



**HANCOCK ESTABROOK, LLP**  
COUNSELORS AT LAW

**LIBRARY TRUSTEES  
ASSOCIATION OF  
NEW YORK STATE**

**BOARD GOVERNANCE**

**MAY 6, 2017**

**Regulators and Regulations**

- Municipality
  - General Municipal Law
  - Local Legislation
- New York State: Board of Regents or Department of State
  - Education Law
  - Not-for-Profit Corporation Law
  - Charter or Certificate of Incorporation
- Internal Revenue Service
  - Internal Revenue Code 501(c)(3)
- Internal - Bylaws



**Presenter**

**Carrie J. Pollak, Esq.**  
Hancock Estabrook, LLP  
Gateway Center  
401 East State Street  
Suite 304  
Ithaca, New York 14850  
(607) 391-2861  
cpollak@hancocklaw.com



**Fiduciary Duties**

- Duty of Care
- Duty of Obedience
- Duty of Loyalty



**Goals for Today**

1. Know your Regulators and Regulations
2. Know your Fiduciary Duties and the context in which you operate
3. Know how the New York legal landscape is shifting and understand your responsibilities when a conflict of interest arises



**Duty of Care**

Requires Board Members to:

Act in good faith with that degree of care which an ordinarily prudent person would exercise under similar circumstances, and which Director reasonably believes is in the best interest of the Corporation.



**Act in Good Faith**

- Active Participation
- Regular Attendance
- Review Materials and Minutes
- Report Corrections
- Ask Questions



**Duty of Obedience**

- Must act in pursuit of the Corporation's Mission
- Board may determine precisely how mission can best be fulfilled
- Cannot divert corporate resources to other purposes, even if charitable



**Similar Circumstances**

- Takes Account of Distinct Facts and Reality
- Based on Facts Available at Time of Decision



**Duty of Loyalty**

Requires Board Members to:

- Exercise power in the interest of the Corporation only – not in their own interest, or that of another entity or person
- Demonstrate undivided allegiance to mission
- Manage conflicts of interest
- Maintain board confidences



**Ordinarily Prudent Person**

- Generalists, no need for specialized knowledge
- Sound, practical judgment and common sense
- Does not mean that all decisions are correct
- Does not require excessive caution
- You can rely on experts and committees



**Board and the Mission**

Provides strategic guidance to staff in pursuit of mission



**Board and the Staff**

Board Provides HR Oversight over Executive Director

Executive Director directs all organization operations



**What is New York getting at?**

Imposed specific duties on the Board to encourage more effective monitoring of the nonprofit's financial health and fraud controls.

1. Board duties may only be satisfied by the board itself or committees comprised solely of board members.
2. Audit functions may only be conducted by independent board members.
3. Conflict of Interest Procedures



**In other words...**

Noses in and Fingers Out



**Committees**

- No more standing committees or ad hoc committees
- Committees of the Board
  - Comprised solely of Board members
  - May be delegated Board responsibilities
- Committees of the Corporation
  - May include non-Board members
  - May not be delegated Board responsibilities
- Other than performing "Audit Functions", board responsibilities means the ability to act on behalf of the board



**Not-for-Profit Corporation Law**

Statutory History

- Enacted on May 26, 1969, effective of September 1, 1970.
- Amended by the New York Nonprofit Revitalization Act of 2013, which took effect on July 1, 2014.
- Technical amendments enacted in October and December of 2015, and December of 2016.



**Conflicts of Interest**

- Conflicts of Interest are not unlawful.
- A Conflict of Interest exists when a Director or Officer, directly or indirectly, has a material personal interest in a contract or transaction.



### Conflicts of Interest

- Obligation to disclose real or *potential* conflict.
- Authorized committee determines whether conflict exists.
- Conflicted director may present information relating to transaction at issue.
- Conflicted director must leave for determination and vote by Board or authorized committee.



### What is a Related Party?

- Technical definition imposed by N-PCL Section 102(23).
- Check the box analysis.
- Case-by-case identification.



### Related Party Transactions

A "Related Party Transaction" means any transaction or agreement in which a Related Party has a financial interest and in which the Corporation or an Affiliate is a party.



### A Related Party is any:

- Director, officer, or member of a committee to whom the governing board has delegated powers;
- or Key Person of either the corporation or an affiliate;
- or other person who exercises such powers over the affairs of the Corporation or an Affiliate;
- Relative of any of these people;
- Entity in which any of these individuals has a 35%+ beneficial interest;
- Partnership or professional corporation in which any of these individuals owns a direct or indirect ownership interest >5%



### New Exceptions

On May 27, 2017, the following transactions will be excluded:

- **De minimis**
- Those that would **not be customarily reviewed** by boards of **similar organizations** and are available to others **on similar terms**;
- Those that benefit **charitable beneficiaries** and are available to other members of the same charitable class



### Related Party Duties

**Normal Conflict Procedure...**

- Obligation to disclose real or *potential* conflict.
- Board or authorized committee determines whether conflict exists.
- Conflicted director may present information relating to transaction at issue.
- Conflicted director must leave for determination by board or authorized committee.



## Related Party Duties

### Plus...

1. Investigate alternatives to the proposed transaction.
2. Determine whether it is reasonably possible that a better transaction that will not give rise to a conflict can be obtained.
3. If not reasonably possible, board or authorized committee must determine by a majority vote, whether the related party transaction is...



## Disclaimer

This presentation is for informational purposes and is not intended as legal advice.



## Related Party Duties

### Required Resolutions

- Best interest of the Corporation
- For the Corporation's benefit and not the related party
- Fair and reasonable

**The decision to enter transaction must be based on these determinations.**



## Summary of Presentation

1. Know your Regulators and Regulations
2. Know your Fiduciary Duties and the context in which you operate
3. Know how the New York legal landscape is shifting and understand your responsibilities when a conflict of interest arises

