

# FOOD FOR THOUGHT: BOARD TRUSTEE EDITION

..... VIRTUAL "BACK TO SCHOOL" FOR BOARD MEMBERS



[CHESCOCF.ORG/VIRTUAL-BOARD-TRUSTEE](https://chesco.org/virtual-board-trustee)



**ASK AN ATTORNEY: AVOIDING LEGAL PITFALLS**  
**JOIN ON ZOOM | Tuesday, Oct. 20 at 4pm**

Thought Leaders: L. Peter Temple, Esq., Donald B. Lynn, Jr., Esq., & Emily Temple Abels, Esq.



# THANKS TO OUR PROMOTIONAL PARTNERS



# BOARD DUTIES



- 1. Ensure Legal & Ethical Integrity**
- 2. Build a Competent Board**
- 3. Determine Mission & Purpose; Ensure Effective Planning; Monitor & Strengthen Programs & Services**
- 4. Protect Assets & Provide Financial Oversight**
- 5. Ensure Adequate Financial Resources**
- 6. Enhance the Organization's Public Standing**
- 7. Select, Support & Evaluate the Chief Executive**

BoardSource, <https://boardsource.org/> Washington DC

# Welcome to Pennsylvania! Business Corporation Law



## PA Business Corporation Law (1988)

PA BCL = Legal requirements & regulations surrounding corps in PA, including:

- Registered agent/address in PA
- Legal rights: buy & sell property; give & take loans; start another business; sue & be sued
- Clear name & purpose
- Articles of Incorporation filed with PA Dept of State Business Division
- Have a board of directors, officers, qualifications, voting process, annual meeting

Note: PA BCLaw requires 3 positions (Pres, Sec, Treas). 1 person may hold all 3.

Legal practice/NOT BEST PRACTICE

- Have bylaws & operate by them

## Legal Consequences

When an individual board member or a full board

**fails to comply** with statutes,

they can be held **legally liable** for criminal or civil monetary penalties that have the potential to bankrupt the organization.

# Standard of Conduct = Business Judgment Rule

## Business Judgment Rule:

Courts typically apply the Business Judgment Rule when rendering judgments, developed over the years as Courts have deliberated to what extent the corporate fiduciary is liable for honest errors in judgment that lead to loss to the corporation:

“Directors are required to perform their duties in good faith, in a manner in which they reasonably believe to be in the best interests of the corporation, and with such care, including reasonable inquiry, skill & diligence, as a person of ordinary prudence would use under similar circumstances.”





# Good Faith = Duty of Care. Duty of Loyalty. Duty of Obedience.

## Duty of Care

- Responsibility for making **informed judgments** lies with the board member:
  - Board members need **to secure facts & ask questions** to get **clarity of the issues**
  - The board should seek **independent professional advice** when decisions are **complex** or in **new** territory
- Per the Office of Inspector General, board members are responsible for two facets of legal compliance with regard to duty of care:
  - to ensure that **accurate information & reporting systems** exist
  - to ensure that reporting systems are adequate to **flag board members** in a **timely** manner when the organization is threatened by **legal** concerns





3Ds: *con't*

## Duty of Care. Duty of Loyalty. Duty of Obedience.

### Duty of Loyalty

- Board members must **cast aside any personal & professional interests**, placing the interests of the nonprofit ahead of their own
- Although Board members technically CAN engage in **financial transactions** with the organization as long as the conflict is disclosed and approved by the other directors, this is perceived by many to be **disloyal self-dealing** and should be refrained from
- Loyalty means **respecting the confidentiality** of the organization's affairs by **not disclosing them** to outside individuals in a way that leads to **loss of opportunity** for the organization

### Duty of Obedience

- Board members are responsible to **assure compliance with all federal, state, & local laws & regulations**
- Board members must be **faithful to the organization's vision & mission**

