

WYOMING BOARD MEMBER RESOURCES

Compiled by
UW Cooperative Extension Community Development Education Team
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LEGAL RESPONSIBILITIES OF BOARDS

Compiled by
Bill Taylor
UW Cooperative Extension Service
Northeast Area Community Development Educator

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The author has attempted to extract those items that apply to appointed and elected boards, as well as nonprofit. However, it is important to check with your County Attorney to determine the specific requirements and liabilities for members of your particular appointed or elected board.

1. Introduction

- a. Reasonableness and Prudence
 - i. Fulfilling Fiduciary Responsibilities
 - 1. The members of a board, charged with exercising responsibility over the organization and its resources, are considered fiduciaries.
 - 2. Fiduciaries are held to a standard known as the test of reasonableness and prudence.
 - a. Board members are expected to regard and treat the organization's assets and other resources with the same care with which they would treat their own resources.
 - 3. A general argument often made against boards is guilt by omission – being passive or otherwise inactive in overseeing the activities of the organization and, consequently, may have failed to adhere to the standards of fiduciary responsibility
 - a. Board must demonstrate that they appropriately discharged the requisite duties.

2. Legal Duties of the Board and Board Members

- a. Directors are fiduciaries of the organization's resources and guardians of its mission.

- i. Responsibility traces back to the individual board member, who can be liable for some actions undertaken in the organization's name and may have to pay penalties.
- b. Board Members as Fiduciaries
 - i. Have the same obligation toward trust's assets as they do toward their personal assets
 - ii. Trustees are fiduciaries; law imposes on them same standards for conduct and management that, together, constitute fiduciary responsibility.
 - 1. *Liability exposure for county board members - minimal*
 - iii. Chief responsibility of board members is to maintain financial accountability and effective oversight of the organization.
 - 1. Due diligence to see that the organization is well managed and that its financial situation remains sound.
 - 2. Requires board members to be objective, unselfish, responsible, honest, trustworthy, and efficient.
 - iv. Collective and Shared Responsibilities
 - 1. Responsibility of board for the organization.
 - 2. Responsibility of individual board members for their actions.
 - 3. One critical element of a legal meeting is the presence of a quorum.
 - 4. If legal action ensues, it can often be traced to an inattentive, passive, or captive board.
 - a. To avoid legal action, board members should attend meetings regularly; make independent and justified decisions, rather than simply voting with the majority; and before approving any meeting minutes, review the document carefully to ensure it truly reflects what happened in the meeting.
 - 5. All board members are liable for their own acts and deeds.
 - a. This requires board members hold each other accountable.
 - b. *Since county-appointed board members' liability is minimal, this is not as much of a legal issue as just a good governance practice.*
 - 6. Responsibilities of boards in general:
 - a. Review and approve the organization's mission statement.
 - b. Approve and oversee the organization's strategic plan and maintain strategic oversight of operational matters.
 - c. Select, evaluate, and determine the level of compensation of the organization's chief executive officer.
 - d. Evaluate the performance and establish the compensation of the senior leadership team and provide for management succession.
 - e. Oversee the financial reporting and audit process, internal controls, and legal compliance.
 - f. Hold management accountable for performance.
 - g. Provide oversight of the organization's financial stability.

h. Ensure the inclusiveness and diversity of the organization.

c. The Three Ds

i. Duty of Care

1. Requires that directors of the organization be reasonably informed about the organization's activities, participate in decisions, and do so in good faith and with the care of an ordinarily prudent person in similar circumstances.
2. Requires members pay attention.
3. Carried out by:
 - a. Attending board meetings and meetings of appropriate committees.
 - b. Preparing in advance for board meetings, such as reviewing reports and the agenda before arriving at the meeting.
 - c. Obtaining information, before voting, to make sound decisions.
 - d. Exercising independent judgment.
 - e. Periodically examining the credentials and performance of those who serve the organization.
 - f. Frequently reviewing the organization's finances and financial policies.
 - g. Ensuring compliance with state and federal filing requirements, particularly annual information returns.

4. Duty of Loyalty

- a. Requires board members to exercise their power in the interest of the organization and not in their own interest or the interest of another entity, particularly one with which they have a formal relationship.
- b. In practice, duty of loyalty is carried out by:
 - i. Adhering to the organization's conflict-of-interest policy.
 - ii. Disclosing any conflicts of interest.
 - iii. Avoiding the use of corporate opportunities for personal gain or benefit.
 - iv. Maintaining the confidentiality of information about the organization.

