

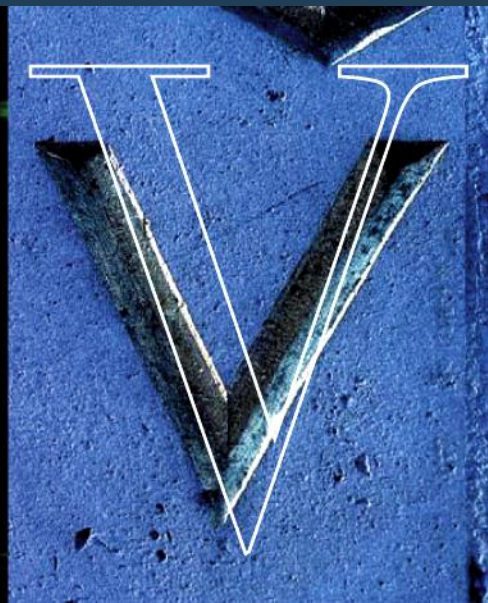
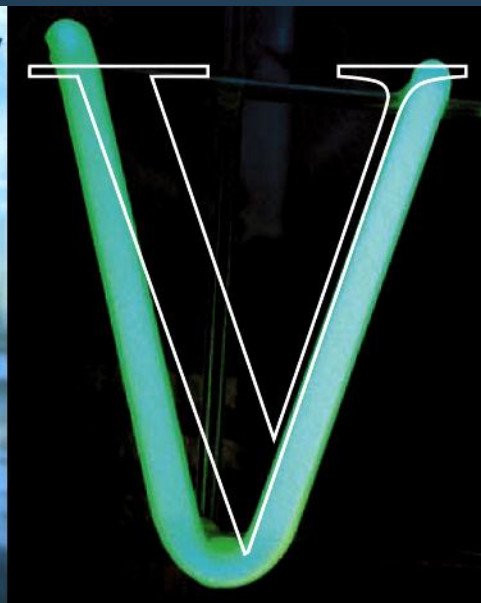
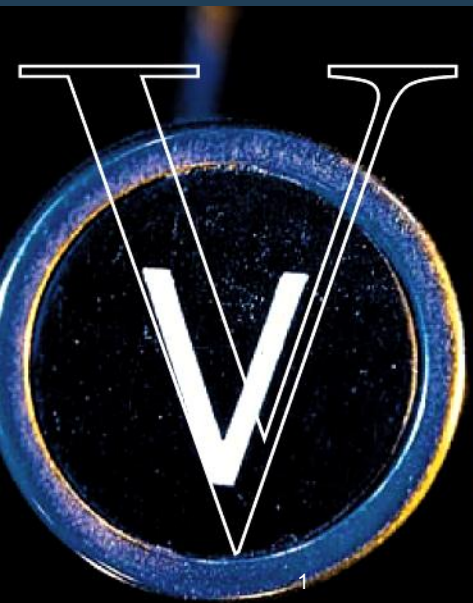
Charity Boards – Ethical Considerations under the Microscope

Robert L. Waldman

Venable LLP

410-244-7499

rlwaldman@Venable.com



A new attitude towards charitable organizations stemming from:

- Corporate scandals such as Enron
- A new view of advisers – Arthur Andersen
- Highly publicized scandals involving nonprofits
- Sarbanes - Oxley



Who oversees charities

- Board of Directors/Trustees
- Officers (Paid vs. Volunteer)
- Employees
- Federal Government – IRS
- State Government – Attorney General, Secretary of State
- The Public



Rights and Responsibilities of Board Members

- Two Duties
 - Duty of Care
 - Duty of Loyalty



Duty of Care

- Informed, good faith decisions
- Follow procedural formalities
- Accurate minutes
 - Record dissents (by name or number)
 - Record votes
 - No unnecessary or irrelevant information
- Regular attendance at Board and committee meetings
- Board members should be familiar with the corporation's, purposes, charter and bylaws



Duty of Care (continued)

- Be clear who has check writing and other signature authority
- Committees should report to Board
- Can rely on reports and consultants, if reliable
- Monitor investments/ investment policy
 - Prudent Investor Rule
 - UPMIFA includes factors to consider



Duty of Loyalty

- Act with undivided allegiance
- Disclosure of conflicts of interest
- Approval by disinterested majority
- Adopt conflict of interest policy
- Corporate opportunity doctrine



Duty of Loyalty (continued)

- Confidentiality
 - Charity's business
 - Board information
 - Donor information



Director Liability

- Sources of Liability
 - To organization itself – breach of fiduciary duty
 - Third party suits
 - Government suits



Potential Areas of Liability

- Personal Injury
- Libel and Slander
 - Board Minutes
 - Employee terminations
 - Publications
- Compliance with restricted gifts
 - Princeton sued for misusing gift to prepare graduate students for careers in foreign service
 - Johns Hopkins dispute over development of farm property
 - Ipswich public schools – sale of property in deviation from terms of a 350 year-old charitable trust that provided “sayd land not to bee sould or wasted for euer.”



Potential Areas of Liability

- Copyright, trademark and patent infringement
- Work place discrimination
- Environmental
- Creditor Suits
- International Philanthropy – FCPA, OFAC, AML



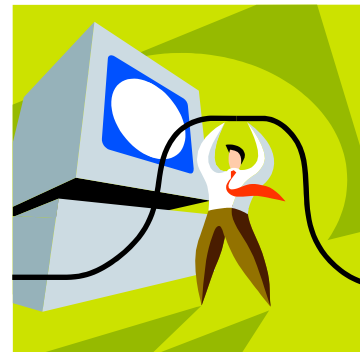
Liability Protection

- Insurance (D&O, Property)
 - Check coverage for exclusions (employment, ERISA, libel)
 - Cost of defense
- Corporate protection (Use of subsidiaries)
- Charitable Immunity
- Volunteer protection acts (State and Federal)
- Indemnification provisions in corporate documents



How does the IRS regulate?

- Form 990 reporting
 - Indicates compensation
 - Related party transactions
 - Board review of 990
- Disclosure rules (applies to tax returns, exemption applications)
- Charitable substantiation rules (receipts)
- Audits



Intermediate Sanctions

- Applies to Excess Business Transactions (including compensation arrangements) – transactions with “insiders”
- 25% tax on the self-dealer (200% if not corrected)
- 10% tax on the Board (up to \$20,000)
- 3 part test for presumption of innocence
 - Transaction approved by disinterested Board
 - Rely on independent valuation
 - Adequate documentation/minutes



Role of State

- Charitable solicitation registration
- Attorney General protects public interest



How public polices

- Stops giving



What's coming

- Sarbanes-Oxley
- Best Practices
 - More aggressive state enforcement
 - California Integrity Act
 - More IRS audits
- Industry self-policing

