

Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices

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Venable LLP

Washington, DC

Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

George E. Constantine, III, Esq., Venable LLP

Michael F. Curtin, Jr., DC Central Kitchen



Presentation



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Wednesday, November 19, 2014, 12:30 p.m. – 2:00 p.m. ET

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Agenda

- Introductions
- Legal and Practical Considerations
 - The Basics—Governance Legal Issues
 - Roles and Responsibilities of Directors and Other Leaders
- Ten Tips on Effective Governance and Board Relationships
- Conclusion



Legal and Practical Considerations

Governance Legal Issues

- Governance basics
 - Nonprofit vs. tax-exempt
 - Corporate protection

- Nonprofit corporate hierarchy of authority
 - Nonprofit corporate law (statute and common law)
 - Articles of incorporation
 - Bylaws
 - Policies



Governance Legal Issues

- Board rules of the road
 - Board is generally only permitted to act in a meeting (but UWC, telephone meetings)
 - State of incorporation governs, regardless of location of headquarters (but note foreign corporation filings)



Governance Legal Issues

- Governance Hierarchy
 - Board of directors
 - Executive committee
 - Other committees of the board
 - Advisory committees, task forces, etc.
 - What about staff?
 - What about officers?
 - What about individual directors?



Governance Legal Issues

- Governance legal duties
 - Duty of care
 - Duty of loyalty
 - Duty of obedience



Ten Tips on Effective Governance and Board Relationships

1. Manage Expectations at the Outset

- Board member roles and responsibilities
- Training and orientation



2. Establish Partnership with Board Chair

- Ideal relationship is one of mutual respect and support
- Open communications—game plan for each meeting



3. Governing Documents Should Be Flexible, Understandable

- Bylaws cannot address every possible eventuality
- Keep bylaws clear and easy to read
- Use policies to help cover gaps



4. Choose Your Battles

- Line between “strategy and mission” and “implementation” is not always clear
- Recognize different approaches and be patient



5. Don't Tolerate Abuses

- Actions in conflict of interest, contrary to the best interests of the corporation
- Speaking/signing on behalf of the organization when not permitted
- Splinter groups and whispers



6. Put Directors in the Best Position to Do Their Jobs

- Materials should be clear, provided well in advance, and tailored to the audience.
- Dashboards, graphs, etc.
- Regular strategic planning and “big picture” exercises
- Time for discussion



7. Attend to the “Farm System”

- Committees, task forces, and other volunteer opportunities
- Note attendance, contributions, willingness to roll up sleeves
- Establish policies to reward contributors with favorable consideration for board openings



8. Make It Worth Their While

- No compensation, but plenty other intangible benefits are possible
- Recognition and visibility



9. Seek Full Participation

- Work with board chair to manage discussion at board meetings
- Encourage committee, task team leadership and participation
- (Gently) manage/regulate the extroverts



10. No Surprises, Please

- “This is the first I’m hearing of this...”
- Give board the chance to make mid-course corrections
- Have a well-thought-out plan for resolution



Questions?

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Speaker Biographies





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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, one of only eight in the 2013 rankings, and one of only nine in the 2014 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-15 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014 edition of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
 Air Conditioning Contractors of America
 Airlines for America
 American Academy of Physician Assistants
 American Alliance of Museums
 American Association for the Advancement of Science
 American Bar Association
 American Bureau of Shipping
 American Cancer Society
 American College of Radiology
 American Friends of Yahad in Unum
 American Institute of Architects
 American Institute of Certified Public Accountants

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American Society of Association Executives

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American Society for Microbiology
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American Society of Association Executives
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Association for Healthcare Philanthropy
Association for Talent Development
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Association of Private Sector Colleges and Universities
Auto Care Association
Biotechnology Industry Organization
Brookings Institution
Carbon War Room
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Design-Build Institute of America
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Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
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Goodwill Industries International
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Human Rights Campaign
Independent Insurance Agents and Brokers of America
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Jazz at Lincoln Center
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Trust for Architectural Easements
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U.S. Chamber of Commerce
United Nations High Commissioner for Refugees
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ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.



