



Board of Directors: Their Legal Roles and Responsibilities:

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Special Counsel

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Presenter

- Fern N. Zappala currently serves in the capacity of Special Counsel to the CEO for the American Society of Health-System Pharmacists, and handles selected legal projects for the organization. Prior to this position Ms. Zappala was the full time General Counsel/Vice President for ASHP for over 14 years, and has represented ASHP in various positions for a total of 28 years. Ms. Zappala holds a Juris Doctor from Catholic University, and a Master of Public Health and Bachelor of Science from the University of Minnesota.



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Disclaimer

Any views or comments offered today are those of the presenter and should not be construed as the official position of the ASHP.

This presentation is designed to provide an accurate and general overview in regard to the topic covered. It is provided with the understanding that Ms. Zappala is not providing legal services or advice. If legal services or other assistance is required the services of a professional in your area should be sought.



Objectives for Today

1. Recent Trends for Board of Directors
2. Legal Overview of “Fiduciary Duties” for BOD
3. Selected Issues that can give rise to liability for Directors
4. Strategies for Avoiding liability

Legal Responsibilities

- Board members must meet certain legal and ethical standards of conduct in carrying out their responsibilities to the organization (grounded in state law)
- Legal Duties include :
 - Duty of Care
 - Duty of Loyalty
 - Duty of Obedience



Duty of Care

- The Duty of Care - “Prudent Person” standard.
- What would an ordinary person in the same position do?
- ▪A board member exercises reasonable and ordinary care when making decisions as a steward of the organization.
- ▪Protect the assets/resources/proprietary information of the corporation through sound decision making.

Duty of Care

- You fulfill the Duty of Care by:
 - Attending all board meetings, committee meetings, etc
 - Reading background materials and minutes
 - Participating in the process of approval of major objectives of the Society - set the direction
 - Overseeing the Society's finances/resources, exercising good business judgment at all times
 - Recruiting/hiring the CEO or management company
 - Reliance on Experts
 - Ask questions !



Duty of Loyalty

- Be faithful to the organization and pursue the “organization’s best interests”.
- Put the interests and mission of the organization above self-interest or other external interests.
- -Undivided allegiance to the organization.
- -Minimize and manage conflicts of interest.
- -Maintain confidentiality of information.

Conflict of Interest (COI)

- Definition: A personal or professional interest or situation (financial or non-financial) which may influence a decision of a Director for the organization, or create an unfair advantage for an outside person/organization.
- Basic Elements for Managing COI:
 - Periodic Disclosure;
 - Refrain from voting on a matter and/or participation in discussion; and/or
 - Resign or withdraw from an activity.
- “Perception is reality”

Activities that may give rise to COI questions

- Participation in some educational activities/programs
- Certain publishing opportunities
- Gifts, gratuities, and remunerations
- Requests to become board member of competing organizations or an organization in same class of trade
- Consulting arrangements within the same industry
- Participation in external focus groups and advisory boards
- Certain use of Social Media!

Confidentiality

- Boards often deal with sensitive and/or confidential matters.
- Do not disclose information learned in the course of your Board service.
- Nondisclosure agreement

Duty of Loyalty

- You fulfill the Duty of Loyalty by:
 - -Compliance with policy and process on Conflict of Interest
 - -Participation in disclosures, and resolving perceived or actual conflicts of interest
 - -Assessment of activities involving board members to ensure there is no potential or perceived conflict of interest
 - -Maintain the confidentiality of information discussed by the Board

Duty of Obedience

- Compliance with state and federal laws, and regulations
- Act only in accordance with organization's articles of incorporation, bylaws, and board policies
- Avoid negligence and fraud

Duty of Obedience

- You fulfill the Duty of Obedience by:
 - Decisions or actions of the Board are consistent and lawful with the purpose and goals of the Society
 - Ensure that policies and procedures are in place to meet legal requirements for organization's operations (i.e. IRS, DOL reports, ERISA, etc)
 - Provide copies of tax-exempt forms, federal reports and financial reports as necessary when requested or required.

Selected Legal Issues

- Apparent Authority
 - Who speaks on behalf of the organization?
- Use of Technology and Electronic Communications
 - Social Media
 - Cyber Security
- Contractual matters
- Maintaining Tax Exemption
- Antitrust liability

Apparent Authority

- Who Speaks for the Organization?
 - Governing documents or a formal policy
 - Authority for decisions is vested in the Board as a whole
 - Authority of the Board cannot be delegated away

Use of Technology

- Use of Social Media
- Cyber Security
- Use of Personal Devices



Contractual Matters

- Agreement or arrangement that binds the organization
- Authorization to sign contracts
- Key provisions
 - Protections for the organization
 - Consistency of application
 - Compliance with local, state and federal laws
 - Potential for significant liability or penalties

Maintaining Tax Exemption

- Form 990 filing
- Annual Filing
- Unrelated Business Income Tax (UBIT)
- Tax Reform Proposals !

Antitrust Exposure

- Rules for doing business
- No exceptions for non-profits
- Antitrust Policy

Minimizing Liability for BOD

- Education on roles and responsibilities as Directors
- Compliance with laws and governing documents
- Indemnification of Directors
- Providing Directors and Officers Insurance

Key Take Aways

- Ensure the proper governance and direction of the organization
- Compliance with mission/exempt purpose
- Minimize risk of liability and claims against Boards for breach of fiduciary duties
- Shield members of the Board from personal liability for actions of the Board
- Ask questions !



Other Resources

- ASHP website. www.ashp.org/stateaffiliates
- BoardSource. www.boardsource.org
- American Society of Association Executives (ASAE). www.asaecenter.org
- Association of Corporate Counsel. www.acc.com
- Association Management Tips. www.rchcae.com/management-tips-templates