

Failing to Understand Fiduciary Duties.

When you volunteer to serve as a director or officer of a non-profit, you accept the responsibility to act with the duties of good faith, due care and loyalty. You also accept the potential liability for failing to fulfill those duties. Donors and the media require vigilance at every step. It is no longer sufficient to rubber stamp committee or staff recommendations or to simply “abstain” from dicey decisions. Today, board service comes with real responsibilities and real consequences for those that fail to live up to them.

2. Failing to Provide Effective Oversight. Boards are entitled to delegate tasks to committees, officers, staff, or in certain cases, professionals, but only if they perform sufficient oversight. Oversight is commonly exercised through policies and procedures so long as the board ensures that the policies and procedures are actually followed. Common oversight mechanisms include review of financial statements as well as the implementation of various governance policies. Popular governance policies for nonprofits include conflict of interest policies, executive compensation policies, travel and expense reimbursement policies, whistleblower policies, etc. Difficult tasks that require more time and focused attention can be delegated to committees. Common governance committees include those designed to oversee finances, investments, audits, and compensation.

3. Deference to the Executive Committee, Board Chair or the Organization’s Founder. No one owns a tax-exempt non-profit. No one committee, director, or individual can control the organization. The executive committee, if one exists, is typically charged with acting on behalf of the board when the board is not in session and cannot be easily convened. It is, however, accountable to the full board and should not be permitted to operate as a “mini-board.” The chair’s primary duty is typically to preside over board meetings and to act as a liaison between the board and the chief executive. The chair does not have the power to override decisions of the board. Similarly, the founder may act as the chief executive and run the day to day affairs of the organization. The founder may also sit on the board, but even founders serve at the pleasure of the board. The board has a duty to review the performance and set compensation for the chief executive and if necessary, censure or even terminate the chief executive.

4. Micro-managing Staff. For a non-profit organization with paid staff, once board members demand keys to the organization’s offices and start making direct demands on staff that report to the chief executive, the board has crossed the line. The board’s key duties are to provide oversight and strategic direction, not to meddle in the organization’s day to day affairs. Board members who cross this line are undermining the authority of the chief executive to their own detriment and should be prepared to quit their day jobs. Similarly, staff should not invite micromanagement by asking the board to take on day-to-day tasks that the staff should be handling. The size and budget of smaller organizations necessitates some blurring of these lines, but board members and staff should know their roles and attempt to adhere to them as much as possible.

5. Avoiding The Hard Questions. It is can be uncomfortable to ask tough questions or to disagree with one’s fellow board members. However, group think rarely leads to sound decision-making. Often, the most valuable board members are the ones who, calmly and respectfully,

speak their mind. It is important to set a tone that encourages a free exchange of ideas, both good and bad. Open, vigorous discussions about key issues should be encouraged. A board that passes every resolution “unanimously” should evaluate whether it needs to do more to encourage a thoughtful and open discussion.

6. Insufficient Conflict Management. If a conflict of interest is with an insider, their family member or business, its not enough to simply disclose the conflict and have the disinterested directors approve the transaction. In such cases, the disinterested members of the board need to consider alternate arrangements that do not give rise to a conflict of interest. If after considering alternatives, the board still finds the transaction with the insider is in the best interest of the organization, then the board should carefully document the basis for the decision and the fact that the interested director did not participate in the deliberations or vote. The best practice is to follow the procedures outlined in the intermediate sanctions regulations to properly analyze and document the proposed transaction.

7. Lack of Awareness of Laws Governing Tax-Exempts. Directors that hail from the for-profit world often assume nonprofits operate in a less-regulated environment. In reality, the opposite is true. Tax-exempt organizations enjoy an array of tax and other benefits. To ensure those benefits are not exploited, Congress and local governments have imposed additional legal requirements that tax-exempts must follow. It is essential that directors of tax-exempt entities be aware of the various federal, state, and local laws that apply to the organization. Many directors are unaware whether they are governing a private foundation, a public charity, a supporting organization, or another form of tax-exempt entity, all of which are subject to different limits on their activities. Board members should understand, at a minimum, the penalties they face for overpaying key employees or other insiders, for engaging in excessive lobbying or political activities, for accommodating tax shelter transactions, for making egregious bad bargains on behalf of the organization, the impact of failing to pass the public support test, etc. Ongoing board training and orientation for new board members is often the best solution.

8. Operating with Outdated, Inconsistent Governing Documents. Over time, many organizations change their mission and purpose without updating their governing documents. Similarly, many organizations develop governance practices that do not comply with their original governing documents. For example, it is not uncommon to see bylaws that call for voting members although no member votes have ever taken place or bylaws with a term that calls for the cessation of the organization on a date that has long since passed. Frequently, these issues stem from copying another institution’s bylaws without regard to the distinctions between the organizations or current law. Encourage compliance by conducting regular reviews of the governing documents and checking the bylaws before electing additional officers or directors, creating additional committees, adopting amendments, etc.