5. Duty of Obedience

- a. Requires that directors comply with applicable federal, state, and local laws, adhere to the organization's bylaws, and remain the guardians of the mission.
- b. Carried out by:
 - i. Ensuring compliance with all regulatory and reporting requirements, such as filing the annual information return and paying employment taxes.

- ii. Examining all documents that govern the organization and its operation, such as the bylaws.
- iii. Making decisions that fall within the scope of the organization's mission and governing documents.

Pitfall

- ii. *When board members have difficulties attending meetings, it is tempting to lower the quorum requirements to be able to conduct meetings regularly. By accommodating the missing participants, however, not only does the board send the wrong message, fewer board members end up making important decisions. A better solution is to allow directors who cannot attend in person to join the meeting by telephone, which is allowed in every state (usually when authorized in the bylaws) and counts the same as presence in person.*

d. Tip

- i. *It is not always possible to list all the potential conflicts on a disclosure form. Many conflicts of interest are tied to a specific transaction or a decision that could not be anticipated. Each situation should be evaluated on the basis of its facts and circumstances.*
- ii. *(For county board members this only applies to financial conflicts when investing and/or expending funds.)*

e. Questions the board should ask:

- i. *Do we regularly have a quorum at board meetings?*
- ii. *If the bylaws have a policy about missing meetings (such as termination of the member's involvement), do we uniformly follow the policy?*
- iii. *Do all board members regularly receive and read information in advance of board meetings?*
- iv. *Do we refer to our mission statement as a guide when making decisions?*
- v. *Do individual board members periodically review and sign our board's conflict-of-interest policy?*
- vi. *Who in our organization is responsible for keeping the legal documents?*
- vii. *Can we easily access legal documents if we need them?*

3. Legal Contexts

a. Board Members

- i. Directors generally oversee administration of the organization.
 - 1. Policymakers – develop plans for the organization and oversee affairs.
- ii. Day-to-day management is supposed to be the province of employees, if they exist.
 - 1. Board may delegate everyday management to chief executive who, in turn and as finances allow, may hire additional staff to help with operations and administration.

- iii. Board of directors may also delegate certain governance duties to officers, usually board members with additional leadership capacities.
- iv. Other Board Structures
 - 1. Bylaws should specify permanent standing committees, provide for possibility of creating other committees and describe how committee members are appointed. Non-board members may serve on committees, and they do so without the threat of personal liability that may accrue to directors.
 - 2. Most common committees:
 - a. Executive
 - b. Finance
 - c. Governance
 - d. Development
 - e. Audit
 - 3. A board may create an advisory council.
 - a. To avoid misleading implications that the advisory council has the power to make policy, limit its actions to:
 - i. Making recommendations.
 - ii. Providing background for board decisions.
 - iii. Furnishing pros and cons for issues.
 - iv. Listing questions that are appropriate for the situation.
 - v. Carrying out specific tasks.

b. Pitfall

- i. Failing to clarify the expectations for all board members is like building a board without an action plan: You may have an impressive-looking board that seems to get along well but ends up accomplishing little.

c. Tips

- i. It is crucial to keep the governance committee involved in defining the board's needs and candidates' qualifications. The objective is always to build the most competent and committed board possible.
- ii. Consider having your board members fill out and sign personal commitment forms, thus encouraging them to individualize their participation. Board members tend to be more engaged when they have had a say in their own activities rather than having them dictated by someone else.

d. Questions the Board Should Ask

- i. Do we have a copy of our state laws, and are we operating in concordance with all the statutes?
- ii. When did we last review our bylaws? Are there any provisions we should add or delete?
- iii. Have we clearly defined the voting rights of any ex officio members of the board?

- iv. Do we have job descriptions for our committees that also define the limits of their authority?

