Nonprofit Board of Directors:
The Legal Basis for Good Governance
Focusing On:

The inter-related State and Federal laws which underlie the creation and structure of nonprofits as well as the basic legal requirements for good governance.

★ NB - Nonprofits are a “regulated industry”
Corporate Structure

NY Tax Exempt Nonprofits
Created, Structured and Governed by:

1. Not-for-Profit Corporation Law (NPCL)
   - Creation & Structure - Certificate of Incorporation
   - Governance & Procedures – By-laws

2. Federal Internal Revenue Code (IRC)
   - Basic requirements for being tax exempt
1. Creation, Structure & Change

NPCL sets forth NY’s requirements on:

- permissions & procedures to create a nonprofit
- certificate of incorporation - specific content
corporate name, purposes, types of nonprofits
- minimum number of directors – 3
- certificate amendments – change in mission, etc.
- sale or transfer of assets
- dissolution
Federal Tax Exempt Nonprofits

2. “The IRC section” - “The Requirements”

501(a) An organization described in subsection (c) . . . shall be exempt from taxation . . .

501(c)(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition . . ., or for the prevention of cruelty to children of animals, no part of the net earning of which inures to the benefit of any private shareholder or individuals, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of, or in opposition to, any candidate for public office.
IRC Tax Exemption Requirements

1. **Organized & Operated Exclusively**
   Must have one of the IRS listed *purposes*
   Other IRS required provisions & nonprofit operates as such

2. **No Net Earnings Inures to Individuals**
   IRS required provision in certificate of incorporation
   Salaries are OK - Sharing in Profits is NOT
   IRC basis for Conflict of Interest Policy

3. **No Substantial Lobbying**
   IRS required provision in certificate of incorporation

4. **No Political Campaigning - prohibition**
   IRS required provision in certificate of incorporation
   Prohibition on - For or Against Any Candidate -
Nonprofit Corporations
New York State (NPCL)

Required Governance Procedures
In the By-laws - Directors

- Number of Directors – Term Limits (?)
- Quorums - flexible
- Annual meeting
- Regular & Special meetings
- Allows Unanimous written consent
- Allows Conference calls – No Proxies
- Defines Interested Directors
- Allows Indemnification
Governance Themes
Based on the NPCL

Bylaws are for:
Collective Decision Making
Use them constantly
Update them as nonprofit changes over time

✔️ No President or Executive Director for life
✔️ Set up to govern nonprofit to exist in perpetuity - Not by personality
✔️ Sets out areas of responsibility & control
✔️ Relationships of Directors (and Members)
✔️ Criteria for Members and Directors – setting the “culture”
Governance
Based on Common Law & NPCL

3 Basic Duties of Directors

★ Duty of Care
★ Duty of Loyalty
★ Duty Of Obedience

What is my Duty ??
Duty of Care - *Use your head*

**The Reasonable Person Standard**

Ask Questions - *Use Experts*

- **Attend**  - Board and committee meetings
- **Read**  - all materials such as minutes, reports, financial statements, program literature
- **Make sure**  - minutes reflect decisions and dissents
- **Ask questions**  - about operations and procedures
- **Make sure**  - there are procedures for deciding about fundraising, fees, compensation, capital expenditures, budgets
- **Participate**  - on committees, in risk assessment and strategic planning
- **Ensure**  - periodic reviews of key employees and appropriateness of insurance coverage for organization’s programs
- **Ensure**  - the Board has a balance of institutional memory and new blood and diverse talents.
Duty of Care
New Board Member

✔ Check List

Read – Certificate of Incorporation, Mission Statement, By-laws, application for tax exemption, minutes, annual reports, publications, web-site, Form 990, audited financials

Get – Lists of Board members and staff, talk to them to determine relationships and management style the current year’s budget and cash flow

Review – Form 990, audited financials, management letter

Ensure – There is a conflict of interest policy, a whistle blower’s policy, that Board meeting materials are distributed in advance
Duty of Loyalty

When Board of Directors votes/decides on actions, the directors effectuate the decisions – even if disagree

Directors are to act in the interest of the nonprofit - bring ideas, assistance, benefits, opportunities to the nonprofit

Private benefit to officers, directors, employees must be done carefully, if at all, at “arm’s length” with full disclosure.

☆ **Basis for conflict of interest policy**.

- new federal IRS “Best Practices” really “required”
Duty of Obedience

Ensure Your Nonprofit:

- Complies with applicable laws and regulations – federal & state registration, annual filings, all employee related matters
- Complies with its internal documents and policies
- Uses its resources for its purposes and specific missions
- Carries out its purposes and does not engage in unauthorized activities.

🌟 Basis for the new IRC Whistle Blower Policy
Dysfunctional Board Syndrome

- Cliques
- Social Freeloaders
- Founder Syndrome
  - Big Egos or Donors
  - Other Agendas
- Board – too big – too small
Useful Web-sites

• IRS – Charities
  www.irs.gov/charities/

• NY Attorney General – Charities Bureau
  www.oag.state.ny.us/bureaus/charities/about.html

• Governance Matters
  www.governancematters.org

• Lawyers Alliance for New York
  www.lany.org
Jewish Community Relations Council of New York

Nonprofit Nexus
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Remember !!

• Use your Head
• Work for the Nonprofit’s Benefit
• Know the Laws
• Don’t be a Rubber Stamp

Thank You