

PBPA Podcast Transcript
Episode 28 – How to be a Conscientious Board Chair
(22:57 minutes)



Sireesha ([00:00](#)):

Becoming the chair of the board of directors of a nonprofit is a big responsibility. Board of directors have legal duties to their nonprofit. And the board chair is in a unique position to oversee these. In this episode of the PBPA Podcast, Marianna Faircloth will outline best practices for board chairs to lead a compliant and overall awesome board of directors.

Sireesha ([00:30](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:40](#)):

Marianna Faircloth is Senior Corporate Counsel with The Home Depot, where she provides counsel on corporate matters, including compliance and governance. She is also literally an award-winning attorney with PBPA. Mariana, thank you so much for being here today.

Marianna ([01:59](#)):

Sure thing. And thank you so much for having me, this is really exciting.

Sireesha ([02:05](#)):

To start off the board of directors have three specific legal duties to their nonprofit. Can you remind us of what those are?

Marianna ([02:16](#)):

So first off we have the duty of care. This duty requires directors to act with the care that an ordinary prudent person in a like position would exercise under similar circumstances. Part of that is actively participating in oversight of the organization and frankly, doing your job as a director. That means attending the board meetings, asking questions, reading the materials, and the minutes that capture what happened at each meeting, reviewing the performance of the executive director. For financial matters, that means actively overseeing financial affairs of the organization, which includes ensuring internal control structures are in place reviewing and approving organizational budgets, monitoring expenditures, making sure that there's appropriate bookkeeping, auditing, financial planning and that all of the necessary paperwork is getting filed with the IRS. So that's the duty of care, basically acting as a prudent person would in similar circumstances.

Marianna ([03:26](#)):

So next up we have the duty of loyalty, meaning that directors need to give their undivided loyalty to the organization, acting in its interest rather than their own personal interest or in the interest of a family member or their business. Directors also need to avoid conflicts of interest. So, what's a conflict of interest when someone associated with the organization, whether it's a director, the executive director, or another employee stands to benefit from a transaction with the organization, with the nonprofit. So for example, the organization's looking for a company to print some promotional materials and someone who works for the organization has a spouse who runs a printing business. If there's any decision that could potentially involve a, uh, conflict of interest, the board needs to really carefully scrutinize that understanding that the public would be skeptical of any arrangements like that. So the disinterested directors would need to look really carefully at the potential transaction assess whether it's a fair deal, go through any procedures required by their conflict of interest policy and carefully document their decision making, so it's really clear that they weigh the options carefully and without being unduly influenced by the interested person. So to sum up the duty of loyalty means that directors are responsible for making sure organizational actions promote the organization's nonprofit purpose and not any private or individual interests.

Marianna ([04:58](#)):

And last but not least, we have the duty of obedience. So this duty requires directors to follow the organization's governing documents, carry out the organization's mission and ensure that the organization's resources are used for lawful purposes consistent with their mission.

Sireesha ([05:15](#)):

So those are the legal duties that apply to all nonprofit board members: duty of care, duty of loyalty, duty of obedience. Now let's shift our focus more specifically to the board chair. Can you speak a bit about the general responsibilities of the board chair?

Marianna ([05:35](#)):

Absolutely. The primary role of the board chair is really to keep the organization on track for fulfilling its mission. So if the board has a chair, which not all boards do, the chair is responsible for running board meetings, for motivating other members of the board to actively participate in and attend meetings. And part of that is attending the meetings themselves. Um, so encouraging a discussion, holding executive sessions without staff, without the executive director when needed. Um, and it's also driving the advanced preparation. So making sure that the chair is reviewing any materials that are gonna go to the rest of the board with the staff ahead of time and making sure that those materials go out to the other directors in advance of the meeting whenever possible. So all the other directors can be prepared for the discussion. It's ensuring that actions taken by the board or the organization are in line with the organization's mission and with their bylaws and, the general goals of the, of the organization serving as the primary point of contact between the organization's key executives and staff with the other members of the board, providing insight as needed and ensuring other directors are on the right committees and staffed on the right projects. Assisting in welcoming and onboarding new directors. So giving them the background about the organization and the support that they may need to get up to speed and, and start doing the work of being a director themselves. Leading fundraising efforts, by example, with active participation and organizing, uh, campaigns when necessary. Mediating personality, conflicts, and disputes between the board members and thinking generally about the long term health and composition of the board, including helping manage transitions of board members or recruit and vet potential board members as needed. One of the jobs is really to remind other directors of the expectations of that role and make sure that they're living up to their responsibility. So if a

director isn't doing what they've signed on to do as a director, the chair is gonna have to help navigate the admittedly really tricky situation of encouraging that director to move on. And it's not always an easy situation to handle an active director. So that's one reason it's really important to have an engaged chair. Who's really actively looking at how the board is functioning, encouraging the directors to engage, working on getting the right mix of perspectives in the room,

Sireesha ([08:14](#)):

Keeping the general board chair responsibilities you just mentioned in mind, and then adding the three legal obligations of board members, obedience, loyalty and care, what are some practical things a board chair can do to help their board function well and minimize legal risk?