4. Managing Legal Liability

- a. Issues most likely to arouse concern pertain to general ethical behavior, transparency, and money-related issues.
 - i. Directors can be found personally liable for a violation of that responsibility.
- b. Key step in liability protection is to know where the danger lies. The most common reasons why boards get sued are:
 - i. Employment claims (hiring, firing, contracts, benefits).
 - ii. Contract claims (length of agreement, termination, work specification, payment terms).
 - iii. Discrimination claims (employment, volunteers, programs).
 - iv. Torts/negligence (injuries, theft).
 - v. Release of records (availability of records).
 - vi. Defamation.
 - vii. *(County board members' exposure here is minimal)*
- c. Conduct of employees is considered conduct by the organization itself.
 - i. If an employee's action (or lack of it) is outside the scope of employment, however, the individual can be held personally liable.
 - ii. If the board has not carried out its oversight duties adequately, it may be implicated in a lawsuit due to negligence of its duty of care.
- d. To be legitimately named as a defendant, a person must have some involvement in the particular facts that go beyond the usual role of a board member.
- e. Fundamental Protective Strategies
 - i. Key to protection is proactive positive action – being a good board member.
 - ii. Proactive Governance
 - 1. First, a board must recognize the fundamental duties and responsibilities inherent in volunteer board service.
 - 2. Next, it must develop a basic understanding of the legal framework that surrounds the organization and its structure.
 - 3. Finally, all board members must show good intentions by being accountable for their own actions.
 - 4. To provide strong base of security against lawsuits, boards should draft policies, ensure those policies are followed, refrain from delegating fiduciary duties, and rely on expert advice when a particular acumen is missing in the boardroom.

f. Pitfalls

- i. *Asking questions about board business via e-mail can bring quick responses but also easily evolve into evidence used to attack someone or charge him with an offense – especially if the messages are carelessly worded. Just remember: Lawyers think of e-mail as “exhibit mail.”*

g. Tips

- i. *Develop a policy requiring the organization's lawyer (particularly outside counsel) to report to one or more board members if staff does not properly handle or resolve a legal matter.*
- ii. *Use consent agendas to allow the board more time to deliberate on difficult issues. If time is not of the essence with a specific issue, it is wiser to table the discussion and make a more educated decision during the next board meeting after more research has been conducted. Airing all sides of an issue carefully is one way to protect board members later on.*

h. Questions the Board Should Ask

- i. *Has the board ensured that the personnel policies include all the necessary clauses to help protect us from the most common legal issues?*
- ii. (Not an issue if the county has a Human Resources Department that provides uniformity.

5. Governance Policies and Issues

a. Principles for Good Governance:

i. Legal Compliance and Public Disclosure

1. An organization must comply with applicable federal, state, and local law.
2. An organization should have a formally adopted, written code of ethics with which all of its directors, staff, and volunteers are familiar and to which they adhere.
3. An organization should implement policies and procedures to ensure that all conflicts-of-interest, or appearance of them, within the organization and its board are appropriately managed through disclosure, recusal, or other means.
4. An organization should implement policies and procedures that enable individuals to come forward with information on illegal practices or violations of organizational policies. This whistleblower policy should specify that the organization will not retaliate against, and will protect the confidentiality of, individuals who make good-faith reports.
5. An organization should implement policies and procedures to preserve the organization's important documents and business records.
6. An organization's board should ensure that the organization has adequate plans to protect its assets - its property, financial and human resources, programmatic content and material, and integrity and reputation - against damage or loss. The board should regularly

review the organization's need for insurance, as well as take other actions to mitigate risk.

7. An organization should make information about its operations, including its governance, finances, programs, and other activities, widely available to the public.

ii. Effective Governance

1. An organization must have a governing body that is responsible for approving the organization's mission and strategic direction, annual budget, key financial transactions, compensation practices, and fiscal and governance policies.
2. The board of an organization should meet regularly to conduct its business and fulfill its duties.
3. The board of an organization should establish and periodically review its size and structure. The board should have enough members to allow for full deliberation and diversity of thinking on organizational matters. Except for very small organizations, this generally means that a board should have at least five members.
4. The board of an organization should include members with the diverse background (including ethnic, racial, and gender perspectives), experience, and organizational and financial skills necessary to advance the organization's mission.
5. The board should hire, oversee, and annually evaluate the performance of the organization's chief executive. It should conduct such an evaluation prior to any change in the chief executive's compensation, unless a multiyear contract is in force or the change consists solely of routine adjustments for inflation or cost of living.
6. The board of an organization that has paid staff should ensure that separate individuals hold the positions of chief staff officer, board chair, and board treasurer. Organizations without paid staff should ensure that the positions of board chair and treasurer are separately held.
7. The board should establish an effective, systematic process for educating and communicating with board members to ensure that they are aware of their legal and ethical responsibilities, are knowledgeable about the programs and other activities of the organization, and can effectively carry out their oversight functions.
8. Board members should evaluate their performance as a group and as individuals at least every three years. The board should have clear procedures for removing members who are unable to fulfill their responsibilities.
9. The board should review the organization's governing instruments at least every five years. The board should regularly review the organization's mission and goals and evaluate at least every five years

the organization's goals, programs, and other activities to be sure they advance its mission and make prudent use of its resources.