# How Does D&O Help?

## Director's & Officer's Liability Insurance (D&O)

- D&O insurance typically protects individual board members as well as employees, volunteers & the organization itself in the instance of a **civil suit**: slip & falls, accidents, employment-related, someone believes the board intentionally took a significant improper action, etc.
- Almost 95% of claims against D&O policies are **employment-related**, including harassment, discrimination, and wrongful termination.
  - Per Nonprofits Insurance Alliance Group, annually 1 in 25 nonprofits has a D&O claim against them, nearly all employment-related.
  - The average D&O claim costs \$35,000 to resolve (a combination of legal defense costs and settlement payments).
  - 10% of claims will cost more than \$100,000 to resolve.
- If an organization has no employees, its risk of claims against board members is low, but so is the premium for such coverage.
  - It still makes sense to buy D&O, if for no other reason than to give board members peace of mind.
- But since each policy is different, sometimes with different features even at the same insurance company, it is important to confirm with your broker that both individuals and the organization are covered, and that coverage for employment practices is included.



# Board Liability Basics

- ❑ Make sure **taxes are paid** & **laws** are followed:
  - Assure **withholding taxes** are paid to the IRS
  - Assure **employment laws** are complied with
  
- ❑ Avoid non-management, mis-management & conflict of interest:
  - **Non-management** = absent & non-participating board members
  - **Mis-management** = the process or practice of managing ineptly, incompetently, or dishonestly. Misbehavior, negligence, violation, carelessness, dereliction, misdeed, transgression, malfeasance, impropriety, immorality, wrongdoing.
  - **Conflict of interest/duality of interest** = a situation in which a fiduciary who, contrary to the obligation & absolute duty to act for the benefit of the nonprofit, exploits the relationship for personal gain

# COVID-Inspired Scenarios & Cases:

## program refinement, risk, fiduciary responsibility

1. A nonprofit that provides food & counseling to low-income families has decided it cannot let the families come onsite as the site is too small inside, and unsafe outside. Plus, its volunteers feel they cannot deliver food safely. So, needy people are going hungry and food is spoiling. **A Board member offers to deliver food daily on behalf of the nonprofit, below the typical market cost, but still for a fee.**

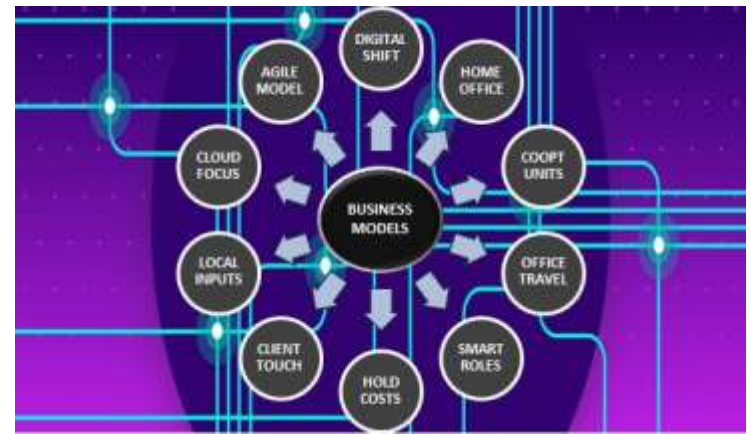
2. A nonprofit health clinic whose **Executive Director and program staff** has fought to have the clinic remain open throughout COVID has **3 of 10 Board members** who are adamant that the health clinic should close. They don't want to be sued if **staff or constituents contract COVID and have serious medical issues as a result**. The Senior Finance Director & Vice President resigned from the nonprofit as they disagree with the Executive Director and program staff; and the Board disagreement continues. Constituents are being served; funders are paying for constituent services at adequate levels, but staff and Board morale is fractured. What should be done, by whom?

3. When COVID struck, the Senior Staff & Board of a nonprofit with a \$20M annual operating budget **implemented immediate program cuts and closures**. It also **laid off personnel** whose work would be impossible because of social distancing regulations, and cut administrative staffing. These moves cut the annual operating budget in half.

The Board also agreed to tap the nonprofit's \$5M in **financial reserves** to provide basic services during COVID.

Throughout COVID, nonprofit has **partnering strategically** and significantly with other nonprofits, to show the community that it is open and able to help.

