

PBPA Podcast Transcript
ED Conflict & Termination
Part III – Nonprofit Board Management of the Executive Director
(37:48 minutes)



Sireesha ([00:03](#)):

One of the greatest challenges a nonprofit board of directors can face is managing conflict with and potentially terminating an executive director. While no board wants to find itself in this situation, it's crucial to be prepared. In this episode of the PBPA podcast, Alex Drummond and Lori Shapiro discuss how boards can navigate conflicts with their executive director and what steps to take if termination becomes necessary. We'll cover key tips and legal considerations to ensure fairness to the executive director, maintain oversight of the nonprofit, and prepare the board members themselves.

Sireesha ([00:53](#)):

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 nonprofit's specific situation.

Sireesha ([02:01](#)):

Alex Drummond is a partner with the law firm of Seyfarth Shaw. He represents management and employment litigation matters in both state and federal court and before state and federal government agencies. He was recently recognized by Best Lawyers in America for litigation and in labor and employment. Alex is actively involved in the nonprofit community of Atlanta, including serving on nonprofit boards as a board chair, and as a dedicated volunteer with PBPA. Lori Shapiro is Senior Employment Counsel here at the Pro Bono Partnership of Atlanta. She has extensive experience advising employers on labor and employment matters, and for the last 10 years, she has served as staff attorney and employment counsel at PBPA. Lori served not only on nonprofit boards herself, but also as a board chair. So both of our speakers today are employment attorneys, have advised numerous nonprofits, and have firsthand experience serving on nonprofit boards—the perfect combo of expertise and insight for our conversation today. I'm so excited to have two such knowledgeable experts to speak with me today. Thank you both for being here.

Alex ([03:23](#)):

Thank you Sireesha, for having us. I'm excited to have the conversation.

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

And I'm glad to be here, too. Thank you very much, Sireesha.

Sireesha ([03:30](#)):

Now I'd like to begin our conversation by letting our listeners know that this episode is part III in a three-part series on board oversight of executive directors. Part I, address general management of the ED. And part II talks about ED transition when the executive director leaves on good terms. Today, we're going to talk about the role of the board when things are not necessarily on such good terms. What should a board do if they encounter conflict with the ED, and what are steps that they should take if they have concerns with the ED'S performance?

Lori ([04:09](#)):

Well, Sireesha, before we talk about any kind of termination of the executive director, I think it's really important that we be very clear about what it is that we're discussing involving the ED. And that is we need to differentiate when there's a conflict that's actually related to the performance of the executive director, as opposed to sort of a more general conflict between the executive director and the board that might have a lot of different causes, but might not actually be performance related. It could be a personality issue or something related to the business on which they disagree or management style. And, if the disagreement is not related to performance, I just feel like it's important for us to mention at the outset that the board should seek some resources or look to experts either on or outside of the board to help with addressing any difficulties that they're having with communicating with the executive director or disagreements that they're having with the executive director that don't necessarily rise to performance issues.

Alex ([05:17](#)):

That's a great point, Lori, and I think one of the things that, to be clear before we talk about the ED itself is if a board member asking himself or herself if the board itself has room for improvements, right? Have we laid out the expectations and communicated those clearly and appropriately to the ED to ensure fairness and understanding of what the expectations are. You know, not always we see this. It's not that there's an underlying performance, but there's a gap in communication between what the board's expectations are and what the ED's view for organization is on any given task of setting goals, strategic growth. I think, too, as we talked through the process there's going to be key differentiators on what the performance problems are. If it is more in operation, if it's something more significant in terms of misconduct that would elicit vastly different approaches on how to handle the situation.

Alex ([06:19](#)):

But if I'm going to step back a little bit and talk about not just specifically with the ED, but as a board member what are the duties and responsibilities, because that really sets the threshold on how that relates to assessing the performance of an ED. And that is that a board member of a nonprofit has a fiduciary duty to the organization. Broadly speaking, that has two components to it. The first being duty of loyalty and, in Georgia, the law is that a board member must discharge their duties in a matter that they believe in good faith to be the best interest of an organization, and that the decisions regarding the nonprofits assets and activities must promote the organization's purpose and not the interests of any specific individual. Right. And, critically, that requires them to distinguish between the best interest of the organization versus the ED himself or herself, right?