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EDUCATION

J.D., University of Maryland School of Law, 1998

Recipient, Order of the Coif law school honors society

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George Constantine concentrates his practice exclusively on providing legal counseling to and advocacy for nonprofit organizations, including trade associations, professional societies, advocacy groups, charities, and other entities. He has extensive experience with many of the major legal issues affecting nonprofit organizations, including contracts, tax, antitrust, governance, and political activity matters.

Mr. Constantine has represented Internal Revenue Code § 501(c)(3), 501(c)(4) and 501(c)(6) clients on a number of critical tax-exemption matters, including representing clients that are undergoing Internal Revenue Service examinations challenging their exempt status; he has assisted associations and other nonprofit organizations going through mergers, consolidations, joint ventures, and dissolutions; and he has provided ongoing counseling on numerous transactional and governance matters that are unique to nonprofit organizations.

Mr. Constantine serves on the Legal Section Council of the American Society of Association Executives. In addition, Mr. Constantine is the former Staff Counsel of the American Society of Association Executives (ASAE), the 25,000-member national society for trade and professional association executives. As ASAE's sole staff attorney, he gained in-depth experience with the many legal issues facing associations. He also represented ASAE's interests before Congress and federal agencies. Mr. Constantine co-chairs Venable's Regulatory Practice Group.

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RECENT PUBLICATIONS

Mr. Constantine is the author of numerous articles regarding legal issues affecting associations and other nonprofit organizations published by ASAE, the Greater Washington Society of Association Executives, the American Chamber of Commerce Executives, the New York Society of Association Executives, and the Texas Society of Association Executives.

- June 24, 2014, Multi-Entity Organizations
- March 27, 2014, Top Five Nonprofit Legal Issues of the Past Year
- February 2014, Key House Committee Chairman Releases Long-Awaited Tax Reform Overhaul: Major Changes Proposed for Nonprofits
- February 2014, Informing Regulators When You Alter Your Mission
- January 2014, Is Your Nonprofit Selling Goods Online? U.S. Supreme Court Provides Reminder of Potential Sales Tax Liability

RECENT SPEAKING ENGAGEMENTS

Mr. Constantine is a frequent lecturer on association and tax-exemption organization legal topics, including corporate and tax issues.

- November 19, 2014, Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices
- October 2, 2014, Second Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- August 11, 2014, "Association Law Review for Aspiring CAEs" at the 2014 ASAE Annual Meeting & Exposition
- August 10, 2014, "Comparing Compensation: Effective Approaches to Benchmarking Pay and Perks" at the 2014 ASAE Annual Meeting & Exposition
- June 24, 2014, "Multi-Entity Organizations" for the Greater Washington Society of CPAs (GWSCPA)
- June 3, 2014, "The Impossible NO (A Panel on Getting Funders to YES)" at the 2014 Nonprofit Empowerment Summit hosted by Raffa, PC
- April 25, 2014, "Trade Association Update" for Georgetown Law's Representing and Managing Tax-Exempt Organizations CLE
- April 15, 2014, "Certified Association Executive (CAE) Prep Course Webinar," American Society of Association Executives



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Mike Curtin is CEO of DC Central Kitchen, a nationally recognized "community kitchen" that recycles food from around Washington, DC and uses it as a tool to train unemployed adults to develop work skills—while providing thousands of meals for local services agencies in the process. Drawing on his experiences as an entrepreneur in the restaurant business, Mr. Curtin has spent significant time expanding the Kitchen's revenue-generating social enterprise initiatives. Under his leadership, DC Central Kitchen's Fresh Start Catering has expanded from traditional catering opportunities to include contracts to provide locally-sourced, scratch-cooked meals to schools in DC. Since 2010, DC Central Kitchen has generated over \$20 million from these businesses, and social enterprise now accounts for roughly 65% of the Kitchen's total operating budget. Because of these and many other innovative social service programs, the Kitchen now employs over 130 people, approximately 40% of whom are graduates of the Kitchen's nationally recognized Culinary Job Training Program.