Marianna ([08:35](#)):

So the first really big thing is to know the organization's bylaws. So that's a huge part of the duty of obedience. You need to know what your organization's rules and processes are to ensure they're followed. Bylaws will have numerous really technical requirements. So it's meeting cadence, uh, notice requirements as in when, when, and, and how do you need to notify other directors of a proposed meeting, board composition? How many directors are you supposed to have, uh, required votes for different corporate actions, terms of office. And that document along with the organization's articles of incorporation is really essential reading. And you also need to be very familiar with the conflict of interest policy that I mentioned earlier. So you can help navigate any, uh, potential conflict of interest transactions. And if you don't have a conflict of interest policy, uh, then definitely something to address, with PBPA, if possible, and again, after that, you need to follow the bylaws.

Marianna ([09:44](#)):

So that's the other big part of the duty of obedience. It's not just knowing the materials, it is making sure that they're followed on the ground. It can be really easy to let things slip when all is going well, or when you're in the middle of something. And you feel like you have bigger fish to fry than the corporate formalities, but it's very important to follow the procedures set forth in your governing documents. If the rules and the bylaws aren't working for the reality of your organization now, then the board can revisit them and work on revising them. And it's better to update the bylaws than to ignore them. So you can't revise your way out of all of the formalities. So you're gonna need directors. You'll have to keep minutes at, you'll have to hold meetings, but you can make sure that whatever procedural requirements are in those documents are realistic for your organization as it is now.

Marianna ([10:37](#)):

And, and in exercising your duties, keep in mind what the board chair role is. Your job is to ensure that there's smooth functioning on the board. So the directors can provide effective oversight. The executive director's job is to run the organization day to day. The board is there to make sure they're serving the organization's mission, not to micromanage the everyday decision making. You need to be willing to ask tough questions, to make sure that the public's interest is being served if you've built effective processes. So you can have smooth meetings with well prepared directors. You're much more likely to have meetings with productive discussion of substantive issues. And if you have a clear chain of command understanding of the board's roles and duties and an appropriate record keeping function, it's always gonna help in the event that conflicts or debates around what happened in the past or, or what the next step forward is arise.

Marianna ([11:32](#)):

And finally, another big responsibility is reviewing the organization's Form 990 filings. So that's the tax return that tax exempted organizations have to make with the IRS while you're, again, you're not there to micromanage financial oversight is a big part of any board's role and the board should be reviewing a budget at least annually reviewing the Form 990 and generally making sure there are appropriate financial controls in place. This doesn't mean you have to be an accountant to be a good board chair, but you need to review the financial documents really carefully and ask a lot of questions and be ready to bring in outside help from accountants or auditors as needed.

Sireesha ([12:15](#)):

Bylaws and 990s those are not items you'll hear mentioned in most "How to Chair a Board" resources, but they're so vital for nonprofit compliance. Can you provide some practical examples of what a board chair should keep in mind as they're looking over their bylaws?

Marianna ([12:36](#)):

Sure. So some common things that, that I've seen are making sure that if you have terms, so terms for service as a director or on a committee that, that they're followed and that you have a vote when a term is up, um, again, when things are going smoothly, it's easy to let those formalities slip, but you want to have the process in place so that if things aren't going so well, um, you have a clear process and a record of what was done and what to do, um, roles and positions. Um, are there any officer positions or committees that are required by your bylaws? There are probably, there's probably at least a president/CEO role, a secretary and a treasurer, make sure those are filled and that the people in them are actually serving those functions. Um, and that the right person is in the right role.

Marianna ([13:28](#)):

Um, so if it's required to be an actual director instead of a member of staff, that that's the case, are there committees required by the bylaws and again, who is allowed to be on them? Um, typically bylaws will cover committees of the directors. Um, but sometimes you'll see non-director employees who are being treated as voting members for the board committee. Um, so you wanna make sure that that's actually allowed. Staff can always sit-in, in a committee meeting by invitation, but wouldn't necessarily be voting members depending on your bylaws. Another really important relationship is working with the board secretary. The board chair is usually responsible for running board meetings and making sure that the board is functioning well. The secretary is responsible for the record, keeping taking minutes, that sort of thing. Advanced planning along with the secretary is key to making sure that all of the relevant hoops are jumped through from a corporate governance perspective and that everything that needs to get done at a given meeting actually gets done.

