



Risky Business; Avoiding Association Hazards

Bob Harris

Tuesday, February 4, 2014

9:30 a.m. – 11:00 a.m.

GREC Course Code #64422/64423

You must Attend 2 – 1.5 hour education sessions to earn 3 hours of CE credit. Partial credit is not given. You are not able to combine the 1-hour and 1.5 - hour sessions for CE credit.

You cannot receive Georgia C.E. credit for this course if you have taken it in the last 366 days.

Due to seating capacities dictated by local fire code ordinances, seating for all education sessions will be based on a first come-first serve basis. GAR will not be allowed to have attendees sitting on the floor or standing up once the room's seating is full.

In order to foster a spirit of camaraderie and to avoid the appearance of recruitment, no nametags or clothing with a company logo will be allowed in the education courses. Should an attendee have one on at the time of entering an education course, the facilitator will kindly ask you to remove your name badge or place a blank nametag over the company logo. We appreciate your cooperation in regards to this matter!



STUDENT NOTICE

2014 Inaugural Meeting – 3 HOURS

The Georgia Association of REALTORS®, Inc. is approved by the Georgia Real Estate Commission (GREC) to offer continuing education, sales post license, and broker pre-license courses. The GREC school code number is 271 with a renewal date of December 31, 2015.

The Georgia Real Estate Commission has approved this course for continuing education (CE) credit. However, to receive credit, you must attend three 1- hour sessions or two 1.5-hour sessions for which you will earn three hours Georgia CE credit. GAR school policy defines an instructional hour as 60 minutes.

To receive continuing education (CE) credit for this in-classroom course, the student must:

- ✓ be on time
- ✓ check in with the course facilitator before the course begins for CE Card
- ✓ remain in the course until the end of the session
- ✓ return the CE card to the course facilitator at the end of the course
- ✓ return a completed evaluation to facilitator at the end of course
- ✓ attend two 1.5 hour education sessions or one 3 hour education session
- ✓ not have taken this course for continuing education credit within the past 366 days.

There is no make-up session for this course.

Electronic devices are distracting. As a courtesy to others, it is required that students keep the volume turned off during courses. Be respectful to your peers and instructor while using your device to view the online handouts and to take notes.

To foster a spirit of camaraderie and to avoid the appearance of recruitment, no nametags or clothing with company logos will be allowed in courses offered for continuing education credit through the Georgia Association of REALTORS® School.

Entrance qualifications and standards of completion will not be based on race, color, sex, religion, national origin, familial status, or disability.

No recruiting for employment opportunities for any real estate brokerage firm is allowed during this course or on the premises while this course is in session. Any effort to recruit by anyone should be promptly reported to the Education Manager; Georgia Association of REALTORS®; 770-451-1831; 3200 Presidential Drive; Atlanta, GA 30340, or to the Georgia Real Estate Commission; 404-656-3916; International Tower; 229 Peachtree Street, NW; Suite 1000; Atlanta, GA 30303-1605.

Risk Management in Associations

Bob Harris, CAE

While it is an honor to be *asked* to serve on a board of directors, there may be risks associated with board service. In addition to the responsibility for governance --- directors have a responsibility for risk management.

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Purpose

The intent of the workshop and handout is to increase awareness of *risk in nonprofit, exempt organizations*. While the board's primary function is to carry out the exempt purpose (mission statement), it has a role in protecting the organization. Each director is a fiduciary and members believe directors are looking after their interests.

The best way to avoid risk is to know where the risks lie. Risk management is a *process*:

1. **Identify** – Awareness of the potential risks.
2. **Assess** – How significant is the risk? The board may be willing to accept some risks (i.e. serving alcohol) while having zero tolerance for others (i.e. antitrust violations.)
3. **Treat/Avoid** – Take actions to eliminate, minimize, share or insure against risks.
4. **Monitor/Review** – Continuously monitor the potential for risks in activities of the organization and the environment.



Format

This information is organized (1) to improve awareness of risks, and (2) to consider methods for managing risks. Be sure to rely on legal, insurance and accounting professionals. As cases and laws change, so too do the risks and approaches to avoid or manage.

