

**TAKING CARE OF BUSINESS:
501C3
NON PROFIT ENTITY
COMPLIANCE**



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Corporate Governance

- Part I Review Save Me The Money: Insurance
- Sloppy Corporate Governance =
 - D & O Liability – This means YOU!
 - Fiduciary Duty
 - Duty of Care
 - Duty of Loyalty
 - Duty to comply with governing corporate documents
 - Potential Legal Exposures
 - Potential Forfeiture of Corporate Status
 - Potential Tax Liabilities
 - Potential Unhappy – VERY UNHAPPY – Donors
 - A waste of a lot of valuable time and energy

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To Maintain 501 C3 Status

- **You Must:**
- Comply with 501 C3 Mgt. Requirements
- File Required IRS Forms
 - Various Form 990s
 - Employment Tax Returns



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You Must NOT:

- Allow more than an “insubstantial accrual of private benefit to individuals or organizations
 - Organization must serve public – not private-interests
- No part of an organizations net earnings may inure to the benefit of an insider (officer, director or key employee)
 - i.e. Payment of unreasonable compensation
- An organization may not engage in an “excess benefit” transaction
 - Providing an economic benefit to any person in a position to exercise substantial influence over its affairs, that exceeds the value of goods/services provided

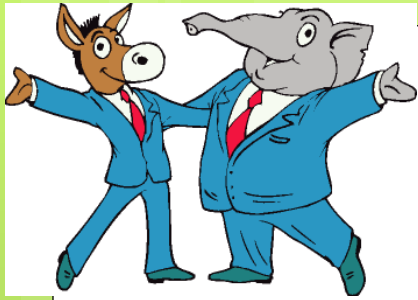
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YOU MUST NOT:



- Directly or indirectly participate or intervene in any political campaign on behalf of a candidate for public office
- **This does NOT prohibit the following activities if conducted in a non-partisan manner**
 - Voter education activities
 - Other activities designed to encourage people to participate in the electoral process, like a “get out the vote” campaign.

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POLITICAL ADVOCACY

- Political candidates MAY be invited to speak but the opportunity must be non-partisan
 - Both candidates must be invited
 - No fundraising is allowed
 - Charity may not indicate support or opposition to the candidate or his/her positions
- IRS considers the following to be inappropriate political advocacy
 - Statements that identify one or more candidates for a particular office
 - Statements that express approval or disapproval of candidates positions
 - Whether statement is delivered closed to election or refers to voting or election

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Legislative Advocacy

- A public charity may not engage in “substantial legislative activity”, i.e. “lobbying”.
- Alternatively, a public charity (excluding churches) may engage in limited lobbying by using the “Expenditure Test”, IRS Form 5768
- Lobbying activity will not jeopardize status provided lobbying expenditures do not exceed a set amount specified in section 4911 of the Code; i.e. \$1 million

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Let's Get Back To Basics

- **When is the last time you looked at your corporate governance documents?**
- What is your organization's mission statement?
- What is your organization's "goals"?
- How current is your organization's business plan?
- How current are your organization's ByLaws?
- How current are your organization's description of:
 - Directors and their title/duties
 - Officers and their title/duties
 - Committees and their title/duties
 - Successors in waiting?



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Without those basics:

- You're flying wild!
- That may be ok for a jump or two
- But sooner or later, you're out of control!



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If You Are Sued:

- What do your Articles of Incorporation Say?
- What do your ByLaws say?
- What do your Minutes say?
- What do your Contracts say?
- What do your IRS Filings say?
- What were your actions and how were they documented?
- Did they comply with the above?
- **ACCOUNTABILITY**



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Litigation Example

- Who can sue a Non-Profit
 - Insiders (staff)
 - Outsiders – 3rd parties with relationship
 - The Entity (ie against its directors and officers)
 - Directors – violation of duty owed
 - Beneficiaries
 - Members – i.e. harm to members interests
 - Donors – misuse of a restricted gift
 - State Attorney General- Mismanagement or DO claim
 - Other governmental officials (IRS, Dept.of Labor)



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Litigation Example



- Public Horse Show sponsored by Non-Profit
- Spectator injured by horse entering ring
- Spectator sues Non-profit
 - If CGL insurance in place, cost of defense and damages handled up to policy limits
 - If damages exceed policy limits, collection limited to assets of Non-Profit
 - No personal D & O Liability

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Exceptions to Limited Liability

- Directors and officers will be personally liable if he or she:
 - Personally & directly injure someone
 - Personally guarantee a bank loan or business debt on which Corporation defaults
 - **Fails to ensure the non-profit deposits taxes or files necessary tax returns**
 - **Fails to follow corporate formalities**
 - Performs acts which are fraudulent, illegal
 - Co-mingles non-profit and personal funds

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Case Study

- Non Profit hosts Concert of Champions with exhibition horses and riders and Youth Orchestra.
- Exhibitor's horse spooks when the orchestra begins to play and throws rider
- Rider sues Non-Profit
- Liable?

