responsibilities imposed on people trusted to act in good faith and honesty on behalf of a third party.**
  - **Duty of Care**
    - Good business judgment at all times
    - Due diligence in decision making
  - **Duty of Loyalty**
    - Act in the best interest of the organization and membership
    - Avoid conflicts of interest

Duty of Care

- **<u>Board members must act:</u>**
  - In good faith
  - With the care that a person in a like position would reasonably believe appropriate under similar circumstances.
- **<u>Practical Application of Duty of Care:</u>**
  - Review all relevant information and take reasonable steps to become informed.
  - Make informed decisions.
  - Make reasonable inquiries where appropriate.
  - Rely on experts, <u>with appropriate oversight.</u>

Duty of Loyalty

- Board members and employees must act in a manner they reasonably believe to be in the best interests of the organization.
- **Best Practices:**
  - Do not use your position to gain secret profit or compete with the organization.
  - Do not usurp the organization’s opportunities.
  - Beware of conflicts of interest.

Conflicts of Interest

- Arise when a Board member or employee (or related person) has a financial or other interest in a matter such that it would reasonably be expected to exert an influence on the member's judgment.

- **Association Board Members and employees must**:
  - Avoid ***acting*** with a conflicts of interest.
  - Disclose conflicts of interest to the Board or Executive Director.
  - Abstain from participating in any discussion or voting regarding any matter in which such member (or related person) has a conflict of interest.

Test: ***Is the interest such that it would reasonably influence a person's judgment?***

Examples

Example 3: A director from an association meets a representative of the American Association of Really Cool Associations (AARCA). The AARCA offers the director a collaboration opportunity with the AARCA worth $10,000. The AARCA informs the director that he could do the collaboration by himself, or he could bring on association. What should the director do to comply with his duty of loyalty?

Examples

Example 3: A director from an association meets a representative of the American Association of Really Cool Associations (AARCA). The AARCA offers the director a collaboration opportunity with the AARCA worth $10,000. The AARCA informs the director that he could do the collaboration by himself, or he could bring on the association. What should the director do to comply with his duty of loyalty?

The director should bring the possibility of collaboration to the Board and allow the Board to discuss and decide whether to proceed with the collaboration. If the director takes the opportunity for himself, it may be a breach of his duty of loyalty because the director has seized a desirable business opportunity that the association may have accepted and profited from.

Fiduciary Duties - Duty of Obedience

- **<u>The duty of obedience requires:</u>**
  - Familiarity with the law
  - Familiarity with the governing documents of the organization
  - Knowledge of the organization's mission and vision

Duty of Confidentiality

- Board members and employees have a duty to maintain confidentiality, i.e., not to use or disclose confidential, non-public information obtained in their capacity as Board member or employee, without authorization.

Examples

Example 4: A director of a national trade association has an active Facebook account but has taken care to ensure any reference to her role as a Board member is removed. The director is also very active at the state level of the trade association and has many influential relationships with state members and leaders across the nation. As a result of her role on the Board, the director becomes privy to confidential information with respect to a sensitive state matter coming up for decision at the Arkansas state association. The director makes a post on her Facebook page hinting that an upcoming big decision in Arkansas will not go the way everyone thinks. Has the director acted inappropriately? Can the director post on her Facebook about the upcoming decision in general, without hinting at the confidential information she is aware of?

Examples

<u>Example 4</u>: A director of a national trade association has an active Facebook account but has taken care to ensure any reference to her role as a Board member is removed. The director is also very active at the state level of the trade association and has many influential relationships with state members and leaders across the nation. As a result of her role on the Board, the director becomes privy to confidential information with respect to a sensitive state matter coming up for decision at the Arkansas state association. The director makes a post on her Facebook page hinting that an upcoming big decision in Arkansas will not go the way everyone thinks. Has the director acted inappropriately? Can the director post on her Facebook about the upcoming decision in general, without hinting at the confidential information she is aware of?

Acting Beyond Authority

- **Board members must act in the best interest of the overall association and keep their individual interests from affecting the role of the board.**

Acting Beyond Authority *(cont.)*

- **Power Dynamics**
  - All boards need to be aware of power dynamics. When "directors" interact with third parties, it comes with a certain level of perceived influence/authority, **and as such, we should take extra care not to step on or interfere with association staff plans (*i.e.*, "noninterference").**
  - Third parties include: people in the industry, vendors, politicians, state associations.
- **Where does it become tricky?**
  - Delineating personal capacity from association with the Board.
  - Acting within **explicitly delegated** authority.

Examples

<u>Example 5</u>: A director is meeting with state political party officials about sponsoring a fundraiser dinner. The director mentions she is on the board of directors for an association, and she believes the association will become a gold-level sponsor for the upcoming fundraiser. The association receives an invoice in the mail, and a mock-up of their logo to be included on the event's welcome banner, with respect to being a sponsor for the fundraising dinner. Was the director acting within her authority? Is the association responsible for the invoice and for following through on sponsoring the fundraiser?

Examples

Example 5: A director is meeting with state political party officials about sponsoring a fundraiser dinner. The director mentions she is on the board of directors for an association, and she believes the association will become a gold-level sponsor for the upcoming fundraiser. The association receives an invoice in the mail, and a mock-up of their logo to be included on the event's welcome banner, with respect to being a sponsor for the fundraising dinner. Was the director acting within her authority? Is the association responsible for the invoice and for following through on sponsoring the fundraiser?

