



Volunteer Lawyers Strengthening Nonprofits & Our Communities

Hartford Foundation Consultant Network – Legal Issues in Board Governance

Priya Morganstern, Esq., Program Director, CT

Sara Taylor, Esq., Staff Attorney, CT Program

Pro Bono Partnership

Presentation March 28, 2023

#PBPstrong | probonopartner.org

© 2023 Pro Bono Partnership. All rights reserved. No further use, copying, dissemination, distribution or publication is permitted without express written permission of Pro Bono Partnership.



Disclaimer

This presentation is provided as a general informational service to clients and friends of Pro Bono Partnership. It should **not** be construed as, and does not constitute, **legal advice** on any specific matter, **nor** does this presentation create an **attorney-client relationship**. You should seek advice based on your particular circumstances from an independent legal advisor.



What is the Pro Bono Partnership?

- Pro bono legal assistance for nonprofit organizations through the services of our staff and corporate and private attorneys
- To be eligible, the organization must be:
 - Nonprofit, tax-exempt (or seeking 501(c)(3) status);
 - Primarily serving the poor and disadvantaged or enhancing the quality of life in neighborhoods in CT, NJ, and NY;
 - Focusing on health and human services, community development, affordable housing, neighborhood revitalization, environmental protection, and the arts; and
 - Unable to pay for legal services without significant impairment of program resources.

More information at www.probonopartner.org

Please sign up for our email updates and check out our upcoming webinars and workshops!

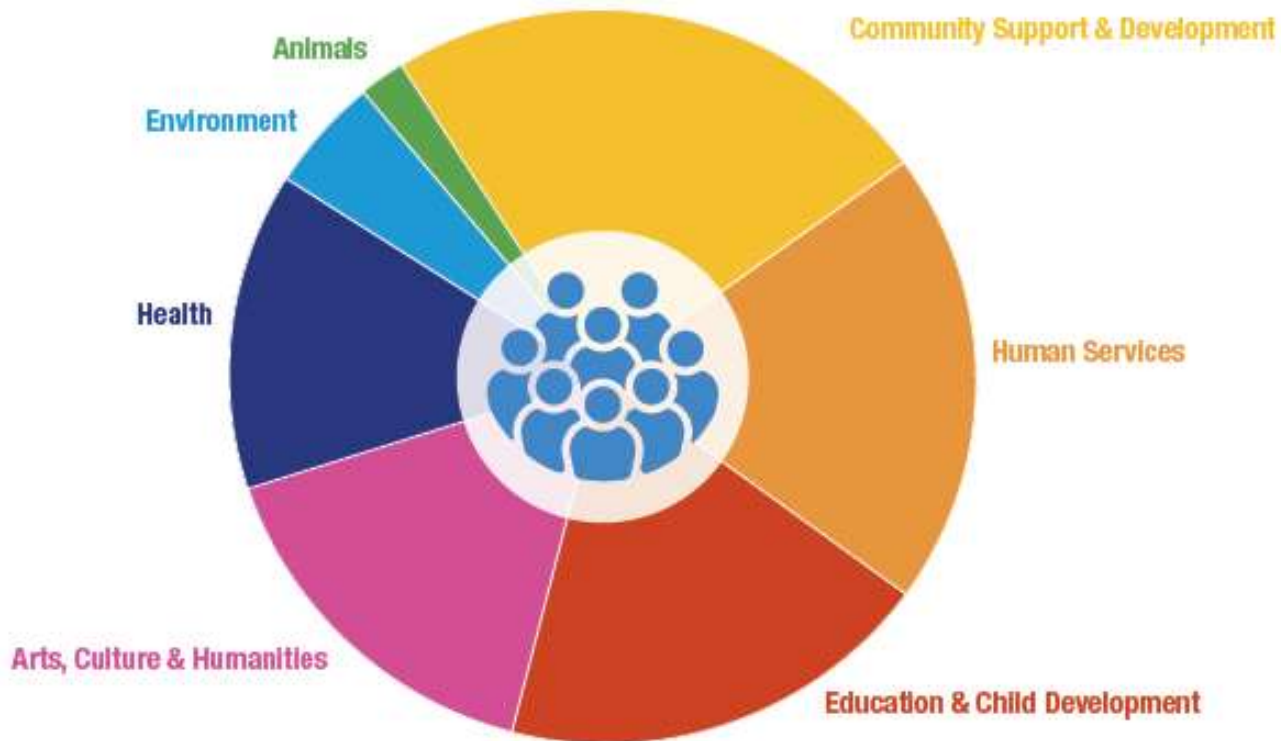


What Assistance is Available?

