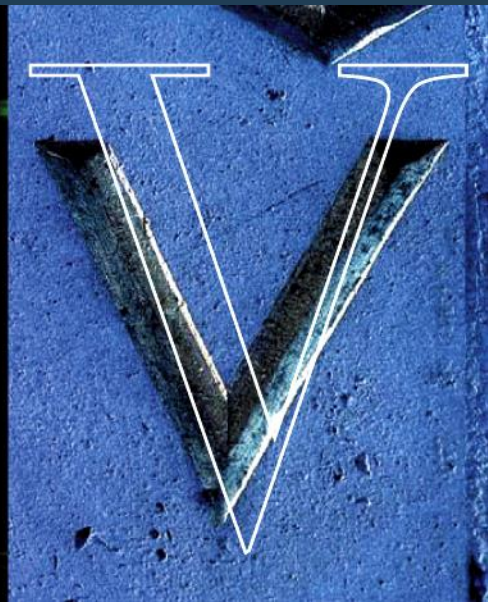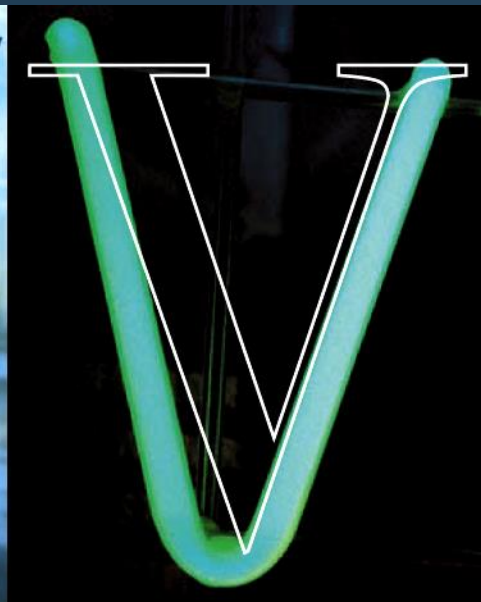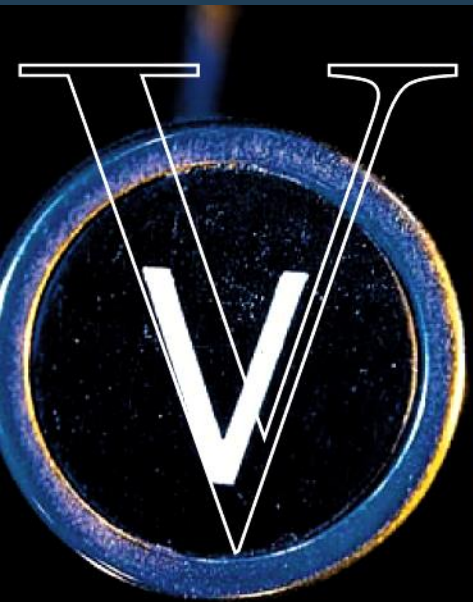# VENABLE® LLP

Ensuring the proper role of the board: hardwiring good governance into board bylaws

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What is Good Governance?

"Planning for the School your Grandchildren will attend"

The Rest is Commentary

Overview of session

- Based on working with schools nationwide
- Substantial increase in legal claims
- Matters with un–anticipated legal implications
  - custody battles
  - confidentiality of board
- Causes:
  - economic times
    - higher tuitions & expectations (parents)
    - concern for job (employees & parents)
  - new legislation & increased enforcement
  - technology (good and bad)
  - general increase in litigation
  - poor governance
  - too many parent lawyers and parents who practice without a license

Top legal issues: board actions

- Breach of fiduciary duty

- Confidentiality

- Actions outside of scope of duty

- Governance documents
  - By-laws
  - Conflict of interest
  - Charter/Articles of Incorporation
  - Whistle Blower
  - Document Ret/Destruction

- Intermediate Sanctions

- Committees for risk management oversight
  - Executive committee
  - Audit committee
  - Personnel Committee
  - Investment Committee

Board's fiduciary duty

- Authority to bind school
  - who can sign and amount limits for multiple signatures
  - what goes before board/finance committee

- Endowment investments
  - compliance with investment policy

- Audit and 990 completion
  - how is 990 presented to board
  - how is audit presented to board

- Retirement plans and oversight

- Review of budget
  - passing balance budget

- Assuming debt

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Board's confidentiality obligation

- Deliberations and exchange of views essential
  - process requires full and honest discussion
    - chilling effect if question of confidentiality

- Board = speak with one voice; appear unified
  - trustees = support board decision or leave board

- Avoid "public" discussions of issues before the board
  - car pool line; spouse; supporters of "your" position

- Breach of confidentiality
  - breach of privacy (student/employee issue)
  - negative impact on decision (appearance of uncertainty)
  - personal liability (cause damage to school)
  - negative reaction by community (reduction in pledges)

Actions outside of scope of duty

- Board responsibility
  - establishes policy; creates strategic plan for the school
  - makes larger policy decisions
  - **<u>supports head of school</u>**

- Administration responsibility
  - responsible for daily operations of school
  - implements boards policy

- Board operating in administration's arena
  - legal claims by heads of school
    - prevents head from performing job
  - legal claims by employees
    - trustees spoke in behalf of administration
    - retaliation for failure to appease trustee