Marianna ([14:35](#)):

And this one will sound, um, sort of basic, but it's, it's really important setting up a system to track your deadlines. So, like I mentioned, the bylaws often have numerous technical requirements about when notice needs to be given how often things need to occur. And beyond, you know, the timing for your, for your IRS filing, uh, you'll have all sorts of dates that you need to keep in mind. And I found it's really helpful to create a calendar maybe annually or quarterly, depending on how often your board is meeting. That has all of the relevant dates for the board meeting, when materials for the meeting need to be distributed for directors, when they need to go to the board chair in advance of that, when the

official notice of the meeting needs to go out, just to make sure that that, um, domino effect of all of the relevant dates, uh, goes forward smoothly, and that everything gets done on time.

Sireesha ([15:33](#)):

My next question is a more technical question that several nonprofits have shared with us. How does a board chair know when they should seek a board resolution versus when a motion is sufficient?

Marianna ([15:49](#)):

So a good rule of thumb is that any big actions I say with, uh, with air quotes <laugh> need to be voted on and memorialized in written resolutions. So it's always better to have circulated the written resolution to the directors ahead of time if possible. So it's very clear that everyone knows what they're voting on. They've had time to think it over and they can discuss any lingering questions at the meeting. So basically if this is some big, um, some big corporate activity that it's not coming up for the first time at the meeting, if possible. When I say big actions that might include something like hiring a new executive director, taking out a loan, expanding into new geographic locations, offering substantially new lines of services for your organization, smaller actions, like let's say a routine contractor, renewal buying office equipment. You know, small transactions might be good to include in the minutes, but don't necessarily need a written resolution.

Marianna ([16:58](#)):

Just be mindful of your bylaws. Since sometimes there are monetary thresholds in the bylaws that will require certain votes or other procedures. For instance, if there's an expenditure over a certain dollar threshold, it might need to be signed off on by two officers of the board. Um, the other thing is the other thing to notice that bylaws often, although not always permit a written consent as opposed to a voted a meeting. So if something comes up that needs really urgent action, and it's going to be difficult to convene a meeting in a given timeframe, you might be able to do a written consent instead of calling a meeting, just make sure to confirm whether articles of incorporation or bylaws allow it and what the majority or, excuse me, what the required vote is for those written consents. As sometimes it's only allowed for a unanimous vote, instead of the average majority.

Sireesha ([17:57](#)):

And finally, once a board chair has implemented all the great tips you have shared so far, they may start to look ahead to their successor. Any thoughts on transitioning from one board chair to a successor board chair?

Marianna ([18:13](#)):

Absolutely. So to me, one of the most important roles board chair can serve is thinking about the long term function of the board and working to develop more junior directors for future leadership roles. As a chair, you wanna be facilitating an environment where directors are very involved, vocal and aware of their strengths and growth areas. So they feel empowered to ask questions and provide advice where they have expertise. Part of that is thinking about composition. If your board has committees, you might wanna think about periodically rebalancing those to bring fresh perspectives to the committee, and also to provide your directors with a growth opportunity. And you need to be thinking about succession planning so that when your term is up, you're ready to pass the baton. There's a plan in place to transition your responsibilities. So the training or transition can take lots of different forms. You could announce the transition well before it occurs. So your successor can shadow for a meeting or, or more

beforehand, and see what the extent of your responsibilities are. The former chair can stay on the board either, you know, for a cycle for a short amount of time or for a longer time to and serve as a resource to the new chair. Um, once they've taken on these board responsibilities, there are lots of different ways that, that you can work to actively transition the role. And hopefully that transition has come after lots of thought about what qualities need to be in this chair position and, what role they serve in the board overall.

Marianna ([19:55](#)):

And that brings me back to this point about succession planning more generally. So board chairs often have to be the one to manage a difficult situation where there's a director who isn't really fulfilling their responsibilities as a board chair, you should make sure that expectations for directors are very clear. So consider putting those expectations in writing in a policy so that potential directors know what's expected of them. And there's a roadmap. If they're not engaging your job as the chair and make sure that you have an engaged board that's providing real oversight to the organization. And a big part of that is continually assessing performance as a board and looking for ways to improve director engagement. So that's not to say that you're just there to be a disciplinarian. Um, the chairs should be working to build relationships with the other directors. So there's a really clear and open line of communication. Both so they know the other director's strengths. And, and also, so you, as the chair can gauge their potential interest and qualification for leadership roles on the board, whether that's transitioning to be the next board chair or heading up a committee or taking on some other strategic responsibility, the chair should also try and serve as a safe space. So directors need to be willing to raise really thorny issues and provide oversight in a productive way. And a good board chair can be a huge part of building that culture where people feel empowered to speak up.

Sireesha ([21:23](#)):

Marianna, thank you so much for answering my questions today. You have provided fantastic insight into the general and legal duties of board chairpersons. I appreciate you sharing your expertise and time with us and to our nonprofit listeners. Thank you for joining us for this episode of the PBPA Podcast.

Sireesha ([21:45](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.