

IMPRESS POTENTIAL BOARD MEMBERS WITH SOUND LIABILITY PRACTICES

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THERE IS NO SHORTAGE OF ADVICE THESE DAYS ON WHAT MEMBERS OF AN ASSOCIATION BOARD OF DIRECTORS SHOULD DO TO FULFILL THEIR FIDUCIARY DUTIES AND, THUS, MINIMIZE THE RISK OF ANY POTENTIAL PERSONAL LIABILITY ASSOCIATED WITH THEIR SERVICE ON THE BOARD.

That focus, and paying attention to meeting fiduciary responsibilities, is incredibly important. Indeed, recruiting the best and brightest among your members to serve on the board requires that they be reasonably assured they have a means to avoid exposing themselves to personal risk. The key to

that is for them to understand they have fiduciary duties, that those duties are relatively easy to fulfill, and that by fulfilling them they substantially minimize their risk of liability.

Further, in Illinois and many other states, there are state laws that statutorily limit the liability of directors (provided they have not acted willfully or wantonly). These limited liability provi-

sions often require that directors not be paid (or be paid less than a certain amount) in order for them to qualify for the limited liability protection. It is important that organizations determine the extent of any state statutory limited liability protection, and do their best to assure that their directors understand the criteria that allow them to be eligible for such protection.



Here is a reminder of what all association boards should do, or have in place, to make sure their organizations are implementing best practices and taking steps to avoid unnecessary liability:

- Make sure the association is in good standing in the state in which it is incorporated and any states in which it is registered to do business.
- Make sure the bylaws are up to date and in compliance with state law, and are being followed. If the bylaws are not being followed in practice, change the practice or change the bylaws. Among other things, the bylaws should contain provisions:
 - outlining the functions and powers of the board, officers and committees;
 - establishing criteria for membership in the organization;
 - providing for indemnification of directors, officers and committee members;
 - outlining the relationship between the organization and any affiliated entities.
- Make sure the association has adopted, and adheres to, reasonable and appropriate policies, including:
 - conflicts of interest, which should focus on disclosing conflicts of interest and provide a process for addressing conflicts for which disclosure alone is not sufficient;
 - antitrust, which should underscore the importance of avoiding anticompetitive conduct and which should include policies and procedures to minimize the likelihood of illegal conduct;
 - ethical business practices for directors and staff, which should include policies on both giving and accepting gifts, perks and other assorted freebies;
 - records retention/destruction, with schedules for various documents, responsibilities and time schedules for implementation, and procedures for ceasing any destruction in the event that there is even a possibility of litigation or investigation;
- whistleblower protection, one of two elements of Sarbanes-Oxley that applies to all entities, not just publicly traded, for-profit corporations;
- audit committee, which assures its independence from management — not its independence from the board — and which describes its role and responsibilities in working with the outside auditors;
- communications, which should identify who is authorized to speak or act on behalf of association, and establish policies on who may use the association's letterhead.
- Make sure there are effective internal financial and accounting controls and that there is a regular financial review by independent auditors.
- Review the annual IRS Form 990 return for accuracy, and to assure that it properly explains the organization's mission and purpose.
- Ensure that there are adequate employment policies and practices (or, in the case of a managed organization, an appropriate management agreement), but avoid interfering with or micromanaging the staff responsible for implementing and enforcing those policies.
- Review the organization's insurance coverage (directors and officers, errors and omissions, association professional liability, general umbrella, etc.) to ensure the premiums, scope of coverage, exclusions, exceptions, riders, and the like are reasonable and appropriate given the organization's size, activities, reserves and risk of exposure.
- Make sure the organization uses reasonable disclosures, obtains waivers and releases, and receives indemnification and, likewise, only provides limited waivers, releases and indemnification.
- Review and document all relationships with third parties and other entities.
- Periodically review all contracts.
- Rely on the advice of outside professional experts (legal, investment, accounting, etc.).
- Ensure that members and staff are sensitive to the art of creating proper records (including e-mails); avoid defamation and slander; respect other's intellectual property; maintain proper minutes.
- Establish procedures for registering and licensing trademarks and for assuring that the organization owns the copyright on materials created on its behalf.

BEST PRACTICES

Educating directors on their fiduciary responsibilities, and emphasizing to them the importance of fulfilling those duties, is a terrific way of helping to get good people to serve as directors and of getting those people to be good board members. Of course, it also is an important element of an overall risk reduction program. However, it should not be the sole focus of the board's efforts to

minimize liability. Boards also should pay attention, and institute practices and procedures, to minimize organizational liability.

The above list is not meant to be exhaustive or all-inclusive. In general, it is wise to follow the old adage: "An ounce of prevention is worth a pound of cure." As such, the board, working with staff, legal counsel, auditors, and other trusted advisors should periodically conduct an institutional

review to ensure that its efforts to minimize personal and organizational liability are up-to-date and reflect best practices. ▣

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