

Corporate Governance in Time of Crisis

Phil Feigen
Ilona Levine
Robert Falk
July 2025



What a law firm
should be.[™]



Presented by:



POLSINELLI

PHIL FEIGEN

pfeigen@polsinelli.com

W: (202) 626-8330

C: (301) 537-5891

Phil Feigen brings a unique perspective to providing general corporate advice, as well as complex business counsel to clients in ever-changing regulatory environments. For more than 25 years, Phil has been providing guidance with respect to investment funds, Small Business Investment Companies and other Small Business Administrative regulations (including the recent PPP rules), federal and state banking laws and federal securities laws.



INTERNET SOCIETY

ILONA LEVINE

levine@isoc.org

Ilona Levine is General Counsel and SVP at Internet Society and Internet Society Foundation, A \$60M global nonprofit with 125,000 members and a presence in 130 countries that focuses on ensuring an open, secure, and accessible global internet. Hired as the first General Counsel to establish and lead the regulatory, governance, compliance, and legal functions. A Corporate Secretary, she also serves as an ex-officio member of the Governance, Executive, and Compensation Committees.



TRUTH INITIATIVE

ROBERT FALK

rfalk@truthinitiative.org

W: (202) 454-5751

Robert Falk is the Chief Legal and Regulatory Officer at the Truth at Truth Initiative where he leads the legal, policy, youth engagement and community outreach teams. He also serves as corporate secretary. He has served as general counsel of three other non-profit organizations.



Being Prepared



Crisis Principles

- **Proactive Crisis Planning:** Boards should develop and regularly update crisis management plans that address potential scenarios
- **Adaptability and Flexibility:** Organizations need to be agile in adapting their structures, processes, and roles to effectively respond to rapidly changing circumstances.
- **Maintaining Mission and Values:** Even in times of crisis, the organization's mission and values should remain at the center of decision-making.
- **Prioritizing Safety and Well-being:** Ensuring the health and safety of staff, volunteers, clients, and board members
- **Effective Communication:** Clear, consistent, and transparent communication
- **Board Engagement:** The board chair should be a key partner with the CEO, providing support and leadership
- **Fiduciary Responsibilities:** Boards must continue to uphold their fiduciary duties
- **Post-Crisis Evaluation:** After the crisis, the board should evaluate the organization's response and its own performance



Initial Triage

- Is this a crisis?
- Who is the client?
- Who are the stakeholders?
- Who do you discuss this with? How do you discuss it?
- Do you get Outside Counsel Involved?
- Who on the Board needs to know? When and what do they need to know?
- Do they need Counsel?
- How are you going to approach communications?

Scenario Example



Internal Players

- GIA is the Gaming Institute of America – they are a non-profit organization that supports the rights of both video game manufacturers, gamers and advertisers. They simply want to promote a great gaming experience for all.
 - Amy is the CEO
 - Bob is the CFO
 - Claire is the Treasurer
 - David is the Chair of the Board
 - Elaine is the member elected President
 - Greg is the GC

Donors

- Their largest donors are **EF Sports** (a manufacturer), **Nunchuk** (a famous gamer), and **Fortday** (a famous gaming company)
 - **EF Sports** donated \$5 million for unrestricted use
 - **Nunchuk** donated \$3 million to be used only to fight legislation related to revisions to game rating systems and regulation of violence
 - **Fortday** donated \$3 million unrestricted and \$3 million related to changes in trademark and copyright law

The Problem



- At the beginning of the year, GIA began the construction of a \$1.5 million gaming studio in their offices.
- It was a controversial initiative, but the board believed without such studio they could not be taken seriously and that their donations would go downhill.

Stage One - Internal

- David recently contacted Amy and said several of the regional board representatives came to him with an issue.
- They believe the gaming studio had gone way over budget and are concerned restricted funds may have been used for the project.
- They also want to know why no financials were presented at the previous Board meeting.



Stage Two - External

- A News Nation reporter calls Claire and David asking for their comments on a report of GIA's former comptroller that Claire has been keeping two sets of books on separate computers.
- The finance staff has reported that the marble for the gaming studio alone cost \$3.2 million.



Stage Three - Legal



- Separately, Greg just received a subpoena from the Senate Judiciary Committee (SJC) related to Fortday and the gaming company's stance on violence in video games.
- As part of that subpoena, the SJC has asked for all financials from the c3 GIA Education Foundation and the c4 GIA.
- The request asks that expenditures be reconciled with Lobby Disclosure Act filings.

Conclusion

- Be prepared
- Determine if there is a crisis
 - Who are the stakeholders?
 - Who is your client?
- Execute your plan
 - Have a law-firm in place
 - Have a communications firm in place
- Be flexible as facts change

Appendix: 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.

Fiduciary Duties

- **Fiduciary 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 Obedience (unique to nonprofits)**
 - Faithful to the mission and goals
 - Follow the governing documents



Duty of Care

- **Board members must act:**

- In good faith
- With the care that a person in a like position would reasonably believe appropriate under similar circumstances.

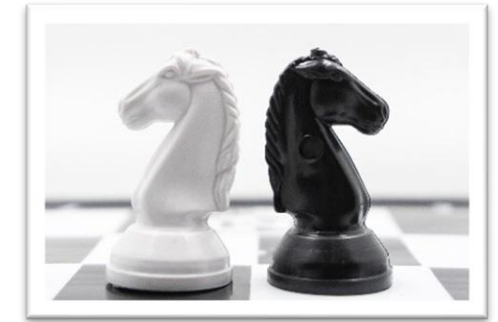
- **Practical Application of Duty of Care:**

- Review all relevant information and take reasonable steps to become informed.
- Make informed decisions.
- Make reasonable inquiries where appropriate.
- Rely on experts, with appropriate oversight.



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?*

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.



Fiduciary Duties – Duty of Obedience

- Board members must act consistently with the goals and mission of association and in compliance with:
 - Applicable laws
 - Bylaws
 - Delegation by the Board
- Board members may be liable for *ultra vires* acts, i.e., “beyond powers” or outside the scope of their authority

- **The duty of obedience requires:**

- 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.



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.**
- **Apparent Authority**
 - Outside parties are entitled to rely on a title in assuming that an officer or director has the right to speak for an association and to legally bind it. This is called “apparent authority.”
 - Given that an individual’s words or actions can bind the association, even if board approval was not obtained before acting, it is crucial to educate all officers and directors about the precise limits of their authority.
 - Even if you do not have authority to enter into a contract, a third party may rely on your apparent authority.

Acting Beyond Authority (Cont.)

■ Risk to Insurance

- In some instances where a board of directors does not take action to prevent a director from acting beyond the scope of its authority, insurance policies may not cover liability.

■ 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.



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.