Alex ([07:22](#)):

This can be difficult at times, particularly if there's a close relationship between a board member and an ED, or even in situations where the ED is the founder of the organization. The second part of the fiduciary duty that we have to keep in mind is the duty of care. And, in Georgia, that means that a board

member must act within the care that an ordinary prudent person would exercise under similar circumstances. Now, that's a very vague definition of what it is. But there's some best practices that are important here. They can include, for example, participating in the management and attending the board meetings itself, times where he needs to consult an external expert when the board lacks a particular expertise to make a more fully informed decision review the board materials, have meetings; understanding the mission of the nonprofit is critical and then be knowledgeable about the organization's bylaws and other governing documents. That also requires being knowledgeable about the organization's operations, programs, and policies, and then support the staff.

Lori ([08:37](#)):

And I think that what you've said is particularly important as well when you're talking about executive director performance. So if we are getting into a performance issue at this point and there's something going on with the executive director, the board member really needs to think about the things that you've just mentioned, the duty of care, the duty of loyalty, and how they approach any issues that they're having with the executive director. And if the board is having performance issues with the executive director, they really in some ways need to treat that just like any other employee who is having a performance issue, and really step back and think about what has the communication been and what is the best way to approach this issue in order to hopefully come to a resolution of the issue that doesn't necessarily involve termination of the executive director. And I think one of the things that we wanted to talk a little bit about was the role of the board, either board members or a board committee, in overseeing the executive director.

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

Yeah, I mean, I think one of the things that in assessing any kind of supervisor discipline best practices in the workplace there are certain hallmarks that we try to preach, right? Consistency, clear expectation. And then, really critically here, the one aspect that I want to talk about is having a formal process by which to assess performance of an executive director, right? The first part of that is delegating which board members on how we're going to go in assessing the performance of an executive director. And that can vary depending on the bylaws of a particular organization. But often what we see is a committee that is charged with that specific function—overseeing performance and setting expectations. That can be a committee that is designed specifically to accomplish that task. Or what we see more often is that falling within the executive committee of a particular organization.

Alex ([10:51](#)):

The other piece of it that I think it is important and often overlooked is developing a formal plan to assess the performance of the ED. And this goes back to really, that it falls on the board member to have a deep understanding of what's the organization's goals to come up with those key performance indicators or KPIs. So not only do we have a measurable set by which we can assess how the ED's doing relative to the expectation of the organization, but also that there's an understanding, clear communication, to the ED of what the board's expectations are. And then that both creates a documentation to the process if things are going to go down the line of performance, that we have a documented set of expectations and clear communication to the ED about what the board expects from him or her.

Lori ([11:49](#)):

Yeah, that makes a huge amount of sense, Alex. And one of the things that I often see on boards where I've served and also with regard to my clients, is for the board to have a process periodically in addition to feedback directly from the board, I think it's really important for the executive director to receive feedback ultimately from other stakeholders related to the organization. And what I often see is boards putting into place some kind of periodic 360 degree evaluation of the executive director that gives really thorough feedback to the executive director that comes not only from the board, but perhaps from the staff that reports to the executive director, and sometimes even from other stakeholders within the community who are important to the operations of the nonprofit. And so that's a process that board members might want to consider as they're considering what formal steps to put into place related to executive director evaluation.

Lori ([12:54](#)):

And it's really important that the board, as you said, I think give regular feedback to the executive director so that the executive director is getting advice, coaching, and information where things are going well, and also where things are not going as well, and the opportunity to really fix those areas that might be deficiencies in their performance. I think it's important for boards to know where they can get resources or information to be able to put such a process together. And sometimes the board has some HR expertise on it, and that's a great place to start. Often boards don't necessarily have that kind of expertise, and they may need to go to outside resources or consultants to talk about what the best process might be for their organization to give feedback to the executive director.

Sireesha ([13:52](#)):

So if we have a situation where a board has good communication with their executive director and they're executing on their duties of care and loyalty, and they have determined that there are potential performance issues with the executive director, what guidance, what suggestions do you have for a board who is in that situation?

Lori ([14:16](#)):

It's really important that, like with any other employee, you use a progressive disciplinary process and that you don't go from today we're having some problems with the executive director. We haven't discussed or documented anything about that performance, and now we're going to terminate his or her employment. You really want to have progressive discipline. You want to be issuing warnings just like you would with any other employee. You know, you might start with a verbal warning that's documented, and then move on to a more formal written warning if things are not going the way they should be going. But the executive director should be warned that there are deficiencies and issues that are happening. And it should never be a surprise if you get to the next level of your progressive discipline, because you've already discussed it with the executive director during that process.