In order to secure sustainable, healthy food for the Kitchen, Mr. Curtin has developed strategic partnerships to purchase unclassified produce from local farms. This initiative has saved money and employed more graduates of the Kitchen's Culinary Job Training Program. The Kitchen's new focus on procuring local produce garnered a Mayor's Environmental Excellence Award and the Washington Business Journal's Green Business Award for Innovation.

Mr. Curtin is a Chair Emeritus of the Restaurant Association Metropolitan Washington and a board member for The Common Market in Philadelphia. He also is on the Advisory Board of DC Greens and Catalyst Kitchens, the Leadership Council of DC Hunger Solutions, and an Advisory Board member for the Center for Health and the Global Environment at Harvard Medical School.

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THE 15 MOST COMMON NONPROFIT BYLAW PITFALLS: HOW TO AVOID THE TRAPS

Although it might not be the document most commonly on the minds of nonprofit directors, officers or staff, bylaws form the backbone of governance for nonprofit organizations; they are a very important document. When nonprofits need to consult their bylaws, such as a membership dispute, concern about an errant director, meeting notice, or voting issue arises, they are often surprised to find that the bylaws are outdated, do not conform to the law, or do not reflect the organization's current practices. Regular bylaw reviews are key to ensure both that the organization is compliant with the state of the law and that the bylaws reflect enough flexibility to accommodate the manner in which the organization's operates today.

1. Understand your state's nonprofit corporation law.

A state's nonprofit corporation statute – a nonprofit is governed by the statute in place in its state of incorporation, regardless of where the organization is located – supersedes any provision of the organization's bylaws. The nonprofit corporation act will contain default rules for areas that the bylaws might not address, such as specifying the minimum number needed for a quorum for a director or member vote; it will also contain prohibitions, such as not permitting directors to vote by proxy, among other provisions.

Organizations should review the default provisions in their state's nonprofit corporation act and determine if there are any defaults the organization would want to override by including a specific provision in the bylaws (for example, if the organization wanted to establish a lower quorum for a membership vote than the default number). Nonprofits also need to be sure that their bylaws do not permit practices that are prohibited by the state nonprofit corporation act;. If so, those bylaw provisions will have no force or effect, and any actions taken pursuant to those provisions will be null and void. In addition, because nonprofit corporation statutes vary from state to state, it is important when drafting new bylaws to review the relevant state requirements as opposed to simply using another organization's bylaws as a base.

2. Make sure your bylaws are consistent with other regulatory documents.

Be sure to double-check your bylaws for both internal consistency as well as external consistency (including keeping in line with the articles of incorporation, the state's nonprofit corporation act, and any policy or governance manual). Note that if your organization is governed or licensed by another state agency, such as a state department of education or department of banking, other state laws might provide additional mandatory bylaw provisions for your organization.

3. Be sure to address all foreseeable scenarios.

Sometimes, for example, bylaws will contain a provision about removing a board member, but leave out any provision covering how that position gets filled upon removal. It is important to take the time to carefully walk through all of the "what-if" scenarios to avoid holes in the bylaws.

4. Populate your bylaw committee with an accurate cross-section of your organization.

Use of a bylaw committee is one of the most common ways nonprofit organizations go about the bylaw review and amendment process. If the bylaw committee is comprised of individuals that do not represent a full cross-section of your organization's membership or constituency, they may find some opposition

when sending bylaws to the full membership for approval (for nonprofits with voting members) or to the full board of directors. By creating a bylaw committee that fully reflects your organization's population, you are less likely to run into this problem, and you will have more success vetting potential issues early on in the process.

5. Coordinate the actions of your bylaw committee with legal advice.

When rewriting bylaws, almost inevitably, a legal adviser will be able to spot inconsistencies and potential problems. Try to coordinate with legal counsel from the beginning of your process, not after all of the committee's work has been done, when it can be very difficult to start over.

