

Top Legal Risks Facing Nonprofits

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Introduction

- Who we are
- Who our clients are
- Major areas of focus

Losing Sight of Your Mission

- Forgetting to fulfill your tax-exempt purposes
- Keeping track of the big picture
- Risk of losing tax-exempt status
- More isn't necessarily better

Staying Focused

- Many nonprofit organizations, including trade associations, attempt to do too much – far more than their tax-exempt purposes allow.
- Pressure from members, Board members, and others often lead to a nonprofit acting beyond its scope and outside of the legal parameters of a nonprofit.
- Since 2004, many certification organizations that started as 501(c)(3) entities have re-established themselves as 501(c)(6) organizations – or created an affiliated 501(c)(6) entity – to avoid excessive UBIT for certification revenue.
- Having a regular strategic planning session that results in achievable goals can help nonprofits stay focused and work towards their tax-exempt mission and purposes.
- Expansion and growth should be considered under the lens of the main purpose of the organization – refer back to your governing documents.

Cutting Through the Noise

- Conflicts of Interest
- Competing Interests
- Micromanagement of Staff by the Board

Acting in the Best Interests of the Organization

- With so many competing voices (Board, staff, members), associations and nonprofits face serious risks that could jeopardize the organization's tax-exempt status.
- Associations need to have a robust conflict of interest policy that Board members should sign on an annual basis. In addition, the procedures for handling conflicts are critical in the event of an IRS audit or litigation.
- Board members and staff must put the interests of the organization first – even if the Board member serves on another board as well.
- The Board is the strategic overseer of the organization. Getting in the weeds or micromanaging the staff is ineffective and inefficient. Organizational staff will lose motivation and become resentful of the Board and senior leadership.

Artificial Intelligence

- **Data Privacy**
 - Compliance with federal, state, and international privacy laws
 - Disclose how data will be collected, used, protected
 - Obtain consent
- **Intellectual Property**
 - AI creates new works based, in part, on work that already exists
 - Ensure you have all necessary permissions to use any copyrighted work
 - Don't claim ownership of any AI-created work without obtaining any required licenses
 - Do not use protected or confidential information when inputting data
- **Discrimination**
 - Potential for discrimination in hiring, membership recruitment, leadership opportunities
- **Tort Liability**
 - Association can be held liable for inaccurate, negligent, or biased results that harm members or other end users
 - Carefully vet and ensure accuracy of any AI-generated information

Antitrust Concerns

- There are a number of off-limit topics where discussions could lead to illegal agreements:
 - Pricing, including any discussions of methods, strategies, timing, discounts, advertising, or what constitutes a fair or reasonable price
 - Whether to do business with suppliers/vendors, customers or competitors
 - Complaints about business practices of other companies
 - Confidential business plans regarding output decisions, employee compensation, marketing plans, or decisions regarding future product/service offerings

Antitrust Concerns (continued)

- Concern that competitors can use these to violate the antitrust laws in the same way they could at meetings
 - Rules regarding off-limit discussions – and other acceptable and non-acceptable behavior/discussions – on the forum should be clearly laid out, agreed to (click-and-accept) by each participant prior to joining, and sent out to all forum participants each year
 - Inappropriate posts can give rise to potential antitrust liability (e.g., price fixing, group boycotts) as well as liability for defamation, tortious interference, copyright or trademark infringement, etc.
 - The boards should be monitored by well-trained and responsible association staff
 - The staff should be able to (and should) promptly take corrective action when inappropriate messages are posted

Stale Voices and Perspectives

- Ensure regular turnover on the Board
- Keep focus on diversity in Board and other leadership representation
- Have a defined role for former leadership

Don't Forget About Governance!

- All nonprofit organizations are required to abide by state and federal laws and their own governing documents.
- It's important to look in the right places and follow the recipe for good governance.
- Order of hierarchy: IRS statutes and rules/state nonprofit corporate law → Articles of Incorporation → Bylaws → Policies and Procedures.

That's The Way We've Always Done It

- Many nonprofits and associations fall into the trap of lifetime appointments or lengthy terms for Board members which can put the organization into a programmatic rut.
- New voices representing diverse perspectives are important to ensure an association's continued success.
- Extended participation for past chairs or other Board leaders can hamstring the organization's forward progression and get stuck in the "that's the way we've always done it" mentality.
- Many prospective members will now look to the diversity of the Board to find a connection.

And, of Course, the Law

- Tax-exempt organizations are guided by their own mission and purposes, but first and foremost comes the law.
- Failure to follow IRS rules and state nonprofit corporate law can put an organization at serious risk.
- Bylaws and policies and procedures should govern the day-to-day operations of an association.
- Regular governance reviews are strongly recommended as many nonprofit statutes undergo revisions on an annual basis.

Questions?

T E N E N B A U M

L A W G R O U P P L L C



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