

Meeting the Moment:

Navigating Nonprofit Governance Challenges in Turbulent Times

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Topics



- Virtual board meetings
- Satisfying duties of care and supervision in an all-remote environment
- Financial reporting to the board
- Accessing endowment funds: a map to the minefield
- Managing crisis
- When is it time to talk merger?

Virtual Board and Membership Meetings



- Virtual board and membership meetings are allowed in all states, if permitted under the corporation's articles or bylaws
- Some states (e.g., CA, OR, DC, AK) permit virtual meetings by default
- Some other states (e.g., NY, WA) issued emergency orders permitting virtual meetings for all corporations on an emergency basis
- Remaining states have statutory provisions that likely serve to permit virtual meetings in emergency situations such as COVID-19

Virtual Board and Membership Meetings

- **What electronic media are acceptable?**
 - Most states require participants to be able to “hear” one another simultaneously
 - “Hear” includes use of assistive equipment, such as TTY, that allows people with hearing loss to participate in real time
 - Media that are OK in all states
 - Conference telephone systems
 - Videoconferencing systems (e.g., Zoom or Teams)
 - Media generally prohibited: those without real-time audio
 - Chat rooms
 - Messaging platforms
 - *Note: A few state statutes (e.g., CA) have ambiguous wording that may or may not allow meetings to take place using such media. But the ambiguity creates risk.*



Virtual Board and Membership Meetings



■ Tips for Conducting Electronic Meetings

- Keep agendas short—everything takes longer
- Make sure all voices are heard. Electronic meetings make it even easier to miss when a participant feels intimidated or gets ignored
- Don't rely on screen sharing alone to share documents (in most cases)
- Don't be afraid to use roll-call voting
- Ensure that videoconference meetings are password-protected and use a unique meeting room
- Minutes should be the same as those for in-person meetings

Financial Reporting to the Board in Difficult Times

- Financial reporting is a critical internal control
 - Neither strategy nor execution is possible without a clear, correct financial picture
- Current conditions are likely to result in dramatic financial changes
- Boards must think through changing strategic needs around funding

Key questions for boards, finance committees, and management:

- How often should boards, and/or executive committees, be getting reports?
- What should be conveyed in the reports?

Financial Reporting to the Board in Difficult Times

- Directors will likely need updates more often to satisfy their duties of care
 - How often? Depends on organization's specific circumstances
- Components of appropriate financial reports
 - Profit & loss statement
 - Compared to budget
 - Compared to prior year
 - Balance sheet (compared to prior year)
 - Analysis related to:
 - Cash flow and reserves
 - Debt-to-income
 - Endowment or restricted assets
 - Program-specific financial metrics



Duties of Care and Supervision in a Remote Environment

Duty of care for directors

- to perform duties “with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances”

The most important ways that directors satisfy this duty have not changed:

- Attend meetings, and be engaged
- Review, and try to understand, documents
- Ask questions when things seem incomplete or don't make sense
- Use your own judgment

But the remote environment adds challenges to all of them

Duties of Care and Supervision in a Remote Environment

■ Supervision in a remote environment

- More frequent and closer engagement: checkups, communication
- Executive committees can be helpful tools
- Flexibility is key!
 - New or different reporting metrics
 - More agile processes (providing they meet legal requirements)
 - Ability to pivot on strategic plans and planning



■ Board development

- Watch for skills and expertise that may be newly relevant on the board

Accessing Endowment Funds: A Map to the Minefield



- What is and is not endowment
- Endowment law
- Permissible spending
- Borrowing, pledging, and lending from endowment
- Releasing endowment restrictions

What is an “Endowment” Fund?

- A fund created by a donor with:
 - a written gift document
 - at the time the donor’s gift is made
 - designating it as “endowment” or otherwise restricting spending, either temporarily or permanently, *or*
- A fund created by donor gifts in response to a charity’s solicitation for “endowment”



What is *not* an “Endowment” Fund?

- A fund the charity’s board has set aside with an intent not to use for current spending (may be called “quasi endowment”)
- A fund created by a donor where:
 - the donor *recommends* that it be used for endowment
 - the donor seeks to restrict funding *after* the gift is made



What law applies to Endowment Funds?



- Charitable corporations or charitable trusts for which a charitable corporation is the trustee:
Uniform Prudent Investment of Institutional Funds Act (“UPMIFA”)
 - Model Act
 - Adopted in 49 states and D.C.

Permitted Spending from an Endowment Fund under UPMIFA

- Donor-specified spending, e.g.:
 - *Require 10% payout regardless of value*
 - Permit spending *no more than 5%* of net asset value
- *Or*, if donor does *not* specify, other than by designating as “endowment,” or saying “spend only income,” then UPMIFA requires boards to apply a “**prudence**” standard



UPMIFA Prudence Standard for Spending

- Core principle is to *preserve purchasing power*
- Spending rate must be “prudent for the uses, benefits, purposes, and duration for which the endowment fund is established”
- UPMIFA does *not* use concepts such as “principal,” “income,” or “historic dollar value”
- More flexible approach that takes modern portfolio theory into account
- But *not* infinitely flexible



What is a Prudent Level of Spending?