- Non-litigation, business law matters, in areas such as:
 - Corporate structure and governance
 - Contracts
 - Employment law
 - Environmental law
 - Intellectual property law
 - Real estate (including lease reviews)
 - Regulatory compliance (e.g., registration, annual reporting, charitable solicitation, lobbying)
 - Tax law and tax exempt status



98% of the Partnership's clients serve low-income individuals & provide important services in our communities



Overview of Program

- Thank you for submitting the legal issues that you are seeing and the questions that you would like answered!
- We have grouped your legal issues and questions and hope to have time to get through all of the topics that you raised.
- We weren't able to address all questions because some were too specific (i.e., our responses could be viewed as providing legal advice) or they were beyond the scope of this presentation.
- For other general information questions that we are not able to address, please consider using our Legal Resource Helpline – you can call or submit questions through our website. More information [here](#).
- We hope that this meeting will be interactive – please feel free to ask questions!



Bylaws, Certificates of Incorporation, and Corporate Policies – Overview

- Hierarchy of corporate governance documents:
Certificate of incorporation – public document; filed with Secretary of the State; voting members of org (if any) typically must approve changes



Bylaws



Policies



Bylaws, Certificates of Incorporation, and Corporate Policies – Legal Issues

- Legal issues you are seeing most often:
 - Removing board members with or without cause
 - Valid board action
 - Issues with terms and term limits on boards of directors
 - Bylaws: reviews, updates, interpretation
 - Bylaws: bare minimum or expansive? Which is best to keep orgs out of trouble?
 - Bylaws that are not in conformance with state law and/or missing required provisions
 - Issues with not having certain policies



Bylaws, Certificates of Incorporation, and Corporate Policies – Questions

- Questions submitted:
 - What should be in the certificate of incorporation vs. what should be in the bylaws?
 - Suggested changes to bylaws in this “post-COVID” world (i.e. governance via Zoom)?
 - How can member meetings be conducted in this “post-COVID” world?
 - Recommended frequency of bylaws revisions?
 - What are implications for boards taking action when they are out of compliance with their bylaws?
 - Who the heck is Robert of Robert’s Rules of Order and do we need him?



Fiduciary Obligations/ Financial Oversight – Overview

- Directors have obligations and responsibilities to the corporation; these duties are grounded in common law and state and federal statutes
- Fiduciary duties, broadly:
 - Duty of Care – must be **reasonably informed**, participate in decisions, and do so in good faith and with the care of a prudent person
 - Duty of Loyalty – must act in the **best interests of the corporation**, not in directors' own interests or the interests of another person or org
 - Duty of Obedience – must act **within the bounds of law generally**, and with the intent of achieving the org's mission
- Responsibility to oversee financial affairs derives from these duties; ensure adequate financial resources and strong and responsible financial management



Fiduciary Obligations/ Financial Oversight – Overview

- Key financial questions every board member should be able to answer (and every ED should know):
 - Are we running at a gain or loss?
 - Are our key sources of income rising or falling?
 - Is our cash flow projected to be adequate?
 - Can we pay debts as they come due? Do we have sufficient reserves?
 - Where are we compared to budget?
 - Is our financial plan (budget) consistent with our strategic plan?
 - Are we filing all needed reports on a timely basis?



Fiduciary Obligations/Financial Oversight – Legal Issues

- Legal issues you are seeing most often:
 - Board obligations re: the Form 990 and what constitutes real review to fulfill fiduciary role
 - Overemphasis on “fiduciary obligation” without a clear understanding of what this means
 - Board’s role with respect to organizational risk management



Fiduciary Obligations/Financial Oversight – Questions

- Questions submitted:
 - Audit requirements for nonprofits with annual gross revenues exceeding \$500K?
 - What are some potential concerns re: board member financial or other legal exposure?
 - What potential liabilities do board members face and how to protect them beyond D&O insurance?
 - What legal filings are required by various CT government entities?