9. Airing Disagreements Outside the Boardroom. Every board’s motto should be “what happens in the boardroom stays in the boardroom.” Inherent in the duty of loyalty that all board members must adhere to, is an implied duty of confidentiality. Once an issue is settled by board vote, the board members who voted against the majority must present a united front. If a vote is so disagreeable that a board member cannot carry on in this manner, the board member should consider resigning. In extreme cases, if the board member believes the corporation’s rights are

being violated, the board member could join together with other like-minded board members to bring a derivative suit to enforce the organization's rights.

10. Failure to Cultivate Board Diversity. The initial board is typically made up of friends and advisors of the organization's founder. Over time, the initial board may reach out to their trusted friends and advisors to fill vacancies. This approach to board recruitment can lead to the "usual suspect" syndrome. This is where the same individuals who went to the same schools, belong to the same clubs, and hail from the same neighborhoods and professions are institutionalized onto an organization's board. If your organization is run by a group of "usual suspects," consider mixing it up by creating a matrix of skills, experiences, and backgrounds that would add valuable perspectives to the board. Those with law, accounting, and fundraising skills are obvious choices. Substantive mission-related skills are also important. For example, an educational organization may want to recruit a retired teacher or school administrator; whereas, a domestic violence shelter may want to include a policy expert, social worker, or someone who has been a victim of abuse.

11. Recruiting and Selecting Board Members Without Due Care. We sometimes select friends, relatives, and business associates often because we believe that they will share our vision, support our views, and make meetings pleasant. And sometimes because we can't find anyone else. We sometimes select influential and wealthy individuals because they will contribute substantial sums to the organization and connect us to their network of other influential and wealthy persons. All of this may be well and good, but only if we make sure that we select directors who are going to attend meetings, provide real oversight, and govern using their independent judgment.

12. Failing to Educate and Motivate Board Members. If we're not in startup mode, we may be stuck, at least temporarily, with a number of directors who regularly fail to meet their legal duties of care and loyalty. Amidst all the media attention on cases involving intentional misconduct, we should recognize that the vast majority of directors simply don't understand what they are supposed to be doing and believe that they will not be held accountable for their inaction. It's up to the president, chair, executive director, and really each board member to correct this lack of understanding. While this may be an ongoing (and seemingly Sisyphean) process, we can make some quick fixes. Set up a basic orientation process. Invite a nonprofit-exempt organizations lawyer to present to the board (directors' ears tend to perk up when they hear the word "liability"). Regularly send out information to the board about the organization's major issues (it's okay to be repetitive if the issues remain outstanding) and how board members might help. Have the board conduct a SWOT (strengths, weaknesses, opportunities, threats) analysis on itself (not just the organization) and create an action plan based on the analysis.

13. Failing to Document Actions Appropriately. Some of us adopt minutes that are virtual transcripts of board meetings. Others adopt minutes that only document actions without any mention of the process or deliberations. What's proper? Well, it depends. But often what's most appropriate lies somewhere between these two extremes. Documenting every discussion could create greater exposure for liability and makes it unlikely that minutes will be reviewed except in cases where we are looking for something specific. On the other hand, documenting only actions can result in a loss of institutional knowledge about why certain decisions were made and

provide less evidentiary support of a board's due care in making decisions. Documenting nothing is not an acceptable alternative, but it's a common problem. Do we incorporate minutes of board committee meetings into our minute books? Do we even have minute books?

14. Failing to Review Program Effectiveness and Efficiency and Take Appropriate Follow-Up Actions. Many board members understand that they are fiduciaries and have a responsibility to provide financial oversight. And we "know" that our charities are doing great work because the executive tells us so. But how do we really know this? And if charities exist to provide some sort of public good, and not to maximize profits, isn't programmatic oversight just as, if not more, important than financial oversight?

15. Failing to Hold Executives (and Nonparticipating Directors) Accountable.

Do we just give pats on the back (which we should do whenever deserved) or do we also take a hard look at deficiencies and take corrective actions? Many nonprofits are transitioning to younger, less experienced leaders as the boomers start to retire or move to other positions. Mistakes happen and may happen more often with new leaders. How do we respond to this? Do we document errors in judgment, complaints, abuses of authority? Are we prepared to fire an executive even without malfeasance where he or she is just not getting the job done? And what about removing directors who don't show up at meetings or otherwise fail to fulfill their governance responsibilities? Tricky stuff, but don't we need to deal with it?