

Corporate Governance Training

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AGENDA

- Legal Duties of the Board
- Fiduciary Obligations in Detail
- Managing Legal Liability
- Discrimination/Sexual Harassment
- Privilege
- Concluding Remarks

LEGAL DUTIES OF THE BOARD

- Board members are **fiduciaries** of the organization, which means they have assumed a duty to act in good faith, and with care, candor, and loyalty in fulfilling their obligations.
- The Board as a collective entity is responsible and liable for what happens in and to the organization.
- As the ultimate authority, it must ensure that the organization is operating in compliance with the law and its own policies.
- In turn, the Board's shared legal responsibilities depend upon the actions of individuals. Each Board member is liable for his or her own acts and deeds, particularly if they are alleged to be civil or even criminal offenses.

FIDUCIARY OBLIGATIONS IN DETAIL

- The duties of the Board of Directors of a nonprofit organization can be encapsulated in the *three Ds*:
 - Duty of care
 - Duty of loyalty
 - Duty of obedience
- Defined by case law, these are the legal standards against which all actions taken by directors are held.
- They are collective duties adhering to the entire Board and require the active participation of all Board members.
- Accountability can be demonstrated by showing the effective discharge of these duties.

DUTY OF CARE

- The duty of care requires that directors be reasonably **informed** about the organization's activities, **participate** in decisions, and do so in good faith and with the care of an ordinarily **prudent person** in similar circumstances.

- The duty of care is carried out by the following acts:
 - attendance at meetings of the Board and appropriate committees.
 - advance preparation for Board meetings, such as reviewing reports and the agenda prior to meetings of the Board.
 - obtaining information, before voting, to make good decisions.
 - use of independent judgment.
 - periodic examination of the credentials and performance of those who serve the organization.
 - frequent review of the organization's finances and financial policies.
 - Compliance with filing requirements, particularly annual information returns.

DUTY OF LOYALTY

- The duty of loyalty requires Board members to exercise their power **in the interest of the organization** and not in their own interest or the interest of another entity, particularly one in which they have a formal relationship. When acting on behalf of the organization, Board members must put the interests of the organization before their personal and professional interests.
- In practice, the duty of loyalty is carried out by the following acts:
 - disclosure of any conflicts of interest
 - adherence to the organization's conflict-of-interest policy
 - avoidance of the use of corporate opportunities for the individual's personal gain or benefit
 - nondisclosure of confidential information about the organization

DUTY OF OBEDIENCE

- The duty of obedience requires that directors **comply with applicable federal, state, and local laws**, adhere to the **organization's bylaws**, and remain the **guardians of the mission**.

- The duty of obedience is carried out by the following acts:
 - compliance with all regulatory and reporting requirements, such as filing the annual information return (Form 990) and paying employment taxes.
 - examination of all documents governing the organization and its operation, such as the bylaws.
 - making decisions that fall within the scope of the organization's mission and governing documents.

MANAGING LEGAL LIABILITY

- A key step in liability protection is to know where the danger lies. The most common reasons why nonprofits get sued are:
 - employment claims (hiring, firing, contracts, benefits)
 - contract claims (termination, work specifications, payment terms)
 - discrimination claims (employment, volunteers, programs)
 - torts/negligence (injuries, theft)
 - release of records (availability of corporate records)
 - defamation

- Fundamental Protective Strategies
 - Proactive governance
 - Drafting policies (and ensuring they are followed)
 - Not delegating fiduciary responsibilities
 - Relying on expert advice when that acumen is missing
 - Incorporation
 - Indemnification – per RIMS Constitution & Bylaws
 - Immunity – certain state Volunteer Protection Acts
 - Insurance – D&O Policy

DISCRIMINATION/HARASSMENT

- Discrimination
 - RIMS is an equal opportunity employer and complies with all applicable federal/state laws prohibiting discrimination
 - Given that discrimination is unlawful (see Duty of Obedience), Board members are obligated to report and/or pursue any instance of discrimination.

- Sexual Harassment
 - Quid pro quo: Submission to inappropriate conduct is used as a basis for employment decisions affecting the individual
 - Hostile work environment: the conduct has the purpose or effect of unreasonably interfering with the Employee's work performance or creates an intimidating, hostile or offensive working environment

 - Board members should be cognizant of behavior, language or jokes – whether delivered in person or via electronic means – that might be perceived as unlawful harassment.

ATTORNEY-CLIENT PRIVILEGE

- Elements
 - Person asserting the privilege must be a client;
 - Person with whom the client communicated must be an attorney and acting in the capacity as an attorney at the time of communication;
 - The communication must be between the client and the attorney exclusively;
 - The communication must be for the purpose of securing a legal opinion, legal services, or assistance in some legal proceeding; and
 - The privilege may be claimed or waived by the client only.

- Implications
 - Email communications that do not satisfy the elements above will not be protected by attorney-client privilege and are therefore discoverable.
 - Be cognizant that the vast majority of email traffic at RIMS is not protected by privilege – *WHAT YOU SAY CAN COME BACK TO HAUNT YOU (AND RIMS)*

QUESTIONS?