- No bright line as to what is prudent; depends on circumstances
- Core principle is to preserve purchasing power
- Some state statutes (e.g., California, New York, Oregon) include a rule under which spending in excess of a fixed percentage (usually 7%) is presumed to be imprudent
- May be possible to rebut this presumption with a strong record
- No presumption that a spending rate *below 7%* is prudent
- Documenting the basis for board decisions is critical



Critical Endowment Fund Questions

- Can we “borrow” from our endowment fund to pay current expenses?
- Can we pledge our endowment fund as collateral for a loan?
- Can we make loans to other charitable organizations from our endowment fund?



“Borrowing” from an Endowment Fund to Pay Expenses



- Not addressed or considered by UPMIFA’s drafters
- Such “borrowing” is not legally a loan; a loan requires two parties, and the ability to enforce repayment
- Cannot analyze as an “investment” since the charity is loaning money to itself
- Likely treated as an appropriation from endowment for spending, analyzed under prudent spending standard
- Fiduciary obligation of board to satisfy prudent spending standard

Pledging Endowment Assets as Security for a Loan

- Official commentary to UPMIFA indicates that UPMIFA permits such a pledge, *subject to a prudence standard*
- Some donors to endowment funds may specifically provide that their gifts may not be pledged
- Some states may require notice to the Attorney General or court approval
- If the charity defaults on the loan and the lender takes the collateral, there may be serious damage to relations with funders and the public
- A charity should be **very cautious** in considering this option



Loans from Endowment to Other Charities

- Loan is an investment
- UPMIFA standards regarding investment of charitable assets
- “***Prudent Investor Rule***” applies to investment of virtually all charitable assets under UPMIFA (charitable corporations) and Uniform Prudent Investor Act (charitable trusts)



Evaluating Loans from Endowment to Other Charities

- Must satisfy prudence standard
- Percentage of endowment fund involved is relevant
- Overall diversification is relevant
- May take into account an asset's “special relationship” with charitable purposes; not obligated to maximize rate of return on each investment, but ***rate cannot be zero***
- Relationship to mission-related investment philosophy and policy



Procedures for Modifying Donor Endowment Restrictions



- Written Donor Consent
- Court “Cy Pres” Petition
- UPMIFA “Old and Small” Funds
- Non-Judicial Agreements
- (available in some states)

Procedures for Modifying Donor Restrictions

- “Old and Small” Funds under UPMIFA:
 - UPMIFA permits a charity to release or modify a donor’s restriction *without the donor’s consent* with notice to the Attorney General if:
 - The charity determines that the restriction is unlawful, impracticable, impossible to achieve, or wasteful;
 - The restricted fund has a value of **less than certain dollar amount (varies by state)**;
 - The fund is **more than 20 years old**
 - Must provide **60 days notice to Attorney General**

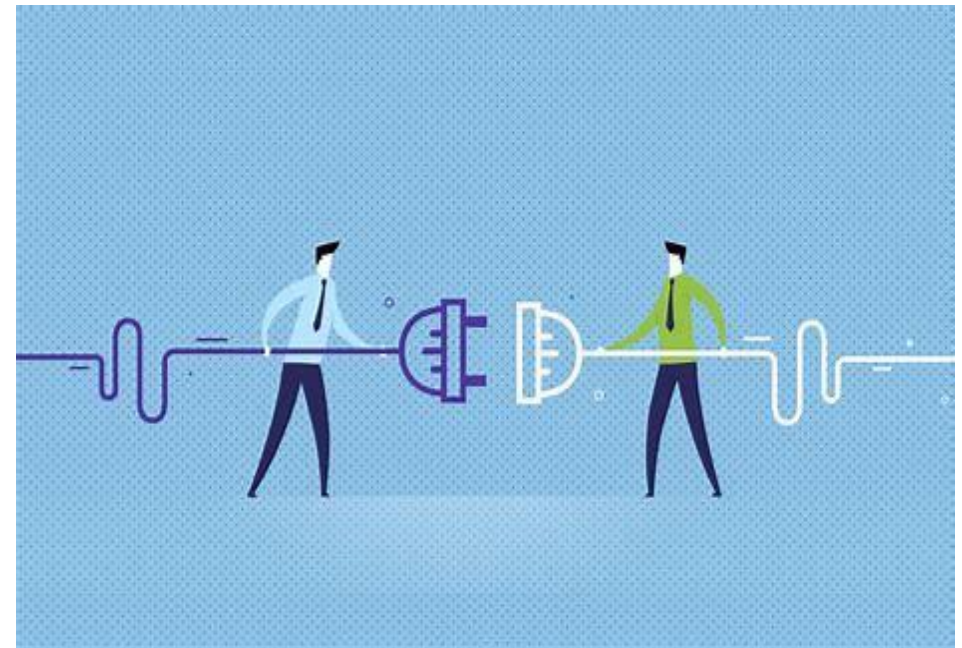
Guidelines for Crisis Management

- Plan in Advance
- Know Your Role
- Support the Team
- Communicate
- Watch the Financials
- Adapt



When Is It Time To Talk Merger?

- Address Succession Issues
- Financial Rescue
- Strategic Gain
- Cost Reduction?





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