6. Create bylaws that reflect the appropriate political climate of your organization.

Bylaws should reflect the appropriate balance of power among the members (if there are members), the board of directors, and the executive committee (or other bodies within the organization's governance structure, such as a house of delegates, key committees, or other structures). Some newer nonprofit corporation acts allow for more flexible governance arrangements, such as the creation of "designated bodies," which provide another option for spreading out the balance of power. Designated bodies, which hold some, but not all, of the power of members or boards of directors, can be particularly helpful in more parliamentary style organizations. Depending on the state in which your organization is incorporated, there could be several options for the disbursement of governance responsibilities; carefully weigh all available options.

7. Keep your bylaws current.

Frequently, organizations inherit bylaws that have been patch-worked together over time. Thus, nonprofits sometimes end up with antiquated bylaws that are not appropriate for how the organization functions today. Sometimes the best solution is to scrap the original bylaws and start over from scratch, using a good, proven model provided by legal counsel or others as a starting point.

8. Keep your bylaws flexible.

How the organization functions today may not be exactly the same as it will need to function in the future. Building flexibility into the bylaws, such as including a range for the exact number of board members and allowing the board to designate additional officers not named in the bylaws, can help the organization moving forward. Bylaws should provide an outline of the governance structure but also should allow some flexibility if and when changes are needed in the future.

9. Reserve the details for policies, not bylaws.

Some details are more appropriately placed in board-approved policies rather than in the bylaws. These often include items such as membership criteria, membership dues determinations, and the operation of committees. It also is helpful to place all board-approved policies into a single physical and/or electronic policy manual. Bylaws generally should be a relatively concise and easy-to-navigate document, leaving the details to policies, which can be more easily revised in the future. This way, bylaws will not need regular amendment.

10. Ensure that your purposes clause reflects your organization today.

This is actually a tax-exemption issue, first and foremost. The IRS generally will refer, among other things, to the purposes clause in a tax-exempt organization's articles of incorporation to determine what is a related versus an unrelated activity. Most nonprofits also have a purposes clause contained near the beginning of their bylaws, and many times that purposes clause will differ, in one or more material respects, from the purposes clause in the articles of incorporation, the latter of which is controlling. The two clauses should be fully consistent and, therefore, an organization might want to include a clause in the bylaws which simply refers to the purposes clause as written in the articles of incorporation. In addition, the purposes clause in the articles of incorporation should be reviewed, keeping in mind that a clause drafted 30 or more years ago may not accurately or fully reflect your organization today.

11. Closely review the meeting and voting procedures for members and directors.

This is an area where we commonly see bylaw provisions that are inconsistent with the governing state law. Nonprofits should closely review how members (if there are voting members) and directors are permitted to meet and vote under the relevant state law. Keep in mind that many state nonprofit corporation acts do not allow directors to vote by proxy, and instead require a director to attend the meeting in-person or via telephone to be counted as present at the meeting for purposes of quorum and voting. Also, although the trend is certainly changing, some state nonprofit corporation statutes still do not allow members to vote outside a meeting unless by unanimous written consent (with the written approval of all members); even for the many state statutes that do permit member voting by email, sometimes specific procedures or prerequisites are prescribed.

12. Look at committee composition.

Some state nonprofit corporation acts are very specific as to who can serve on a committee of the board and how such persons may be appointed. For example, the District of Columbia and several states require that “committees of the board” only be made up of directors and that those committee members must be appointed by at least a majority of *all* directors in office (as opposed to a majority of those directors present at a meeting at which a quorum is present, which often can be a lesser number). This requirement applies to those committees exercising the power of the board, such as an executive committee or an audit committee. In these jurisdictions, other committees not exercising the power of the board, such as fundraising committees or nominating committees, can have committee members who are not directors.

13. Pay attention to the approval process.

For organizations with voting members, amendments to the bylaws will almost always require member approval (check the applicable nonprofit corporate statute for the specific requirements). Approval also may be required by the board of directors. Many times, written notice of the proposed amendments will be required to be given a certain number of days in advance of the meeting. It is important to note the required timeline at the beginning of the process, so that your organization does not go through the entire bylaw review process only to realize it will be another year before the required membership approval can be obtained due to failure to adhere to the minimum notice period.