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Scenario 1

- Non-profit is:
 - Properly funded
 - Records are up to date
 - Tax and IRS reportings are up to date
 - Organization carries both CGL, Special Event and D & O Liability Coverages

Both cost of defense and damages are picked up by carrier; Directors and Officers are shielded from personal liability

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Scenario 2

- Non-profit has been struggling for past two years and is behind on tax payments
- Non-profit just let its insurance lapse but has not yet informed Directors and Officers
- Injured party's damages exceed available funds of Corporation
- Directors and Officers potentially personally liable

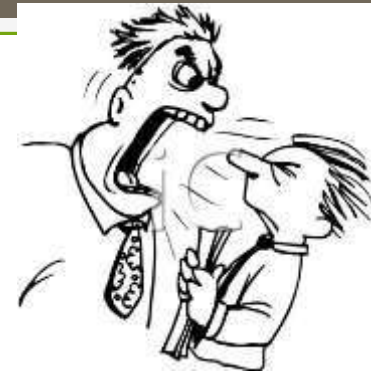
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Scenario 3

- Injured rider also sues Gate Attendant who is a volunteer
- Alleges combination of gate opening with beginning of orchestral music “spooked” horse
- What result to Volunteer?
 - EALA Act
 - VAP Act
 - Assn. Insurance Coverages

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Scenario 4



- Association's membership rules establish process for member discipline & expulsion
- Member violates rules, receives notice of expulsion
- Member files suit alleging Association's failure to give Member Notice and Hearing
- Result?

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○ ASSOCIATION REVIEW OHIO 2014



- Stewards suspended trainer and required return of purse after his winning horse tested positive for Ranitidine.
 - Initial proceeding in compliance with Assn. Rules/Regs
- Trainer requested de novo hearing and received one before hearing examiner.
 - In compliance with Assn. Rules/Regs
- Examiner again recommended suspension and loss of purse but lifted much of his decision from a different case, including extraneous material.
- Trainer filed objections but Commission adopted examiner's recommendations. Trainer appealed to Court of Common Pleas and the Ohio Court of Appeals

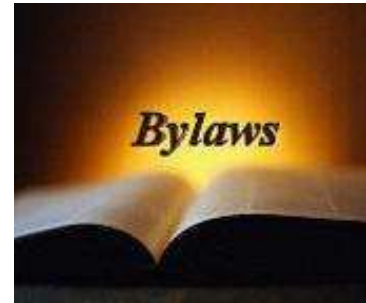
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Result

- Court of appeals noted the court's deference to administrative procedures of associations
- Rejected Trainer's claims of errors in Examiner's report where Assn. followed its own rules & regulations
- Rejected Trainer's claims of errors where final decision did not rest exclusively on the extraneous materials.
- Rejected multiple claims of hearing error dealing with credibility of witnesses, validation of experts, or that forfeiture of the purse was discretionary here where the medication was not deemed "performance enhancing".
- Court did agree that rules permitting Commission to assess costs were unenforceable as they were not authorized by and in fact conflicted with statute.
- SUMMARY: It's generally hard to overturn an administrative ruling via end run to court if association followed its own rules & regulations!
- Citation: 11 N.E. 3d 1215 (Ohio App. 2014)

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Scenario 5



- Association member signed Membership application which contained the following:
- Liability release for participation in ALL Association sponsored events
- Binding arbitration clause, and
- Acknowledgement of reading and accepting Associations' Rules, Regulations & Bylaws.
- Enforceable?

