

RCO law[®]

**Lawyers
on
Non-Profit Boards**

The Center For Nonprofit Resources

W. David Arnold

April 1, 2021

Topics

- General considerations for joining a nonprofit board
- Special considerations and issues for lawyers on nonprofit boards
- Due diligence
- Legal obligations of nonprofit directors
- Open meetings

First, deciding to accept the invitation. Important considerations for everyone...

- Is there alignment between you and the non-profit's mission, values, and activities?
- Will service on the board provide you with a meaningful opportunity to contribute to something you *sincerely* care about?
- Why serve on the board of this particular non-profit?
- What is the organization's reputation in the community, and its perceived and real strengths and weaknesses? Ask around.
- Are you prepared to support the organization with your time commitment and, in most cases, financially (e.g., through annual or capital campaigns)?

Special Considerations for Lawyers

- Do the legal needs of the agency likely fit your practice areas?
- Is the organization really looking for a *pro bono* lawyer?
- Does the nonprofit have counsel? If so, what areas do they cover?
- Ethical considerations –
 - Conflicts
 - Independence
- Preserving the privilege
- Insurance coverage

Due Diligence – Questions to Ask

- Does the organization maintain adequate insurance coverage for its directors?
- Do the bylaws provide for indemnification of directors?
- Who else is on the board?
- What are they looking for in a new board member?

Due Diligence – Documents to Review

- Review the two or three most recent audit reports.
 - Is the entity financially stable?
 - Have there been significant concerns raised in management letters accompanying the audits?
 - If so, how have the executives of the agency reacted?
- If the entity does not obtain annual audits, ask to review a couple of years of periodic profit and loss statements and balance sheets.
- Review board minutes from several months of meetings.
 - On what issues and concerns are the board members focused?
 - Do the meetings appear to be business-like and efficient?

Due Diligence – Documents to Review

- Read the Bylaws/Code of Regulations and the Articles of Incorporation. Are the required tax-exempt statements present?
- If the entity is exempt from federal taxes, review the 990s filed for the past few years.
- If not tax-exempt, find out why not.
- Review the Conflict of Interest policy.
- Review the D & O insurance policy.

Expectations

- Have a candid conversation with the Executive Director and the Board Chair about expectations.
- Once there is clarity on your expected role, confirm those expectations in a letter to the board and agency leadership. The letter should address the expectations of the agency, board leadership, and you.
- For lawyers, this letter also will address compliance with ethical and legal standards, privilege issues, and insurance coverage.

Serving on the Board – Role Clarity for Lawyers

- Are you acting as a director or as a lawyer when you speak at a meeting?
- Are the other board members and staff clear about your role?
- Are you clear about your role?
- What will the minutes reflect?

RCO law®

Examples of Legal Services

- Amending Bylaws
- Preparing employment contract for executive director
- Preparing 1023 or 990

RCO law[®]

Serving on the Board - Conflict Issues

- Legal and ethical issues – Potential Conflicts
 - As entity attorney and director
 - As director – other clients
- Doing business with entity
 - Comply with entity's conflict of interest policy
 - Disclosure critical
 - Arms length
 - No vote

Serving on the Board – Independence

- Will the dual role, lawyer and director, affect the independence of the lawyer's advice that is required by the ethical rules?
- If called upon to address legal issues involving a matter on which the lawyer previously voted, will she be able to offer independent advice unaffected by the position she took on the issue as a director – especially if she voted on the losing side of the issue?

Serving on the Board – Privilege

- Privilege applies only when there is an attorney-client relationship.
- Will confusion over the lawyer's role lead to loss of the privilege?
- Other directors may mistakenly assume that privilege always applies because lawyer is present.

Insurance

- Nonprofit Directors & Officers coverage for directors
- Lawyer's malpractice policy
- How will the dual role as lawyer and director affect coverage?

A lawyer will worry about winding up with the worst of all possible worlds.

RCO law®

Understanding the Legal Obligations of Non-Profit Directors

- O.R.C. §1702.30
- Duty of care
- Duty of loyalty

RCO law[®]

O.R.C. 1702.30:

(B) A director shall perform the duties of a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. A director serving on a committee of directors is acting as a director.

(D) For purposes of division (B) of this section:

(1) A director shall not be found to have failed to perform the director's duties in accordance with that division, unless it is proved, by clear and convincing evidence, in an action brought against the director that the director has not acted in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances.

O.R.C. 1702.30:

(E)(1) Subject to divisions (E)(2) and (3) of this section, a director is liable in damages for any act that the director takes or fails to take as director only if it is proved, by clear and convincing evidence, in a court with jurisdiction that the act or omission of the director was one undertaken with a deliberate intent to cause injury to the corporation or was one undertaken with a reckless disregard for the best interests of the corporation.

(F) For purposes of this section, in determining what a director reasonably believes to be in or not opposed to the best interests of the corporation, a director shall consider the purposes of the corporation and may consider any of the following:

- (1) The interests of the employees, suppliers, creditors, and customers of the corporation;
- (2) The economy of this state and of the nation;
- (3) Community and societal considerations;
- (4) The long-term and short-term best interests of the corporation including, but not limited to, the possibility that those interests may be best served by the continued independence of the corporation.

Board Operations

- Core functions of nonprofit board –
 - Hire and fire executive
 - Ensure financial stability
 - Ensure legal compliance
- Role of board versus management
- Avoiding micromanagement
- Avoiding back-channel communication with staff
- Formality? How formal will meetings be?
How formal should they be?

Bibliography – Open Source Material

Ohio Sunshine Laws 2020 – Ohio Attorney General
www.ohioattorneygeneral.gov/yellowbook



RCO law®

Questions?



Thank You!

W. David Arnold

419-249-7900

darnold@rcolaw.com

RCO law[®]