14. Do not make your bylaws too difficult to amend.

Some bylaws may require that amendments be approved by a two-thirds vote of the membership (for organizations with voting members), or contain other super-majority or burdensome requirements for approval. Focus on creating a bylaw amendment provision and process that is not overly difficult to execute and that is appropriate for the history, culture, and politics of your organization.

15. Keep a pulse on the bylaws.

After engaging in a bylaw amendment process, make sure that your bylaws do not become dusty. Some nonprofits maintain a standing bylaws committee comprised of board members that can speak up at meetings when issues implicating the bylaws are discussed. Other organizations place the bylaws as an agenda item at each annual meeting of the board of directors, to prompt consideration. At the same time, as discussed above, well-drafted bylaws should be flexible enough to not require regular amendment, and constant deliberation over revising the bylaws generally is unhealthy, unproductive, and diverts attention from the more pressing business and issues facing the organization.

* * * * *

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This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

ARTICLES

November 1, 1999

LEGAL DUTIES OF ASSOCIATION BOARD MEMBERS

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Association officers, directors, committee members, and others involved in the association's governance structure are often unclear as to their roles and responsibilities. And for good reason - some rights and obligations are determined by law, others by the association's articles of incorporation and bylaws, and still others by written policies and procedures or more informal arrangements. The following article is designed to clarify the delegation of duties, explain the fiduciary duties imposed by law on association officers and directors, and suggest ways to protect volunteer leaders from personal liability.

Roles and Responsibilities.

The *board of directors* is the governing body of the association, responsible for the ultimate direction of the management of the affairs of the organization. The board is responsible for *policymaking*, while employees (and to a certain extent, officers) are responsible for executing *day-to-day management* to implement board-made policy. However, the ultimate legal responsibility for the actions (and inactions) of the association rests with the board.

The board can act legally only by consensus (majority vote of a quorum in most cases) and only at a *duly constituted and conducted meeting*, or by *unanimous written consent* (in most states, boards cannot act by mail, fax or electronic ballot). The board may delegate authority to act on its behalf to others such as committees, but, in such cases, the board is still legally responsible for any actions taken by the committees or persons to whom it delegates authority. An *individual* board member has no individual management authority simply by virtue of being a member of the board. However, the board may delegate additional authority to a board member such as when it appoints board members to committees. In a similar fashion, an *officer* has only the management authority specifically delegated in the bylaws or by the board (although the delegated authority can be general and broad).

Committees have no management authority except for that delegated to them by the bylaws or by the board. Furthermore, under most state nonprofit corporation laws, certain functions may not be delegated by the board to committees. For example, in many states, the board may not delegate to committees the power to elect officers, fill vacancies on the board or any of its committees, amend the bylaws, or approve a plan of merger or dissolution.

Employees have no management authority except that specifically delegated to them in the bylaws or by the board. For example, most associations' bylaws delegate to the chief staff executive the responsibility for the day-to-day operations of the association's office(s), including the responsibility to hire, train, supervise, coordinate, and terminate the professional staff of the association, as well as the responsibility for all staffing and salary administration within guidelines established by the board.

Members have no management authority, as such authority is held by the board of directors. However, state nonprofit corporation laws generally reserve to members the right to remove officers and directors and to amend the association's articles of incorporation, among other rights. Under some associations' bylaws, certain matters, such as the amendment of the bylaws or the election of officers and directors, must be submitted to the membership for a vote. However, most other matters generally are not submitted to the full membership, but rather are handled by the board, one or more of its committees, or the officers or employees of the association.

Fiduciary Duty.