Terminology

Awareness of key terms regarding not-for-profit and exempt organizations will be useful. These are defined in the *appendix*.

Antitrust	IRS Information Return (Form 990)
Due Diligence	Nonprofit – Not-for-Profit
Duty of Care	Letter of Determination
Duty of Loyalty	Policy
Duty of Obedience	Policy Manual
Exempt Organization	Public Records
Fiduciary Duty	Tax Exempt Status
Governing Documents	Subsidiary
Insurance	Unrelated Business Income Tax (UBIT)

Oversight Agencies

Two government agencies primarily have oversight and authority over exempt, not-for-profit organizations.

At the *federal level*, the Internal Revenue Service designates and monitors the purpose, finances and governance of the organization. At the *state level*, the Division of Corporations (or similarly named agency) approves and monitors the nonprofit corporation.

Other agencies with an interest in and authority over associations include (*not* an inclusive list):

- **Department of Justice, Federal Trade Association** – antitrust, endorsement, communication. Identify theft
- **Federal Department of Labor** – labor law
- **State Department of Revenue** – sales tax collection, exemption
- **City, County Agencies** – occupational license

Areas of Risk and the Considerations

Antitrust Avoidance – When two or more competitors in the same business or industry gather it is important to avoid discussions that might lead to antitrust violations.

- ✓ Fines and penalties can reach \$10 million.
- ✓ The FTC recommends trade associations have a “measure of antitrust avoidance” be in place.
- ✓ Record annually in meeting minutes that leaders have been advised not to violate antitrust laws.
- ✓ A policy of antitrust avoidance exists.

Charitable Solicitation – Many states require an organization to register if they are soliciting charitable funds.

- ✓ A common exemption from the registration is the existence of *existing business relation* (EBR) with the persons being solicited.
- ✓ Check state law.

Conflicts of Interest – Good governance includes disclosure of conflicts of interest among volunteer leaders and staff.

- ✓ Policy exists to disclose conflicts on a consistent and regular basis.
- ✓ Officers and board understand response to disclosure can range from documentation to request for recusal or resignation.
- ✓ Conflict of interest form is distributed.

Electronic Meetings – Meetings that are not held in person are held electronically, whether it be by conference call, on-line collaboration or webinar.

- ✓ Be certain the organization's bylaws allow for electronic meetings.
- ✓ Corporate laws prescribe or limit electronic meetings, the notice and call for meetings, and voting parameters.
- ✓ The law varies by state.

Endorsements – An established relationship between the nonprofit organization and a company providing a unique benefit or service to members.

- ✓ Be careful not to position the exempt organization as a “partner” or doing work on behalf of a for-profit company.
- ✓ The process for selecting and recommended a preferred provider should be based on established policies and criteria.
- ✓ Document the terms of the agreement, including performance expectations.

Employees – Labor laws may apply to persons working for the association in the form of employees, independent contractors and consultants.

- ✓ Whistleblower clause in personnel manual.
- ✓ Americans with Disability Act accommodations.
- ✓ Performance evaluations of which the board may evaluate the chief paid staffer

while the executive director evaluates staff below.

- ✓ Organizational chart depicts lines of authority, communication and supervision.
- ✓ Be sure the definition of an independent contractor is met if that is the position of the worker.
- ✓ Some associations use an association management company (AMC).
- ✓ Attorney and CPA have a direct line of communication with the board.
- ✓ Board conducts confidential, self evaluation of performance.

Filings – The organization has a responsibility to file, usually annually, with government authorities.

- IRS – Form 990 Information Return, schedules and ancillary documents
- Secretary of State – Corporate report updates; registered trademarks.
- Solicitation – Charitable solicitation laws in some states.
- Revenue – Sales tax collections and renewals.
- Domain Registration – Renewal of the domain names.
- Personnel – Unemployment, Form 1099, etc.

- ✓ Board reviews Form 990 before submission to the IRS.
- ✓ Vigilance in understanding laws and filings maintained in a timely manner.
- ✓ Accuracy and perjury.
- ✓ If there is a parent organization, be sure information is submitted in a timely manner so their data remains accurate.