iii. Strong Financial Oversight

1. An organization must keep complete, current, and accurate financial records. Its board should review timely reports of the organization's financial activities and have a qualified, independent financial expert audit or review these statements annually in a manner appropriate to the organization's size and scale of operations.
2. The board of an organization must institute policies and procedures to ensure that the organization (and, if applicable, its subsidiaries) manages and invests its funds responsibly, in accordance with requirements of law. The full board should approve the organization's annual budget and monitor performance against the budget.
3. An organization should spend a significant portion of its annual budget on programs that pursue its mission. The budget should provide sufficient resources for effective administration of the organization.
4. An organization should establish clear, written policies for paying or reimbursing expenses incurred by anyone conducting business or traveling on its behalf, including the types of expenses that can be paid or reimbursed and the documentation required. These policies should require that travel on behalf of the organization is to be undertaken in a cost-effective manner.
5. An organization should neither pay for nor reimburse travel expenditures for spouses, dependents, or others who are accompanying someone conducting business for the organization unless they are also conducting the business.

b. Tips

- i. No law requires bylaws or policies to be written in "legalese." Use clear language to make your statements understandable without ambiguity so they are not open to many different interpretations.
- ii. Develop an annual evaluation process to ensure the board provides the chief executive with formal feedback regarding on-the-job performance. According to BoardSource's 'Governance Index 2007,' chief executives who receive a written evaluation are more satisfied with their jobs than those who don't – 88 percent versus 78 percent.

c. Questions the Board Should Ask

- i. How well does our organization perform against the governance principles listed above?
- ii. Did we receive a clean audit? Have we addressed all the issues mentioned in the auditor's management letter?

- iii. *Do we adhere to safe harbor processes (the rebuttable presumption under the intermediate sanctions rules, when we determine the chief executive's compensation? Who on the board is responsible for that?)*

6. Conclusion

- a. Be a Guardian of the Mission
 - i. Every organization needs to define its fundamental purpose, philosophy, and values, and find appropriate ways to tie them into meaningful activities. Without a purpose and mission, an organization has no mandate. The primary role and most important duty of the board is to act as the guardian of that mission.
 - ii. Checklist:
 - 1. Fully understand and be able to articulate the organization's mission at any given time.
 - 2. Understand the overall operations of the organization.
 - 3. Read and understand materials prepared and distributed by the organization.
- b. Ensure Compliance with Laws and Rules
 - i. Organizations function within the legal framework created by the federal government and state where they carry on business. An organization must also operate according to its own formal documents and the commitments it has made to various stakeholders. If the board is not familiar with and sensitive to the applicable laws, rules, and guidelines, it becomes vulnerable to liability and jeopardizes the organization's legal status.
 - ii. Checklist:
 - 1. Periodically review the bylaws to ensure that the organization is in compliance with its governing documents.
 - 2. Understand the relationship between and among the organization's related entities and assess their purpose.
 - 3. Engage an auditor to attest to the reliability of the organization's financial condition.
- c. Promote Collective and Individual Vigilance
 - i. Here are some practical ideas and processes to help board members become more organized, more knowledgeable, and more cautious about fulfilling their duties.
 - ii. Checklist:
 - 1. Have an up-to-date board book.
 - a. Include, at a minimum:
 - i. Board roster and address list.
 - ii. Organization's articles.
 - iii. Bylaws.
 - iv. Documents with legal overtones.
 - v. Recent board meeting minutes.

- vi. Latest financial statements.
 - vii. Job descriptions for the board.
 - viii. List of expectations for individual board members.
- 2. Keep up with issues that affect the functioning and future of the organization.
 - a. Consider periodic board retreats, occasional educational seminars
 - b. Continuous board education is effective in providing members with incentive and requisite tools.
- 3. Regularly attend board meetings.
 - a. A board member cannot exercise the requisite degree of fiduciary responsibility without attending meetings and interacting with the other members.
- 4. Actively participate in the decision making process.
- 5. Ask questions.
 - a. Failure to ask questions is one of the worst nonactions of a board member.
- 6. Give careful consideration to board minutes.
- 7. Stay within bounds.
 - a. The board should oversee the programs of the organization – not meddle in tasks that it has delegated to the chief executive.