

Board Basics: Understanding the Legal Duties and Responsibilities of Nonprofit Board Members



Presenter:
Chaniece Mulligan, Esq.

Mission of Pro Bono Partnership of Atlanta

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals.

We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

Client Criteria

In order to be a client of Pro Bono Partnership of Atlanta, an organization must:

- Be a 501(c)(3) nonprofit.
- Be located in or serve the greater Atlanta area.
- Serve low-income or disadvantaged individuals.
- Be unable to afford legal services.

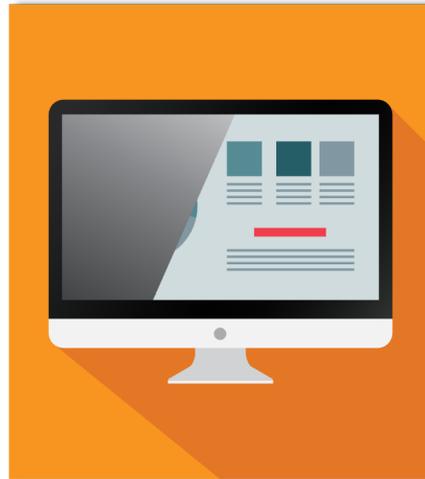
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Agenda

A. Nonprofits and Directors

- A. Nonprofit – 501(c)(3) Organization
- B. Legal Constituents: Members, Directors, Officers
- C. Main Documents: Articles, Bylaws and Committee Charters

B. The Legal Duties of Directors

- A. Duty of Care – Active and Informed Decision Making
- B. Duty of Loyalty – Best Interest of the Corporation
- C. Duty of Obedience - Faithful to the Corporation's Mission

C. Directors' Role/Responsibilities

D. Practical Considerations

Nonprofit – What Is It?

- **What Is It?**

- Public charity recognized by the IRS (most common 501(c)(3) captures: religious, charitable, educational, literary scientific, prevention of cruelty to animals and children, fostering amateur sports, and testing for public safety purpose)
- Must be **Organized** and **Operated** for charitable purpose

- **Benefits**

- No Federal Income Tax and Maybe No State and Local Tax
- Contributions by Donors are Tax Deductible
- Grant Qualifications

Legal Constituents

- The Members: Additional oversight (*if applicable*)
- The Board of Directors
 - ❑ Purpose: To provide support and oversight of nonprofit's mission, vision, values, programs, legal compliance, governance and other policies, board performance, executive performance, and external environment (*e.g.*, legal/policy environment, donors)
 - ❑ How is the purpose fulfilled?
 - ✓ establish mission; create strategic plan to further mission; monitor and review actions of nonprofit with mission in mind
 - ✓ hire competent CEO/executive director and management team to implement strategic plan and mission
 - ✓ recruit and appoint competent board members
 - ✓ Active engagement (*e.g.*, attendance, informed decisions, familiarity with the nonprofit and the landscape in which it operates)

Legal Constituents (cont.)

- The Officers

- Board Officers: Directors may name such officers as they want (must have secretary)
- Staff/Management: Manage the day-to-day business

Main Documents: Articles

- Nonprofit articles of incorporation are filed with the Secretary of State and create the nonprofit
- The articles typically contain the following provisions:
 - Charitable purpose / activity
 - Provision for the Board of Directors
 - Indemnification of Directors and Officers (if not explicitly in there, Exculpation Clause should be added)
 - Provision for the registered agent of the nonprofit (authorized to receive legal documents)

Main Documents: Bylaws

- Rules adopted to govern the nonprofit
- There is a lot of discretion in drafting the bylaws
- Best practice is to keep the bylaws flexible
- Typical bylaw provisions include:
 - number, term, powers, election, removal and succession of directors
 - Board meetings/action in lieu of meeting, quorum and voting rights
 - officers (titles and descriptions)
 - Amendment procedures
 - board committees

Main Documents: Committee Charters

- The Board of Directors may establish various committees to lead the charge on certain functions, each of which will be governed by a “charter” outlining the committee’s responsibilities
- Typical standing committees include:
 - Governance
 - Audit
 - Finance
 - Executive
- Note: the Board of Directors may also create ad hoc committees, which typically do not have charters

Fiduciary Duties of Directors

- Duty of Care
- Duty of Loyalty
- Duty of Obedience

Duty of Care

- In managing and overseeing a nonprofit, the directors must act with “the amount of care that an ordinarily prudent person would exercise in a like position and under similar circumstances” when making a decision
- This requires that directors:
 - be reasonably informed;
 - participate in decisions; and
 - exercise independent judgment and act in good faith and in furtherance of the mission

Duty of Loyalty

- **Conflict of Interest**

- ❑ Act with the organization's interest in mind, not your own. Be aware of situations where you or another director may have a personal interest in a decision to be made by the Board, which interest could cloud your undivided loyalty to the organization. Recognize, disclose and abstain from the decision-making process when you have a personal interest, for example in a proposed transaction with the organization.

- **Corporate Opportunity**

- ❑ Do not take an opportunity for yourself that otherwise would have belonged to the organization. If you learn of an opportunity that is of interest to you, but that may also be of interest to the organization, offer it to the organization first. Only take it, if the Board has declined such opportunity.

- **Confidentiality – Keep It**

Duty of Obedience

- The duty of Obedience is a special duty applicable to directors of nonprofits. It requires that directors **are at all times faithful to the mission of the organization** and that their actions are always consistent with the mission. Directors' actions must comply with the mission statement, the governing documents of the organization (Articles and Bylaws) and all tax exemption filings and requirements. Directors must not commit acts that under those documents or under the law are beyond the scope of the organization's powers.
- Know your non-profit documents, mission and restriction on activities that could endanger your tax exempt status.

Directors' Role/Responsibilities

- Programs: ensure programs are in line with nonprofit's mission and evaluate programs and regular intervals
- Strategic Planning: ensure the nonprofit has a strategic plan to carry out its mission
- Fundraising: assist, and sometimes, lead fundraising efforts
- Finance/Audit: formulate/approve annual budget and retain/liaise with independent auditor
- Personnel: hire and evaluate the CEO/executive director
- Advocacy: brand ambassador

BoD is Responsible to:

- Members: if the Organization is a Membership Organization
- Attorney General: State attorney general's often oversee charitable organizations' activities on behalf of the donating public
 - Carrying out charitable mission
 - Using funds wisely
- Governmental Agencies: Internal Revenue Service
- Other: donors, employees and other third parties

Helpful Tips

- **Be informed: What you don't know will hurt you!**
 - Diligence & prudence: Ask questions
- **Keep Bylaws current.**
 - Directs meetings, meeting topics and how to conduct them
 - Sets policies & procedures
- **Seek advice when needed. Whether it's a legal, accounting or financial question, if the decision is significant and the area is complex, consider asking for expert advice.**
 - Risky Investment schemes
 - Conflicts of Interest
- **Look into directors and officers liability insurance.**
 - May add another layer of protection, though most policies have many exclusions and are expensive.

Questions?

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rla@pbpatl.org