Finances – The board is responsible for the assets of the organization. Tools for maintaining and reporting financial assets include:

- Annual Budget
- Financial Reports
- Audits
- Investments

- ✓ The budget is approved annually and noted in the minutes.
- ✓ Financial statements are presented and accepted at every board meeting.
- ✓ Policy exists on conducting an audit, review or compilation by an independent financial auditor.
- ✓ An investment policy exists for savings/reserves.
- ✓ Board is conversant in budget and finances.
- ✓ Board knows the ratio of dues to non-dues income.
- ✓ Board understands ratio of savings to annual budget.
- ✓ Minutes reflect that the board has conducted its due diligence at meetings.
- ✓ Safeguards and policies are in place protecting assets.
- ✓ Awareness exists the CPA counsels the board and is not member of the staff.
- ✓ Policy on checking signing and credit card usage.
- ✓ Reimbursement guidelines and documentation by receipts.

Governing Documents - The board of directors is responsible for abiding by the governing documents.

- Articles of Incorporation
- Bylaws
- Policies

- ✓ Board members have access or receive the documents.
- ✓ Minutes reflect that directors received the documents.
- ✓ Directors read and understand.
- ✓ Amendments to governing documents are reported to the IRS.

Insurance – The organization purchases insurance.

- D & O Liability on the Board
- General Liability

- Meeting Cancellation
- Surety or Fiduciary Bond

- ✓ The amount of coverage needed for D & O may be impacted by events and activities.
- ✓ An attorney has reviewed D & O policy to be sure it adequately covers the organization, people and events and activities.
- ✓ Coverage considered for E & O, social media, publishing, etc.

Intellectual Property – The organization protects original content including body of knowledge, training manuals, guides, logos, trade names, etc.

- ✓ Original works are copyrighted to indicate property of the organization ©.
- ✓ Infringements of copyrights are strictly avoided in web content, newsletters, teaching, social media, etc.
- ✓ Creators of original works have transferred ownership to the organization, including compensated person and committees.

Meeting Minutes – Minutes document meetings of board and committees.

- ✓ Minutes record actions, motions and include self-serving statements.
- ✓ Minutes are *not* a newsletter or a place to record directors' notes and reminders.
- ✓ Audio recordings are discouraged or policy exists on limiting and use of recordings.
- ✓ Minutes are approved by a motion of the board.
- ✓ Minutes are safeguarded perpetually.
- ✓ Document decisions of Executive Committee.
- ✓ Be cautious about excessive Executive Sessions.
- ✓ Proof of annual corporate meeting exists.

Membership Notices – A membership organization is required to give notice to members that (1) dues are not deductible as a charitable expense, and (2) a portion of the dues were used for “direct lobbying.”

- ✓ Non deductibility notice on all membership applications and dues renewals.
- ✓ Percentage of lobbying noticed to members annually.
- ✓ Record retention of such notices to support an audit inquiry.
- ✓ Exception for 501(c)(3) organizations.

Parent – Chapter Relations – A chapter or component may have a binding relationship with and compliance requirements with a parent organization.

- ✓ Governing documents are consistent with parent.
- ✓ Compliance with parent-chapter requirements on a timely manner.
- ✓ Chapter does not create risk for the parent.

Policies – Policies are the wisdom on the board expresses through motions at the board meeting and archived in a policy compendium.

- ✓ IRS query about policies including:
 - whistle blower
 - record retention
 - compensation
 - public records
 - financial audits
 - conflicts of interest.
- ✓ Policies can be adopted, amended and rescinded by the board without notice to members.
- ✓ Policies are *not* procedures.

- ✓ Policies must be consistent with governing documents.
- ✓ Sufficient number of policies in an organization is often 25 to 50.
- ✓ The policy compendium can be sunset or should be re-affirmed periodically.
- ✓ Policies must be applied consistently.

Protection of the Board – The board of directors is generally protected in numerous manners.