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Sample Clause

- All Members additionally agree that any dispute in regard to this agreement, its interpretation or applicability, any and all issues regarding damages, causation, or any other issue in which (Assn) or its officers, directors, members, employees, contractors, sponsors, volunteers, owners and/or operators of any property, facilities or equipment shall be submitted to binding arbitration in the county in which Association is headquartered, and before a neutral arbitrator, mutually selected by the parties, pursuant to rules of the American Arbitration Association.
- By signing this membership application “I agree to abide by the By-laws and Rules of (Assn) and agree to the conditions stated above.”

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What about E Signatures?

- Electronic Signatures in Global and International Commerce act (ESGICA) (2000)
- Makes electronic contracts and signatures as legally valid as paper contracts
- Must include terms of contract, option for signer to use paper vs computer, outline cryptology and storage methods.

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TIP # 1

- Every Year - For every new Board Member and Board
 - First meeting should be a corporate retreat
 - Board members should be provided with, and review all corporate governance documents including Mission Statement, Bylaws, and Descriptions
 - Board members should be advised regarding financial status of corporation and the limits on their power to:
 - Speak for the organization
 - Contract
 - Incur debt
 - Mission statement should be kept current
 - Board members should be required to sign a document of accountability
 - They understand, will comply, will stay within guidelines, and will meet the stated expectations
 - They understand failure to do so can expose organization to liability, and themselves to personal liability.



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Tip #2



- Conduct annual reviews of the corporate filings required to retain 501C3 status
- Analyze tax filing systems and annual insurance coverage reviews
 - Request copy of insurance Exclusions & Riders
- Consider new corporate forms, i.e.
 - Board Policy Statements

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Tip #3 Pull In Your Members

- Committees should be defined
- Committee scopes and stated goals should be defined
- Committee chairs should be appointed



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Tip #3: Pull in your Members

- Committee chairs should be required to:
 - Appoint a Sub-Chair annually (continuity!)
 - That Sub-chair automatically moves to Chair in the following term, thus carrying forward the committee knowledge, work and goals
 - Appoint 2-4 members to serve in that committee
 - New Sub-chair is identified from this group.
 - Schedule regular phone meetings on a standard date/time each month
 - Prepare written reports of all such meetings
 - President should work with Executive Director to acknowledge those committees consistently hitting the mark.

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Tip #4: Understand those Young-uns!

- They don't think like us
- They don't act like us
- They aren't us.
- THANK GOD!
- They are our future.
 - And they're fun!
 - And they help us with technology.

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Tip #5: Incorporate Inter-Generational Communications



- Recruit young board members
- Specifically identify what they require to “invest”
- Give them the feedback they require
- Give them the responsibilities they desire
- Remember their ways might just be BETTER! Or at least more interesting.

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Tip #6: Reward and Acknowledge

- Your D/Os, Staff & Members!
- Your Donors
- Your Volunteers
- You can't praise people enough!
- Mechanisms:
 - Newsletter
 - Web page
 - Annual meetings
 - Special programs or events
 - Dinner with Volunteer of the Year
 - awards



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Tip #7: Put a quiet lid on:

- Inter-board griping
- Back-biting
 - Super detrimental
 - Find things to applaud
 - Redirect that energy
 - Create a positive culture
 - Have a “no tolerance” policy for rotten apples
- Make all members commit: if they have a complaint, address it directly, remedy it, and move on!



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Biggest Cause of Board Turnover

- I'm a volunteer
- I'm not getting paid for this
- I don't need this ...
(fill in the blank)



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Tip #8: Understand your Limits

- Create a Board
 - “Conflict of Interest” policy
 - “Document Retention” policy
 - “Whistleblower” policy



Policies &
Procedures

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Tip #9: Be Creative

- Do Offsite Meetings or Retreats
 - Make it fun for D/Os
- Use Affiliate agreements
 - Office space
 - Staffing
 - Other Support
- Use Barter agreements
 - Member services for goods, advertising
 - Record for tax purposes



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Tip #10: Be pro-active

- Review contracts
- Use current waivers
- ID & protect intellectual property
- Review and manage risk areas
 - Political/lobbying activities
 - List all activities that come within that parameter & monitor/enforce IRS compliance
 - Personnel policies
 - Communicate & obtain signed acknowledgement
 - Social media policies
 - Communicate & obtain signed acknowledgement



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Remember:

- “If your actions inspire others to dream more, learn more, do more and become more, you are a leader.”
– John Quincy Adams
- “Each of us has a spark of life inside us, and our highest endeavor ought to be to set off that spark in one another.”
– Kenny Ausubel



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Questions?

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