After 8 months of COVID restrictions, the nonprofit continues to provide basic services to a grateful constituent group, raise **modest funds**, and hold on for dear life. The reserves are almost fully depleted, and the annual operating budget has been pared to a shadow of its former self. **What's the Board to do?**



# COVID-Inspired Scenarios & Cases:

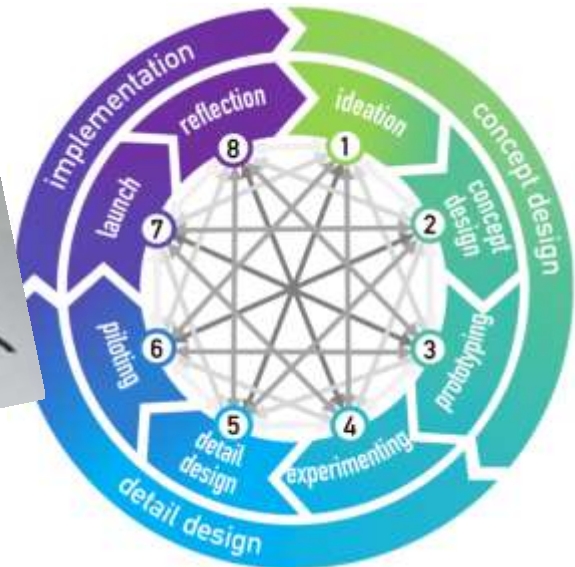
## personnel

1. When COVID began, the nonprofit's 10-person staff quickly adapted to work remotely from home. Staff held a weekly Zoom coordination call; monthly committee meetings; and Board meetings every month or so. Six months later, a few staff have returned to the office; but most of the staff would rather work remotely. The Executive Director is concerned about decreasing productivity and synergy, and would like to slowly bring staff back onsite safely. **What is the Board's role here, especially with staff who would rather continue to work remotely, even though the Executive Director wants everyone back in stages, safely?**
2. A staff member comes to a Board member, **complaining that the Executive Director wants them to work on-site rather than remotely, now that COVID protocols are known and implemented.** But they would rather work remotely. What should the Board member do?



NOT DYING  
FOR WORK

3. The Executive Director admits to the Board Chair that they are finding it difficult to **monitor and evaluate the quality of staff's remote work with constituents**, as much of it is private, conversational and does not have immediate impact. What concerns does the Board need to address?
4. During COVID, the Board conducted the Executive Director's appraisal by distributing an on-line survey and then reviewing findings by a Zoom call. The Executive Director is finding it hard to conduct **virtual appraisals of staff working virtually.** What is the Board's role here?



# COVID-Inspired Scenarios & Cases:

## fundraising & donor accountability

1. Staff uses **social media**, especially Facebook & GoFundMe, to encourage **involvement & donations**. Due to COVID, **more and more donations are coming in online from social media**. A Board member wonders whether this raises any legal issues.
2. A Board member is concerned about the drop off in events and the nonprofit's inability to maintain donor relationships during COVID. The Board member **offers to hold a major donor reception in their home: outdoors & indoors**. What should the Board do?
3. The nonprofit received a **large grant from a donor last year**. The funded project closed down due to COVID-related issues and the grant money remains unspent. The nonprofit would like to **spend the remaining grant money to pay staff for core mission-related work** during COVID. Can they? What should the Board do?
4. The Executive Director is thrilled to report to the Board that an **anonymous donor** is contemplating a \$1,000,000 gift to help with COVID. The donor's condition is that NO ONE knows who makes the gift. As a 501(c)(3) non-profit public charity, must the Board know the name of the anonymous donor?





What opportunities  
has your nonprofit discovered  
amidst the pandemic crisis?