- Volunteer Immunity
- Corporate Veil
- D & O Insurance
- Indemnification
- Reliance on Legal and Accounting Counsel

- ✓ Volunteer immunity covers the work of the board described in the governing documents.
- ✓ Indemnification will be identified in the bylaws; and has little meaning if resources are not available.
- ✓ Corporate status may require annual filings and may be dissolved.
- ✓ The board can reasonably rely on advice of the executive director, general counsel and CPA.

Public Records – In most states the organization is a private corporation as registered with a state government. Very few records are considered public with exception of:

- IRS Form 990
- IRS Letter of Determination
- IRS Application (Form 1023 or 1024)

- ✓ The public records, open to anybody, are designated by the IRS.
- ✓ Compliance includes availability on the internet.
- ✓ There are penalties for not disclosing public records.
- ✓ Board members are aware of documents that are to be treated as confidential.

- ✓ A principle of *transparency* may guide the board and staff in allowing access to additional documents beyond IRS records.

Social Media – The organization reaches beyond traditional communications and a website by using social media such as Facebook and Twitter.

- ✓ Guidelines and controls for content, copyright and professionalism exist.
- ✓ Antitrust violations, and libel, etc. are strictly avoided.
- ✓ Legal cases have stated that an association can be held liable for the social media it controls.

Software Licenses – The organization maintains appropriate software licenses and avoids pirating.

- ✓ The Business Software Alliance checks for licenses and issues significant fines for use of unlicensed software.
- ✓ Safeguard licenses.
- ✓ Policy exists to limit downloading or installing unlicensed materials on association computers.

Speaking for the Organization – Lines of authority and communication exist in the organization. To ensure consistent messaging, the chief elected officer has designated spokespersons.

- ✓ No person should assume they have authority to speak for the officers, board or organization.
- ✓ Courts have stated that a board member, committee or chapter may appear to be an *agent* for the organization hence may cause liability for statements.
- ✓ Discussions and documents in board meetings are treated with confidentiality.
- ✓ Policy exists restricting use of logos, letterhead and titles.

Subsidiaries – Many associations create subsidiary or related organizations.

- Political Action Committee (PAC)
- Foundation [501(c)(3)]
- For-Profit Corporation

- ✓ Rely on legal and accounting professionals prior to establishing subsidiary.
- ✓ Control by the parent organization is often a key issue.
- ✓ A subsidiary agreement on file documents the exchange and use of staff, logos, licenses, office space, etc.

Sustainability and Crisis Management – The board has a responsibility to ensure the sustainability of the organization through successive leadership and staff planning and preparedness for a crisis.

- ✓ Emergency manual for communications and backing up critical documents is maintained outside the office.
- ✓ Leadership continuously identifies and vets emerging leaders.
- ✓ Succession plan for senior staff considered.

Unrelated Business Income Tax – Though an organization is exempt from federal income tax, it may be required to file Form 990-T to the IRS for unrelated business income tax (UBIT.) Three common triggers for UBIT include:

- Rental income
- Advertising income
- Royalty income and endorsements

- ✓ Income and profit can be offset by expenses.
- ✓ The association does not position itself as a *partner* to the endorsed program or party.
- ✓ Sponsorship income is tax exempt, compared to advertising income.

APPENDIX

Everything I Need to Know for Board Service I Learned in Kindergarten

By David P. Goch, Esq.

A highlight of one's professional career is serving as an officer or member of a board of directors. However, while it is an honor the distinction carries with it significant obligations.

Fulfilling one's duties can be achieved by following some basics that were likely taught when we were in kindergarten. Follow these principles for successful board service.