Lori ([15:13](#)):

And then ultimately, I think a part of your progressive discipline process should be a very specific performance improvement plan that gives the executive director some time to improve, and where you have regular meetings to discuss any issues that are going on perhaps on a weekly basis, and whether the goals of the performance plan are being achieved. And I will mention that, at Pro Bono Partnership of Atlanta, we have a really excellent webcast that gives step-by-step instructions for how to create and implement a performance improvement plan. And I would highly recommend that any board members

who are considering doing that, take a look at that webcast I think it would be really valuable for them to look at it. And Alex, I don't know if you had any other thoughts about those topics?

Alex ([16:05](#)):

No, those are great points. Lori, I particularly like the concept about the 360 evaluations, right? And, and for the board members to be a part of this process, because a lot of times some boards rely exclusively on the ED to be the vehicle by which they're communicating with the rest of the organization or understanding what's going on in the organization and that somehow that filter sometimes doesn't paint a full picture of what's going on, or at least not in a sense that it gives you an ability to assess where the organization is. So being part of that process, not only for the executive director, but for the board members as well opens up this lens, right? And I know we're going to talk about legal risk down the road, but as you talk about the process and the progressive discipline you know, and fairness I think us as employment lawyers, and if you're familiar with the concept of employment at will, and people say, well, I don't have to be fair. I just, I can make a decision on it. And while that's true, if these become legal dispute disputes and goes to a jury, a jury's expectation is always, were you fair? Did you give that person clear communications by which they were expecting to adhere to? And did you adhere to what you said you were going to do in terms of expectations and disciplines? So all great points.

Sireesha ([17:35](#)):

Those are great guidelines for generally speaking, a good relationship between a board and executive director, but also a good reminder about the importance of progressive discipline. And for our listeners out there, Lori mentioned a resource to PIPs, and I will include a link to that in the episode page for this episode. But now Lori, Alex, let's talk about what a board should do if they have hopefully taken all of these steps, matters have not been resolved to the board satisfaction, and now they are considering termination. What are next steps?

Lori ([18:20](#)):

Yeah, and I think it's really important that the board consult with an attorney if they get to the point where they're contemplating a termination of their executive director. You really want to be sure that you've done a very good job of following your process for evaluation and discipline, and that you've documented what you've done and that it is a really well supported and well-reasoned decision. When you get to the point of actually making a decision to terminate the executive director, you really want to review and evaluate what you've done so far, make sure there aren't any gaps in the steps that you've taken, and make sure to some degree, I think it's very helpful to have sort of a third party to bounce things off of who is outside of the process and isn't quite as invested and involved in the emotions of what's going on in the process,

Lori ([19:21](#)):

who can give you an objective opinion about what the risks are based on the actions that you've taken so far, and the action that you plan to take going forward. And as I said before, when you get to the point of termination, you want to be sure that you're not causing a surprise. You're not you're not walking into a meeting with the executive director and the executive director is saying, I had no idea that this was happening or coming. You want to make sure you've been very thorough and careful in your communication, in your documentation so that everyone is sort of on the same page that this isn't working. And the executive director, while they may not agree that their employment should be terminated, will understand because of the prior conversations that have occurred. And there are also

some processes that need to be followed with regard to your board. And I think, Alex, you wanted to talk about some of that?

Alex ([20:21](#)):

Yeah, no, I do. But before that I can underscore — it resonates with me when you say the importance of seeking outside counsel that is outside the organization. Because obviously as an employment lawyer, having been a board member of a number of different nonprofit organizations, there's this temptation to come to a board member that has that expertise in asking him or her to be the person that's going to provide advice, and that creates issues you know, about attorney-client communication, expectations, conflict of interest, and the such that it's, I love the idea of what you're saying. That is how important it is to have that objectivity from a third party that is not directly involved in the organization.

Lori ([21:14](#)):

Alex, can I just mention— Also, I just want to be sure that those who are board members on this call understand that you know, if you are a Pro Bono Partnership of Atlanta client, you can reach out to your Pro Bono Partnership of Atlanta attorney without involving your executive director at any time when you need guidance or legal advice related to the organization. We represent your organization and not your executive director or any particular individual involved with the organization. So please don't hesitate to reach out to us if you need guidance and assistance. And Alex, sorry, too, I've jumped in there.

Alex ([21:55](#)):

No, no. It's a great resource and I hope that people do reach out.

Sireesha ([22:02](#)):

Alex, are there any additional considerations you would recommend for the board to consider before they inform the executive director of their decision to terminate?

Alex ([22:14](#)):

The process, right, and the formality of it. And the first and foremost is kind of going back to the bylaws, and if you're taking the decision, the difficult decision of separating the executive director from the organization, making sure you're doing that in the way that is designed by the governing documents about it. So that can be a vote that's recorded in a minutes on it. That's not my preference. My preference is to have it done by a board resolution, which there's documentation and discussion of not only the reasons, but also the ultimate vote and decision of the board. But then it's stepping back. You really have to kind of look at the impact of the separation from the ED of the organization and really kind of focuses on the needs of the organization and how we're going to transition.