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Intermediate sanctions

- Method for review of compensation of head, business manager and others

- Avoid payment of excess benefit

- Review directly or by board establishing a committee

- Compensation committee
  - ensures members have no conflict of interest
  - selects comparable schools
  - collects comparable remuneration of similarly situated professionals (more than just salary)
  - considers information
  - establishes remuneration
  - documents process

- Presentation to board
  - general vs detail

Conflict of interest policy

- Written policy
- Formally adopted by board
- Signed by trustees and head annually
  - perhaps others
- Create disclosure statement
- Process for disclosing conflicts
- Process for vetting conflict
- Include tracking system
- Confirm tracking in board resolutions
- Referenced in 990

By-laws - general

- Review regularly to ensure compliance
  - Board's actions must be consistent with by-laws
  - Failure to comply with by-laws invalidates boards' actions
    - proxy vote not provided for in by-laws
    - e-mail notification of board meetings
- Use by-laws as good governance foundation
  - Consider how board wants to act as an entity
  - What is the board's culture
    - transparency?
    - commitment to diversity?
    - ability to address issues?
    - level of "democracy"?
    - expectations of board service?

Format for selection of board members

- Governance committee
  - Who appoints the committee
  - Same system as other committees?
  - Former chair transitions to Committee Chair

- Governance vs Committee on trustees
  - Role and responsibilities
    - Selection of trustees
    - Selection of officers
    - Review of trustees
    - Removal of trustees
      - receives and investigates complaints, reports to board, makes recommendation
      - TRUSTEE LEAVES DURING DELIBERATION

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selection of board members

- Trustees vs. Directors

- Number of Trustees on Board

- Selection of board members
  - Fixed skills or open spots
    - Design for needs of board
  - Who selects the candidates
    - Governance Committee, board in general or community
    - Level of Head of School participation
    - Can community make suggestions?
  - Interview process and vetting
    - Is there an interview process, who performs
  - Presentation to the board

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voting and term limits

- Voting for board members
  - If membership or community involvement
    - One vote/family
  - Slate vs. individual nominees
  - Nominations from the board at meeting
  - Percentage vote needed

- Rotating terms
  - % of trustees that roll off each year

- Term limits of trustees
  - Years per term
  - # of terms can serve
  - Break between terms
  - Honorary trustees

leadership

- Board chair and other officers
  - Chair
    - unlimited vs. fixed term
    - 2 or 3 years? 1 year with renewal?
    - Who selects? Board, Governance committee?
    - Succession planning
      - Vice chair becomes chair?
  - Other officers
    - What positions exist?
      - Secretary, vice chair, treasurer,
    - Term limits?
    - Does term suspend during service
    - Can term extend if in leadership role

votes, attendance & notice

- Percentage of votes needed for various decisions
  - What decisions are most vs. least important
  - Votes for:
    - removing trustee, employing and terminating head
  - Not established default to state law or Robert's rules

- Attendance
  - Meeting by phone or skype
  - Consequence of not attendance

- How are votes allowed
  - By proxy
  - Email Votes

- Notice to trustees
  - By email, letter, phone
  - Emergency meeting rules

committees

- Committees
  - What committees established
  - Creation of new committee?
    - Who can establish, what is needed to establish
  - Role of each committee
- Executive committee
  - Decisions between meetings
  - Regular meetings
  - With head of school
  - Creation of agenda
  - Plans for the year
- Head's committee
  - Evaluation of Head
  - Transition for new head
  - Work with executive coach

other issues

- Executive sessions
  - Standing session at end of each board meeting
  - With/without head of school

- Head of school
  - Selection and review
  - Method for establishing compensation
    - Intermediate sanctions obligations
    - 990 presentation to board

- Directors and Officers insurance and indemnification
  - Amount of coverage?

- Make up of board
  - Faculty? Student? Alumni officer? PTA officer? Non-parents? Other head of school?

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Policies

- Charter and articles of incorporation

- Whistle blower policy

- Document destruction and retention policy

- Intermediate Sanctions Policy

- Audit Policy

- Investment Policy

- Conflict of Interest Policy
  - Process for vetting conflict
  - Disclosure of conflict
  - Annual execution by trustees, head and cfo

Charter and articles of incorporation

- Establishes school as legal entity
  - Do you know where your articles are?
- Review regularly
  - Check state filing
  - Document consistent with board modifications/amendments
- Charter or articles in "forfeiture"
  - Actions of board invalid
    - board acts without authority
  - School name can be taken
  - Loans and or financing in jeopardy
- JEPORDIZE 501 (c)(3) status

Whistle blower policy

- Ensures protection of employees who report financial impropriety from retaliation

- Care be taken to limit extent of reporting topics
  - Only financial impropriety

- Consider who accepts and considers complaints
  - Audit committee
  - Finance committee

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Document retention and destruction policy

- Policy outlining how documents are maintained and destroyed

- Important for litigation
  - Once litigation filed documents must be kept
- Assists in litigation filed against school
- Assists in subpoena by parents
- Ensures maintenance of necessary documents
- Consider all documents including
  - Financial aid, development, application
- Consider all parties at school with documents

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