Those in positions of responsibility and authority in the governance structure of an association - both volunteers who serve without compensation and employed staff - have a fiduciary duty to the organization, including duties of care, loyalty and obedience. In short, this means they are required to act *reasonably, prudently and in the best interests of the organization*, to *avoid negligence and fraud*, and to *avoid conflicts of interest*. In the event that the fiduciary duties of care, loyalty or obedience are

breached, the individual breaching the duty is potentially liable to the association for any damages caused to the association as a result of the breach. This fiduciary duty is a duty to the association as a whole; even those who only serve on a particular committee or task force owe the fiduciary obligation to the entire association.

1. Duty of Care. This duty is very broad, requiring officers and directors to exercise *ordinary and reasonable care* in the performance of their duties, exhibiting honesty and good faith. Officers and directors must act in a manner which they believe to be *in the best interests of the association*, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. The "business judgement rule" protects officers and directors from personal liability for actions made in poor judgment as long as there is a reasonable basis to indicate that the action was undertaken with due care and in good faith. The duty of care also imposes an obligation to protect any confidential information obtained while serving the association.

2. Duty of Loyalty. This is a duty of faithfulness to the association. This means that officers and directors must give undivided allegiance to the association when making decisions affecting the association. In other words, officers and directors cannot put personal interests above the interests of the association. Personal interests may include outside business, professional or financial interests, interests arising from involvement in other organizations, and the interests of family members, among others. Officers and directors should be careful to disclose even *potential* conflicts of interest to the board of directors, and should recuse themselves from deliberation and voting on matters in which they have personal interests. For pervasive and continuing conflicts - such as a director of the association concurrently serving on the board of a competing association - resignation from the individual's association leadership post or from the outside conflicting responsibility may be required. Officers and directors can have business dealings with the association, but such transactions must be subject to considerable scrutiny. In such event, officers and directors must fully disclose any personal interests to the board of directors, and the terms of any transaction must be fair to the association. In addition, state nonprofit corporation statutes frequently provide specific procedures for dealing with transactions in which officers or directors have conflicts of interest.

Corporate Opportunities Doctrine. The duty of loyalty specifically prohibits competition by an association officer or director with the association itself. While officers and directors generally may engage in the same "line of business" or areas of endeavor as the association, it must be done in good faith and without injury to the association. One form of competition that is not permitted, however, is appropriating "corporate opportunities." A corporate opportunity is a prospect, idea or investment that is related to the activities or programs of the association and that the individual knows, or should know, may be in the best interests of the association to accept or pursue. An association officer or director may take advantage of a corporate opportunity independently of the association *only* after it has been offered to, and rejected by, the association.

3. Duty of Obedience. This duty requires officers and directors to act in accordance with the organization's articles of incorporation, bylaws and other governing documents, as well as all applicable laws and regulations.

Reliance on experts. Unless an officer or director has knowledge that makes reliance unwarranted, an officer or director, in performing his or her duties to the organization, may rely on written or oral information, opinions, reports, or statements prepared or presented by: (i) officers or employees of the association whom the officer or director believes in good faith to be reliable and competent in the matters presented; (ii) legal counsel, public accountants, or other persons as to matters which the officer or director believes in good faith to be within the person's professional or expert competence; or (iii) in the case of reliance by directors, a committee of the board on which the director does not serve if the director believes in good faith that the committee merits confidence.

Willful ignorance and intentional wrongdoing. Directors cannot remain willfully ignorant of the affairs of the association. A director appointed as treasurer, for example, with limited knowledge of finance cannot simply rely on the representations and reports of staff or auditors that "all is well" with the association's finances. Moreover, officers and directors acting *outside of or abusing* their authority as officers and directors may be subject to personal liability arising from such actions. Furthermore, officers or directors who, in the course of the association's work, *intentionally* cause injury or damage to persons or property may be personally liable, even though the activity was carried out on behalf of the association.

Reducing Personal Liability Risk.