- **Attend** - If you are not there, you're not involved. Directors who do not attend meetings are nevertheless bound by actions taken at those meetings and will be held responsible if any such actions are deemed negligent.
- **Participate** - Be engaged. The *minimum* level of participation required of directors is to read all relevant materials (e.g., committee reports, budgets) and ask questions to be better informed. A good board member frequently asks questions that verify that things are operating effectively and without risk¹.
- **Delegate** – Volunteers cannot do it all. Boards delegate their authority to others; typically to committees and the organization's staff. But while such delegation is a legitimate practice, abdication of the board's responsibilities is not. Board members need to remain alert and aware.
- **Fiduciary Duty** – While this not a kindergarten term, it means to “play fair.” It includes the duty of good faith and fair dealing. A person assumes this duty, created by their own undertaking, and is required to act primarily for the benefit of the organization.
- **Conflict** - Conflicts of interest should be avoided but they continue to arise. While state laws vary, the general rule is that a director with a potential conflict of interest should disclose that interest to the board and recuse him or herself from consideration of, and voting on, the conflict-affected matter. Most organizations have a policy addressing conflicts.
- **Money** – Financial mismanagement is a common risk. It is vitally important that directors review financial statements and ask questions. If financial information is presented in a manner that cannot be understood, the directors should educate themselves on how to read financial statements. One of the important questions is how finances are being invested (how diverse and how safe)?

¹ Bob Harris, CAE and board coach refers to the practice as, “Verify and Trust.”

- **Professionals** - You *don't* need to know it all! Boards are strongly advised to work with attorneys, auditors, professional investment advisors and insurance consultants to help protect the organization from liability and risk.
- **Papers** - Keep your homework! Documentation is essential for having a historical path to chart future decisions as well as to provide it with the “ammunition” necessary to defend the board if challenged. The board should have a document retention policy.
- **Relationships** - As implied throughout this document, the board is the decision making body. In fact, it is legally obligated to be so and it carries all the possible legal liability for it. While the responsibilities of the board and staff may overlap, suffice it to say that the board governs and acts strategically while the staff manages and is tactical. __

Official Action

The nine rules assume that appropriate board action has occurred, or the meeting has been duly called and convened. Official action occurs where: 1) there is a meeting duly called in accordance with the bylaws; 2) with notice and adequate time being provided to all that are entitled to such; 3) there is a meeting that is conducted by unanimous consent (if all parties entitled to vote agree, then adequate time and notice is not necessary); or 4) if entitled parties voluntarily waive their right to notice of a meeting.

Generally, board action requires a majority vote of those parties present and entitled to vote. An official meeting cannot take place unless a quorum, generally defined as a majority of the members of the board, are present.

Although boards can ratify action subsequent to its occurring, unilateral decisions by directors and officers is discouraged except in the most extreme cases and upon consultation with others within the leadership and, if necessary, legal counsel.

The nine rules, similar to what one learned in kindergarten, will help board members understand their roles and responsibilities.

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Note: David Goch is a Partner in the Washington law firm of Webster, Chamberlain & Bean. His practice includes all aspects of nonprofit law including: contracts, corporate, tax, antitrust, intellectual property, standards and certification, employment matters, and government relations for which the firm has established a national reputation as being the leader in the field. He has over twenty years experience working with associations/chambers/charities of all sizes. He can be reached at Webster Chamberlain & Bean, 1747 Pennsylvania Avenue, NW, Suite 1000, Washington, DC 20006, (202) 785-9500 or dgoch@wc-b.com.

Glossary

Antitrust – When two or more people in the same industry or profession get together to discuss business practices, there is a possibility of violating antitrust laws. Penalties can exceed millions of dollars.

Due Diligence – The expectation that a board member exercises reasonable care and follows the business judgment rule when making decisions.

Duty of Care - The expectation that a board member exercises reasonable care when making decisions.

Duty of Loyalty - The expectation that a board member remains faithful and loyal to the organization. Loyalty is sometimes misunderstood in the case where directors are selected from a federated or affiliated organization but must be loyal to the parent corporation.

Duty of Obedience – The expectation that a board member remains obedient to the governing documents of the organization as well as its mission and goals.

Exempt Organization – A designation by the IRS that an organization is exempt from paying federal income tax. See **UBIT** for exceptions to tax exempt exceptions.

Fiduciary Responsibility - A duty of the board members to ensure that financial resources of an organization are sufficient and handled properly. Describes a legal or ethical relationship of confidence or trust regarding the oversight of money and property of the organization.

Governing Documents – The documents that grant authority and limitations for governance and management; the bylaws, articles of incorporation and policies.

Insurance – Board insurance coverage is referred to as “**D & O**” - directors and officers liability. Common insurance coverages for nonprofit organizations include D & O, general liability, meeting cancellation and a fiduciary bond to cover fraud or acts of dishonesty.