Alex ([23:10](#)):

and the the vacuum that, that's going to leave. You know, that can be big picture of how that's going to impact the plans, the strategic goals of the organization or it can be more of the mundane of access to files and passwords and bank accounts and things like that, right? So the other piece of it is kind of thinking about it in terms of how are you going to transition to the period between the leadership of a current ED and, and the next steps until a new ED can be taken to place that might be colored through what the issues are with the ED. We're going to talk about the severance as one of the issues to take into account, but you can make almost like a transition agreement with the ED in which they stay for a

short period of time, even though they understand that their tenure there is going to not continue past a certain point and they can provide that transition.

Alex ([24:14](#)):

Obviously, that doesn't work if the performance issues aren't related to more day-to-day operations. And there are things that are more serious, such as you know, misconduct, embezzlement, violation of serious company policies in which case you do not want to have the person stay on for any transition period. But really kind of looking at those pieces and how am I going to get the organization from this current leadership until the next person can step in? And that may and often will require board members stepping into some critical roles, whether that be communicating transition with staff, it can deal with communications and transitions with key financial supporters and making sure that we're securing the financial wellbeing. Because anytime in changes in leadership, particularly if it's done involuntary way, that may cause donors to have some doubt about the future. So communicating with them to secure the financial backing and long-term health of the organization is going to be critical as well as within the board, making sure that those responsibilities aren't falling on a vague, "well the board needs to do this," but really to ensure accountability and effectiveness and communication is designating somebody who's going to have the key responsibility to do that.

Lori ([25:43](#)):

Right. And Alex, one thing to keep in mind as a board member is that it may be that a board member is the person, or several board members are the people, who step up and take over some of the responsibilities of the executive director. But another thing that I've often seen clients do is to appoint someone as an interim executive director. And that's really something you want to think through, if possible, before you let the executive director go. And you really want to know what your plan is going to be for someone to step in and take over those duties, because you don't want to leave your staff up in arms, your donors up in arms, and uncertainty about how the organization is going to run, as Alex said after the ED departs. And also bear in mind that sometimes you may want to bring in someone from outside to be your interim ED and have that person sort of standing by and ready to step in as soon as the termination occurs.

Lori ([26:44](#)):

Another thing that Alex just brought up, which is really important, is to think through how you're going to transition that executive director out of the organization and what you need to do to ensure that there's a smooth transition of, and of course, one part of that is determining how the business is going to transition and making sure you have all the information that you need such as passwords, access to bank accounts, access to online resources, things like that. But also you need to think through how you are exiting the executive director. So is there going to be some kind of severance pay or package that the executive director receives to help with that transition, or is that not something that you feel is appropriate in the circumstances? And that's definitely a decision you'll want to talk through with your attorney and outside counsel. And then—Alex, I don't know if you had any thoughts about that before we sort of transition to communication with everyone.

Alex ([27:49](#)):

Yeah, no, I think it, it definitely is an individualized decision. I mean, we advise clients on enter into severance agreement under different circumstances all the time, be it the nonprofit space or under commercial enterprises that we work with, right? It really is you have to consider the resources of the

organization. Are we having a situation where we think there is some legal risk? If we don't have a release obviously in any circumstances in which we are providing severance to the executive director or departing employee, it is always my preference that if we're going to do that, we obtain the release. It is something that Pro Bono Partnership of Atlanta can provide guidance or partner up the organization with outside counsel, that it can provide that agreement and effectuate whatever decision that the board thinks it's appropriate and—.

Lori ([28:49](#)):

Great. And I completely agree. I I, our clients are always trying to do the best thing for their employees, and they want to help and be as positive and nice as possible as they're carrying out these types of events, as they're terminating employees. But it is really important to have a release agreement if you're going to pay severance pay to a departing employee including, of course, your executive director or any other employee who you terminate from the workforce.

Sireesha ([29:21](#)):

So now let's talk about the termination meeting. What guidance can you share for board members as they prepare to tell the executive director that they are being terminated?

Lori ([29:33](#)):

To have a very good and clear plan for the discussion that you're going to have with that individual about the departure. You want to have a termination meeting that is sort of clear, cordial, but also decisive. You want it to be sort of short and sweet, we say. You want to think about a number of things as you're considering how to conduct that meeting. And you also want to be careful that you're very carefully maintaining the confidentiality of the decision until you're ready for communications to occur. So think about to whom you're disclosing your decisions. Think about the conversations that you're having, and try to be very deliberate in your planning for when communication is going to happen and how it's going to happen. And get a plan in place for that communication, not only with the executive director, but with the other stakeholders and staff and third parties, because you'll want to be sure that some of those conversations happen somewhat simultaneously.