**THANKS TO OUR  
FOOD FOR THOUGHT  
DISCUSSION LEADERS & PARTNERS**



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# RESTORE CHESCo: NONPROFIT INNOVATION & RESILIENCY FUND



<https://chescofc.org/covidgrant/>

## Priorities

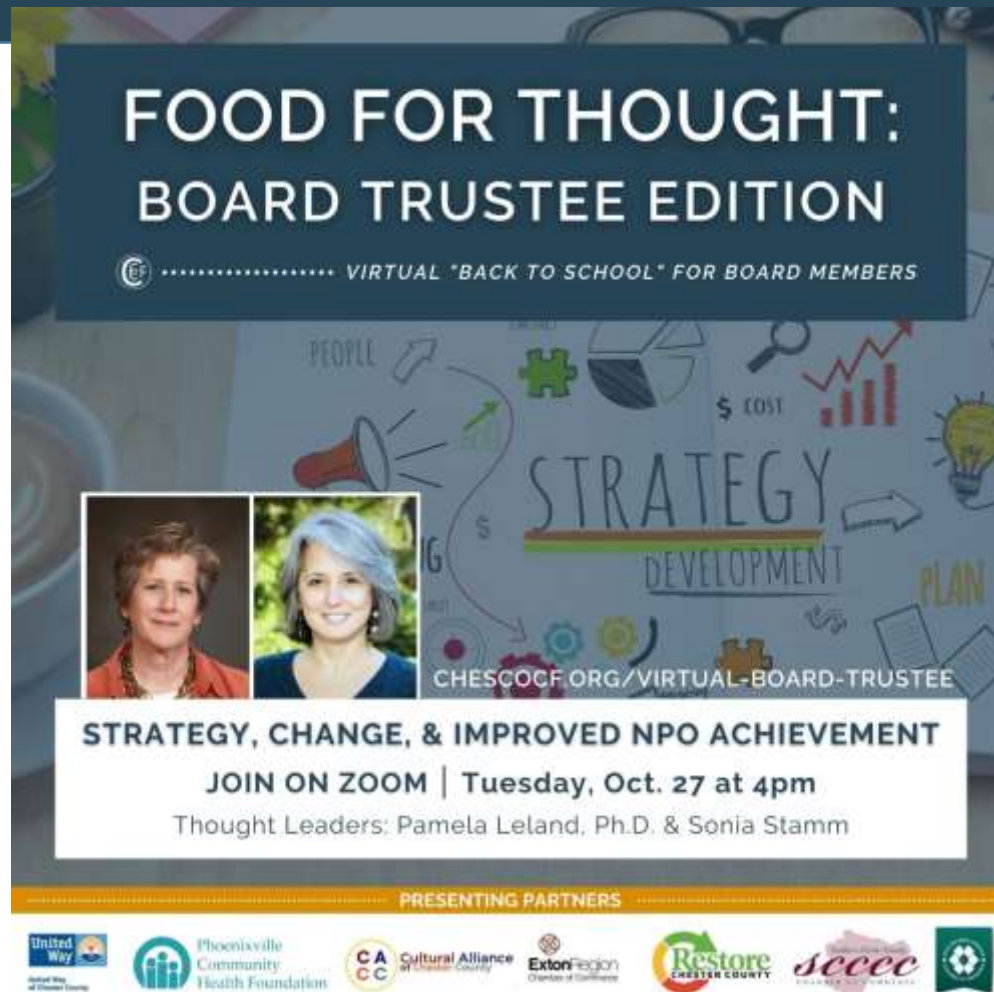
- Nonprofits that provide **clear evidence** of how they aim to/are **reshaping** their programs, services, administration, marketing and fundraising, to safely provide services and thrive in light of COVID impacts
- Nonprofits with substantial costs to comply with COVID public health requirements
- Nonprofits that serve a diverse constituency, and are governed and managed by diverse leadership




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# HOPE TO SEE YOU NEXT WEEK



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**STRATEGY, CHANGE, & IMPROVED NPO ACHIEVEMENT**  
**JOIN ON ZOOM | Tuesday, Oct. 27 at 4pm**  
Thought Leaders: Pamela Leland, Ph.D. & Sonia Stamm

**PRESENTING PARTNERS**

Register: [chescof.org/virtual-board-trustee/](http://chescof.org/virtual-board-trustee/)