Association officers and directors can help minimize their risk of personal liability by doing the following:

- * Being thoroughly and completely prepared before making decisions.
- * Becoming actively involved in deliberations during board meetings, commenting as appropriate, and making inquiries and asking questions where prudent and when such a need is indicated by the circumstances.
- * Making decisions deliberately and without undue haste or pressure.
- * Insisting that meeting minutes accurately reflect the vote counts (including dissenting votes and abstentions) on actions taken at meetings.
- * Requesting that legal consultation be sought on any matter that has unclear legal ramifications.
- * Requesting that the association's accountants assess and evaluate any matter that has significant financial ramifications.
- * Obtaining and carefully reviewing both audited and unaudited periodic financial reports of the association.
- * Attending the association's meetings and reading the association's publications carefully to keep fully apprised of the organization's policies and activities.
- * Reviewing from time to time the association's articles of incorporation, bylaws and other governing documents.
- * Avoiding completely any conflicts of interest in dealing with the association and fully disclosing any potential conflicts.

Liability Protection.

If preventive risk management fails, the liability of association officers and directors can be limited through indemnification by the association, insurance purchased by the association, and state volunteer protection laws.

Apparent Authority.

In the landmark 1982 case, *American Society of Mechanical Engineers v. Hydrolevel*, the U.S. Supreme Court determined that an association can be held liable for the actions of its officers, directors and other volunteers (including actions which bind the association financially), even when the association does not know about, approve of, or benefit from those actions, as long as the volunteer reasonably *appears* to outsiders to be acting with the association's approval (i.e., with its "apparent authority"). The Supreme Court made clear that associations are to be held strictly liable for the activities of volunteers that have even the apparent authority of the association. Even if an association volunteer does not in fact have authority to act in a particular manner on behalf of the association, the law will nevertheless hold the association liable if third parties reasonably *believe* that the volunteer had such authority. The law thus requires an association to take reasonable steps to ensure that the scope of its agents' (e.g., officers, directors and committee members') authority is clear to third parties, and that agents are not able to hold themselves out to third parties as having authority beyond that which has been vested in them by the association - for example, by regulating access to association letterhead stationery.

Antitrust.

Associations are subject to strict scrutiny under both federal and state antitrust laws. The Sherman Act, the principal federal antitrust statute, prohibits "contracts, combinations, or conspiracies ... in restraint of trade." By their very nature, associations are a "combination" of competitors, so one element of a possible antitrust violation is always present, and only some action by the association that unreasonably restrains trade needs to occur for there to be an antitrust violation. Consequently, associations are common targets of antitrust plaintiffs and prosecutors.

The consequences for violating the antitrust laws can be severe. A conviction can carry stiff fines for the association and its offending leaders, jail sentences for individuals who participated in the violation, and a court order dissolving the association or seriously curtailing its activities. The antitrust laws can be enforced against associations, association members, and the association's employees by both government agencies and private parties (such as competitors and consumers) through treble (triple) damage actions. As the Sherman Act is a criminal conspiracy statute, an executive who attends a meeting at which competitors engage in illegal discussions may be held criminally responsible, even if he or she says nothing at the meeting. The executive's attendance at the meeting may be sufficient to imply acquiescence in the discussion, making him or her liable to as great a penalty as those who actively participated in the illegal agreement.

Common antitrust claims against associations include price-fixing (any explicit or implicit understanding affecting the price of a member's product or service is prohibited, even if the understanding would benefit consumers), group boycotts / concerted refusals to deal, customer allocation or territorial division, bid-

rigging, and illegal tying arrangements. Antitrust-sensitive areas of association activity include membership restrictions, standard setting, certification and self-regulation, statistical surveys, and information exchange programs, among others.

To avoid antitrust liability, associations should adopt a formal antitrust compliance program, and this policy should be distributed regularly to all association officers, directors, committee members, and employees. The policy should require, among other conditions, that all association meetings be regularly scheduled - with agendas prepared in advance and reviewed by legal counsel - and that members be prohibited from holding "rump" meetings. Above all else, members should be free to make business decisions based on the dictates of the market - not the dictates of the association. Any deviation from this general principle, such as adoption of a Code of Ethics that infringes on members' ability to make fully independent business decisions, should be approved by legal counsel.