Lori ([30:41](#)):

You know, as you're meeting with the executive director, you're going to want to make sure that you're addressing any information or systems that you need to have access to. But then also you want to make sure that as sort of as soon as that conversation happens, you know what you're going to do with regard to communicating with your staff and how you know they're going to receive that informa—what information you can share with them and the news that the executive director is departing. With regard to your meeting with the executive director, consider a number of factors. Who should attend the meeting. I always advise that more than one person deliver that news to the executive director. So, it could be two board members. It could be, I don't know if you have anybody on staff, your nonprofit who would be appropriately placed in, in a management level to be privy to the decision like an HR expert.

Lori ([31:41](#)):

If you do, it's possible you could have that person in the meeting, but that might not be appropriate. So think through that carefully. And then consider which board members it should be. If you're going to have two board members present at the meeting, or maybe even more than two. Think about where the meeting should occur, when the meeting should occur. What's the reaction of this person going to

be to having this meeting? Should it be in the middle of the day in your office? Should it be at the end of the day? Should it be somewhere else outside of your office? What documents do you need to have in place for the meeting? Obviously, you're going to want to have any separation documents, the release agreement, you need to have a Georgia separation notice. You need to know when the final paycheck is going to be provided.

Lori ([32:30](#)):

You need to know what your transition plan is. Is this person going to stay, and how are you going to present that to the executive director? And then how are you going to present the information about whatever the severance package is that's being provided to the executive director. You also want to think through what happens to this person's benefits after the termination occurs, and you want to be able to communicate that. I think it's really important to draft a script for that termination meeting and to stick to it as much as possible. It should be a very brief and very professional meeting, and you want to carefully think through the points that you want to make as you're communicating your decision to the executive director. You want to be clear what the decision is and that the decision is final and it's not going to be reconsidered. And you want to be very clear with the executive director about what they need to do next and how much time they have to do it, such as signing the agreement and transitioning the things that you need them to transition.

Alex ([33:40](#)):

Those are great tips, Lori, because particularly as employment lawyers, we see this through the prism of when things go badly, right, and result in litigation. And, a lot of times when we're trying to advise clients we talked about placing them in a position that if they are sued, they can defend that lawsuit effectively, right? Which is important, but often more important than that is you know, don't be in a position to be sued in the first place. So really being in a position not to be sued in the first place is important, and I think the steps you outlined really help in that regard, because when we don't have that clear communication, that respectful communication, you create that sense of anger towards your organization because people feel like they weren't treated fairly. And as we often say, what do angry people do?

Alex ([34:34](#)):

Angry people sue. So going through all the steps, I think it's really important to the other piece, transition. I think as you're thinking about this there are two roles. The, the board, and I think we touched upon briefly, but to really be con— more focused on it, is designating you know, that that board member that is going to be the primary contact with the staff being one, and then with outside, external stakeholders as well. Often with the staffs with, as we designed handbooks, how we often address with nonprofits in terms of receiving complaints of harassment or discrimination, for example, because we want staff to have an avenue to come to someone to raise concerns about the executive director, so we don't always make the executive director the person who's solely responsible, so we want to make sure accountability.

Alex ([35:31](#)):

So often the chair of the board is identified under nonprofits' policies as having some responsibility or oversight about receiving complaints, communications with the staff that depending on who the chair is, that may or may not be the right person to have that conversation. Coming back to the first point it really underscores the need for board members to be involved in operational issues to have somebody

who at least has the knowledge and relationship with the staff that can ease the transition within the nonprofit. And then again, having somebody who, depending on who they are can facilitate conversations with outside stakeholders, which it can include financial backers, but as well as strategic partners other organizations that the nonprofit you know, partners with in terms of delivering services for client community to make sure that we're minimizing disrupting the service that, that the organization has provided to its, its clients.

Sireesha ([36:35](#)):

Alex and Lori, thank you so much for answering my questions and walking through the legal considerations for a board navigating conflict and termination of an ED. No board member ever wants to go through this, but armed with the guidance you have shared in this episode, it will make the process less daunting for board members. Lori and Alex, thanks for sharing your time and expertise with us today.

Alex ([37:02](#)):

Thank you for having us. Thanks, Sireesha.

Sireesha ([37:06](#)):

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.