Conflicts of Interest – Overview

- Private inurement
 - Broadly, tax-exempt orgs cannot use their assets for the private benefit of corporate insiders, such as the founder, officers and directors, other key employees and their family members
 - Examples:
 - compensation arrangements with employees that aren't reasonable or negotiated at arms-length,
 - loans or extensions of credit that are granted to insiders,
 - organizations that engage in sales or leases of property at prices in excess of (or below) fair market value, or
 - personal and exempt organization assets are intermingled
- Private benefit
 - Broadly, when an org serves a private interest rather than one that is public (i.e. setting up an org to help a specific individual)



Conflicts of Interest – Overview

- Conflict of Interest Policy
 - Though not required in order to qualify for federal tax exempt status, each tax-exempt org should have one
 - Compliance with the policy should be regularly monitored by the org
 - Each individual covered by the policy must disclose, on an annual basis, any relationships with people doing business with the org that could give rise to a conflict of interest
 - Having this policy in place and complying with it protects the org's interests – and its tax-exempt status



Conflicts of Interest – Legal Issues and Questions

- Legal issues you are seeing most often/Questions submitted:
 - Organizations that want to hire someone who currently serves on the board
 - Board members who desire to provide a service to the nonprofit while serving as a board member
 - Is there a pathway for board members to serve on the board and provide a service to the nonprofit concurrently?
 - Spouses and other family members serving on the same board
 - Family board members – conflict of interest or other considerations with this?
 - What other potential conflicts of interest organizations should be aware of?
 - Consider duality of interests – board members who simultaneously serve on multiple boards



Employment and Board Management Issues – Overview

- Complex web of state and federal laws; nonprofits are subject to them to same extent as businesses
- Engage with experts – HR consultants, employment attorneys
- Encourage orgs to consult with an expert before taking adverse employment actions



Employment and Board Management Issues – Legal Issues and Questions

- Legal issues you are seeing most often:
 - Issues with executive directors (EDs): performance reviews, performance improvement plans, termination
 - Boards' hesitance to act when a board member or ED might have done something at minimum unethical or potentially illegal
 - Failure to hold EDs accountable
 - Confusion about board roles vs. internal leadership roles; who is the boss?
 - Lack of awareness re: setting pay for highly compensated employees
 - Improper categorization of staff:
 - Employee versus independent contractor
 - Exempt versus non-exempt
- Questions submitted:
 - Does a CEO have the right to have an attorney present during board meetings or in Executive Sessions?
 - What are highlights of CT paid leave program?



Corporate Merger/Dissolution/Restructuring – Overview

- Business and strategic considerations are key
- Merger – must follow requirements in corporate governance documents and statutory requirements; legal result is that only one org is the survivor; can be one of the merging entities, or a newly created entity
 - We recommend the survivor being one of the merging entities, rather than a newly created entity
 - For a newly created entity, you are essentially “starting from scratch” – have to incorporate a new entity, seek tax-exempt status, etc.
- Dissolution – must follow requirements in corporate governance documents and statutory requirements; legal result is that the org ceases to exist



Corporate Merger/ Dissolution/Restructuring – Questions

- Questions submitted:
 - What are some legal considerations for CT nonprofits considering dissolution?
 - What if an organization wants to change its structure from a member nonstock corporation to a nonmember nonstock corporation?



Additional Questions

- Questions submitted:
 - What is a nonprofit's obligation to pay property tax in its municipality?
 - Local chapters of national organizations – advisory board members: Are they the local fiduciaries or just advisors?
 - Nonprofits that are unionizing – what legal issues/boundaries should boards be aware of before contract negotiations begin?
 - What are the best resources to educate organizations?
 - Pro Bono Partnership has many!
 - When should a board seek legal counsel on an issue?
 - Before you need them!



Thank you!

- Our sincere thanks go to:
- Meher Shulman, Betsy Johnson, and Monica Kelly of the Nonprofit Support Program of the Hartford Foundation for hosting this webinar and for all their planning and technical assistance

and

- Marci Sternheim of Sternheim Consulting for her assistance with planning and helpful feedback in preparing this presentation



For More Information

Priya Morganstern, Esq.
Program Director
Pro Bono Partnership, Inc.
280 Trumbull Street, 28th Floor
Hartford, CT 06103
Phone: 860-541-4951
pmorganstern@probonopartner.org



Sara A. Taylor, Esq.
Staff Attorney
Pro Bono Partnership, Inc.
[same address]
Phone: 860-541-4952
staylor@probonopartner.org



Please Note

- IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.
- This presentation is provided as a general informational service to clients and friends of the *Pro Bono Partnership*. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this presentation create an attorney-client relationship. You should seek advice based on your particular circumstances from an independent legal advisor.