Examples

Example 6: A director is attending a political conference unrelated to his board position. On his name tag, he highlights that he is on the board of directors for the association. The director frequently mentions the association he is affiliated with while also mentioning his political views. He then says he is against gun control, and he hopes that Congress never passes any laws banning assault weapons. The director states that the board and the association would agree and support any candidate who is against gun control. However, the association has never taken a stand on the topic. Is the director acting within his authority?

Examples

Example 6: A director is attending a political conference unrelated to his board position. On his name tag, he highlights that he is on the board of directors for the association. The director frequently mentions the association he is affiliated with while also mentioning his political views. He then says he is against gun control, and he hopes that Congress never passes any laws banning assault weapons. The director states that the board and the association would agree and support any candidate who is against gun control. However, the association has never taken a stand on the topic. Is the director acting within his authority?

Business Judgment Rule

- Board members are generally not liable for mistakes in judgment if they act:
  - in good faith,
  - with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and
  - in a manner the directors reasonably believe to be in the best interests of the association.

What Can You Do?

- Stay current.
- Be consistent.
- Review corporate documents.
- Have a training session for your Board and others.

Appendix

POLSINELLI
What a law firm should be.SM

Examples

Example 7: An employee of a nonprofit complains about illegal business practices and supervisory practices at the association. The Board votes to terminate the employee because of those complaints. The Board of Directors insists that the real reason for the termination was poor performance. However, the Board cannot furnish adequate documentation of the employee's poor performance. Did the Board breach its duty of obedience?

Examples

Example 7: An employee of a nonprofit complains about illegal business practices and supervisory practices at the association. The Board votes to terminate the employee because of those complaints. The Board of Directors insists that the real reason for the termination was poor performance. However, the Board cannot furnish adequate documentation of the employee's poor performance. Did the Board breach its duty of obedience?

Yes, the Board breached its duty of obedience if the Board intentionally terminated the employee as retaliation for making waves in the association. Firing someone because they have pointed out wrongdoing is illegal. If an employee complains about illegal business practices, supervisory practices, or any other portion of the business and then is terminated because of those complaints, the Board has breached its duty of obedience. Moreover, the Board likely has no power to make employment decisions. Board members may provide information or facts they are aware of, but it is most often the CEO's decision to hire and/or fire employees.

Examples

Example 8: A director is active at a state-level organization with a similar mission to the association. Can the director share confidential information with the state-level entity?

Examples

Example 8: A director is active at a state-level organization with a similar mission to the association. Can the director share confidential information with the state-level entity?

Examples

Example 9: A director, who is also the treasurer, has been explicitly authorized by the Board of Directors as a whole to purchase up to $2,000 worth of supplies for an annual event. The director calls a supply store and introduces herself as a director and treasurer for the association and requests a quote. She receives the quote and is happy with the $1,900 price point. She then informs the supply store that she will move forward with the purchase and signs a contract for the supplies on behalf of the association. Is the director acting within her authority?

Examples

Example 9: A director, who is also the treasurer, has been explicitly authorized by the Board of Directors as a whole to purchase up to $2,000 worth of supplies for an annual event. The director calls a supply store and introduces herself as a director and treasurer for the association and requests a quote. She receives the quote and is happy with the $1,900 price point. She then informs the supply store that she will move forward with the purchase and signs a contract for the supplies on behalf of the association. Is the director acting within her authority?

POLSINELLI®

What a law firm should be.℠

NFP Presentation

Nonprofit Practice

- Deep and experienced team focused on the nonprofit sector
- Significant experience with social service, associations, NGOs, education, healthcare, environmental advocacy, etc.
- Specialized brokerage teams for management liability, cyber, media, property & casualty, international, and travel risk/duty of care
- Large claims advocacy group including in-house claim counsel for large and/or complex claims

Management Liability Policies – The First Line of Defense in Governance Related Claims

- Common approach for nonprofits is a ML package policy which includes D&O, employment practices liability, and fiduciary
- Limits can be shared or dedicated
- Defense costs are within the limit
- Claims made policies

D&O Insurance Structure

- Side A
  - Pays on behalf of the insured person loss that is not indemnified resulting from a claim against the insured person
  - Who is insured? Individual officer
  - What is at risk? His/her personal assets
- Side B
  - Pays on behalf of the company loss that is indemnified resulting from a claim against the insured person
  - Who is the insured? The organization
  - What is at risk? Corporate assets
- Side C
  - Pays on behalf of the company loss that is incurred resulting from a claim against the organization
  - Who is the insured? The organization
  - What is at risk? Corporate assets

- Who is covered?
  - Past, present and future directors and officers
- What is covered?
  - Allegation of wrongful act
  - Defense costs
  - Financial losses where insured is held liable
- Who can claim?
  - Creditors, banks
  - Regulators, government authorities
  - Customers
  - Suppliers

Common Risks and Exclusions

Common D&O risk scenarios include:

- Breaches of fiduciary duties owed to the company
- Reporting errors
- Inaccurate or inadequate disclosure
- Failure to comply with regulations or laws
- Breach of contract
- Creditor claims
- Competitor claims

Common D&O exclusions include:

- Fraud
- Intentional criminal acts
- Illegal remuneration or personal profit
- Claims made under a previous policy
- Libel and slander
- Suite brought by one director against another

Market Dynamics Affecting Nonprofits and Associations

- Government investigations/FCA
- Antitrust claims
- Decreasing appetite for carriers to provide >$5M limits
- Limited underwriter appetite for religious and political focused organizations as well as non-governmental organizations
- Increasing frequency and cost of employment claims

Considerations When Constructing the Policy

- Choice of counsel
- Control group
- Dedicated Side A/DIC coverage
- Be mindful of the retroactive date

Independence changes everything.

LOCKTON®

UNCOMMONLY INDEPENDENT