THE TOP 15 NON-PROFIT BOARD GOVERNANCE MISTAKES & 5 WAYS TO FIX YOUR BOARD

KELLY M. JOLLEY
INTRODUCTION
THE MISTAKES
THE FIXES
YOUR QUESTIONS

AGENDA
THE IMPORTANT WORK OF MOVING THE WORLD FORWARD DOES NOT WAIT TO BE DONE BY PERFECT MEN.

George Eliot
TOP 15 NON-PROFIT BOARD GOVERNANCE MISTAKES
1. FAILING TO UNDERSTAND FIDUCIARY RESPONSIBILITIES

▸ No good deed goes unpunished.

▸ When you volunteer to serve as a director or officer of a non-profit, you accept the responsibilities to act with the duties of good faith, due care, and loyalty.

▸ You can no longer presume that charitable immunity will protect you — increased scrutiny by government, media and the public mean you need to be sure you are EXERCISING your best judgment.

▸ No rubber stamping.
2. FAILING TO PROVIDE EFFECTIVE OVERSIGHT.

- Boards may only delegate tasks to committees, officers, staff and professionals, if they continue to perform sufficient oversight.

- Oversight may be exercised through policies and procedures, but the board must ensure that the policies and procedures are actually followed.

- The board should be reviewing the financial statements and the annual Form 990 as well as governance policies (i.e., conflict of interest, executive compensation, travel & expense, whistleblower policies, etc.)
3. DEFERENCE TO THE EXEC, BOARD CHAIR, OR FOUNDER

- No one owns your non-profit.

- The exec acts FOR THE BOARD when the board isn’t in session and can’t be easily convened. It should not operate as a “mini-board”.

- The chair is the liaison between the board and the executive; the chair may not override the board.

- The board is obliged to review the performance and set the compensation for all executives, even founders.
4. MANAGING OPERATIONS RATHER THAN STRATEGY

- Directors are responsible for oversight and strategic direction, not the organization’s day to day operations.

- If you have paid staff and a paid executive, the staff should report to the executive and not the Board.

- Staff should not “invite” micromanagement by asking the board to take on staff tasks.

- Size and budget may blur the lines, but the board and staff should review roles and responsibilities annually.
5. AVOIDING HARD QUESTIONS (& REFUSING TO MAKE DECISIONS)

- Conflict isn’t the enemy and consensus isn’t the goal.
- It is difficult for directors to exercise their fiduciary obligations if the board doesn’t encourage the free and respectful exchange of ideas.
- Beware the board that passes all actions unanimously.
6. IGNORING CONFLICTS

▸ Conflicts must be managed as well as disclosed.

▸ While it is important to follow the conflict of interest policy, if the conflict is with an insider, an insider’s family member or business, the disinterested directors need to consider alternatives that do not give rise to a conflict of interest.

▸ If after consideration the directors believe the transaction with the insider is the best option for the organization, they should record their reasons and conduct deliberations without the interested director’s involvement.
7. BEING IGNORANT OF NON-PROFIT LEGAL REQUIREMENTS

- Lack of profit does not mean lack of regulation.

- Directors must be aware of the various federal, state, and local laws that apply to the organization. For example, many directors do not know what type of entity they are governing (private foundation, public charity, supporting organization, etc.) although each is subject to different limitations on their activities.

- Directors should know the penalties they face for overpaying key employees or other insiders, for engaging in excessive lobbying or political activities, for accommodating tax shelter transactions, for agreeing to bad business deals on behalf of the organization, failing to pass the public support test, etc.
8. FAILING TO OPERATE IN ACCORD WITH CORPORATE DOCUMENTS

- Organizations commonly amend their purpose or mission without amending their documents. They also frequently develop practices that are not in compliance with their bylaws.

- Governing documents should be reviewed at least annually for fitness with the organization and bylaws should be used to ensure compliance when electing officers or directors, amending bylaws, etc.
9. TALKING OUT OF SCHOOL

- “What happens in the boardroom, stays in the boardroom”
- An implied duty of confidentiality is inherent in each director’s duty of loyalty to the organization.
- After the vote, directors should present a unified front. If a director cannot in good conscience do so, then he should consider resigning from the board or, if the issue is serious, filing a derivative suit with other like minded directors on behalf of the organization.
10. FAILING TO CULTIVATE BOARD DIVERSITY

- Recruit beyond friends and business associates of the founder and initial directors.

- Expand the skills, experiences, and backgrounds of directors and add valuable perspectives to the board.

- Consider the mission of the organization in addition to law, accounting, and fundraising needs.
11. BUT BE SURE TO EXERCISE DUE CARE IN RECRUITMENT

- Desperate directors often recruit themselves into more work by taking whomever they can get and not selecting directors who are going to attend meetings, provide real oversight, and govern using their independent judgment.

- Educate new directors who were volunteers of their new duties and role. Being good in one role does not always translate into being good in another.

- Communicate expectations before making a prospective applicant part of the board.
Ineffective directors are a problem and not just a inconvenience. Resolving the problem requires ongoing work:

- Set up a basic orientation process.
- Invite a nonprofit-exempt org lawyer to present to the board on “liability”.
- Keep in regular contact with the whole board about the organization’s major issues.
- Have the board conduct a SWOT (strengths, weaknesses, opportunities, threats) analysis on ITSELF (not just the organization) and create an action plan based on the analysis.
13. FAILING TO DOCUMENT ACTIONS APPROPRIATELY

- Board minutes: transcript or action list?
- Documenting everything can create greater liability exposure for and reduces likelihood that minutes will be reviewed.
- Documenting only actions may result in a shortage of institutional knowledge about reasons behind decisions and provide less evidentiary support of a board’s due care.
- Documenting nothing is an unacceptable failback.
- What about committee minutes?
14. FAILING TO REVIEW PROGRAM EFFECTIVENESS

- A director’s fiduciary obligations extend beyond financial oversight.
- How do you evaluate the public benefit your organization provides?
FAILING TO HOLD EXECUTIVES AND DIRECTORS ACCOUNTABLE

▸ Are evaluations held regularly?

▸ Do they result in continuous improvement (or attendance) or only recognition for previous accomplishments?

▸ Does the evaluation document errors in judgment, complaints, abuses of authority? Is the board prepared to fire an executive if he or she is just not getting the job done?

▸ Does the board remove directors who don’t show up at meetings or otherwise fail to fulfill their governance responsibilities?
5 WAYS TO FIX YOUR BOARD
IF YOU THINK YOU ARE TOO SMALL TO BE EFFECTIVE, YOU HAVE NEVER BEEN IN BED WITH A MOSQUITO.

Betty Reese
KNOW YOUR ORGANIZATION’S PURPOSE AND YOUR BOARD’S DUTIES AND OBLIGATIONS

KNOW THYSELF
MAKE SURE YOUR EXECUTIVE KNOWS WHERE TO GO AND EVALUATE THE TRIP

PICK THE RIGHT BUS DRIVER
SHOW ME THE MONEY

TAKE BUDGET AND MONITORING RESPONSIBILITIES SERIOUSLY
DIRECTORS SHOULD NOT HAVE KEYS TO OFFICES OR MAKE DIRECT DEMANDS ON STAFF

STAY IN YOUR SWIM LANE
PRACTICE DEFENSIVE CORPORATE COMPLIANCE & PROTECT PRIVILEGE

KEEP YOUR SHIELD UP
PRACTICE AREAS:

- Privacy, Information Security, and Information Governance
- Healthcare Regulatory Compliance
- Outside General Counsel to Non-Profit Organizations
- Trusted Advisor in Complex Business Transactions
- Business Litigation
- Strategic Planning

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