IRS Information Return – The IRS requires nonprofit organizations to file an annual information return; also known as **Form 990** or a variation. The document is a public record.

Letter of Determination – A public document from the IRS indicating that the organization is exempt from paying federal income tax.

Non Profit – A designation by a state government agency, usually the Division of Corporations. The legal reference is “not-for-profit.” Nonprofit does not mean the organization cannot make a profit. An organization must produce streams of revenue to support its mission and programs.

Policy – A policy represents the wisdom of the board to guide future leaders and to interpret the bylaws and articles. Policy adoption is a responsibility of the board.

Policy Manual – A notebook or manual referencing the policies adopted and amended by the board of directors over time.

Public Records – Nonprofit organizations have specific records that must be made available upon request to the public; mostly IRS documents that include **Form 990**, the application for exemption and the **letter of determination**. Fines may apply for denial of requests for public records.

Tax Exempt Status – Organizations receive tax exempt status (exemption from paying federal income tax) by applying to the IRS. Chambers of commerce and associations are generally assigned 501(c)(6) status. Foundations are designated as 501(c)(3) organizations

Subsidiary – A nonprofit organization may have subsidiaries or related organizations to achieve its goals and increase income, including political action committee, for-profit corporation and/or a foundation. Directors must understand the relationship of the parent board of directors to related organizations.

Unrelated Business Income Tax (UBIT) – A mechanism for the IRS to determine if income received is outside of the mission statement. Common triggers for UBIT, if a profit is shown, are advertising, rent and royalties.

BOARD RESPONSIBILITIES

Serving on the Board of Directors is a rewarding and important responsibility. This guide informs leaders of the various aspects associated with governing a volunteer membership organization.

"The board governs..."
...the staff manages."
Everywhere, volunteer leaders are responsible for the governance of the organization. The board provides, develops policy and sets a vision. The mission statement should frame all decisions -- avoid major management -- avoid major management. Four board functions:
• Governance
• Policy & Program Development
• Financial & Human Resources
• Education

Management: Staff and consultants are responsible for **ADMINISTRATIVE** the organization. Staff partners with the board to advance goals and strategies, while making sure that administrative and financial management is sound.

Board Governance
The board is responsible for the organization's success. It is the board's responsibility to ensure the organization's success. The board is responsible for the organization's success. The board is responsible for the organization's success.

Board Fund
The board is responsible for the organization's success. The board is responsible for the organization's success. The board is responsible for the organization's success.

To order laminated guides send quantity and street address to
bob@rchcae.com
\$12 for one or \$10 each for more than one, plus S&H.
Nonprofit organizations will be invoiced (no credit cards).

Policies Common to Associations

A policy management toolkit and samples are available at www.nonprofitcenter.com.

- Antitrust Avoidance
- CEO Performance Evaluation
- Committee Authority
- Compensation
- Conflicts of Interest
- Consent Agenda
- Diversity
- Executive Session of the Board
- Financial Audit
- Guests Attending Board Meetings
- Insurance Coverages
- Liquor
- Listservs, Bulletin Boards, Social Media
- Logo and Letterhead Usage
- Meeting Minutes
- Original Works and Intellectual Property
- Public Records
- Record Retention
- Savings Reserve
- Strategic Planning
- Whistleblower

Volunteer Leaders Commitment Form (sample for adaptation)

Volunteer Leader Commitment

As a volunteer leader of the organization, I am committed to:

- Uphold governing documents, policies and strategic plan.
- Avoid discussions that could lead to violations of state and federal antitrust laws.
- Respect the confidentiality of discussions and documents and speak for the organization only when explicitly designated or based on approved messaging.
- Disclose conflicts of interest.
- Serve on committees and workgroups as needed.
- Support the financial needs for the organization with contributions or in-kind services.
- Work to serve the members and advance the mission.

Signature_____Date_____

Bob Harris, CAE, provides free association governance and management samples and templates at www.nonprofitcenter.com. He can be contacted at bob@rchcae.com. He facilitates strategic plans, trains board and staff.