



SCHELL BRAY PLLC
ATTORNEYS AND COUNSELORS AT LAW

The Practice of Good Governance

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Your Service



General Roles of a Governing Board

NCGS § 55A-8-01(b)

“All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors, except as otherwise provided in the articles of incorporation.”

General Roles of a Governing Board

- Hiring, establishing comp. for, managing, and evaluating the CEO
- Setting vision and planning for direction
- Monitoring plan implementation vis-a-vis mission
- Financial and other oversight
 - Approving budgets
 - Monitoring reports
 - Audit
 - Independence

General Roles of a Governing Board

- Helping secure needed resources
- Managing risk
- Advocating for the organization
- Evaluating itself and planning for succession

Governing Law and Documents

- Section 501(c)(3) and related provision of the Internal Revenue Code
- NC Nonprofit Corporation Act (internal affairs)
 - Other generally applicable laws
 - Articles of Incorporation
 - Bylaws
 - Policies

Fiduciary Duties

Legal obligations that inform not what board members do, but how they do it:

- Duty of Care
- Duty of Loyalty
- Duty of Obedience

Duty of Care

- Responsibility to carry out board roles:
 - in good faith;
 - with the care an ordinarily prudent person in a like position would exercise under similar circumstances;
 - and in a manner the director reasonably believes to be in the best interests of the organization.

Duty of Care

So what does that mean?

- Showing up
- Paying attention
- Remaining informed
- Asking questions until reasonably satisfied
- The more consequential the decision, the more diligence required

Protected by the “Business Judgment Rule” but not when there is a conflict of interest or misconduct. Also may reasonably rely on the reports/advice of officers, counsel, professionals, committees.

Duty of Loyalty

- Responsibility to put the interests of the organization above your own
 - Conflicts of interest:
 - Know what constitutes a conflict and the process to handle it
 - Corporate opportunity doctrine
 - Confidentiality

Duty of Obedience

Responsibility to remain true to mission and governing documents:

- Charter (Articles of Incorporation)
- Bylaws
- Policies

(sometimes this duty is seen as a subset of the other duties)

Common Oversight Issues

- Fundraising
- Donor Intent
- Investment and Endowment Spending
- Financial Oversight

Fundraising

- Help shape the fundraising story and strategy
- Opening doors/seeking opportunities
- Being ambassadors
- Contributing personally
- Build a culture! Inspire and engage

Donor Intent

- **Donor restrictions bear the force of law**
 - Purpose vs administrative
- **Intake issues:**
 - Making sure restrictions are legal and appropriate
 - gift acceptance policy
- **Outflow issues:**
 - Compliance with restrictions
- **Long term issues:**
 - When and how to modify

Investment and Spending

- Required to prudently invest assets
 - Typically executed by hiring and monitoring third party
 - Investment policy statement
- Endowment spending policy
 - True endowment vs other funds

Financial Oversight

- Approving and monitoring budget
- Controls and separation
- Annual audit or review
- Form 990 review

Governance Structure

- Board meeting management
 - Quorum, chair, etc
- Role of Committees
 - Executive Committee
 - Finance and Audit Committee
 - Governance Committee
 - Performance and Evaluation Committee

Governance Structure

- Roles of Board vs Management
 - Two way understanding – oversight and reliance
 - Clear delegation and clear communication
- Key Board Policies
 - Conflict of Interest
 - Whistleblower
 - Document Retention
 - Others?

(Some) Best Practices

- Ask questions, basic and hard
- Document decisions in well drafted minutes and supporting documents
- Have a clear delegation for management
- Constant vigilance regarding independence and conflicts
 - Use of executive/closed sessions and outside counsel
- Use committees; have clear charges and delegation
- Self reflect (annual self evaluation), return to your mission and charge
- Act as if you expect public scrutiny

Legal Protections for Board Members

- Immunity
- Indemnification – typically in bylaws
- Insurance



Questions?

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