

# I'm on a Nonprofit Board - **Now What?**

## The Legal Governance Lowdown for Nonprofit Board Members and Leaders



### Keeping House: Three Policies Every Nonprofit Needs

*This article presents general guidelines for Ohio nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

As a nonprofit leader or board member, it goes without saying that many responsibilities demand your attention. Policies that are considered a best practice, but not required by law, often fall into the “back burner” category.

However, a well-written policy can be a critical guideline for how a nonprofit should operate.

Importantly, a policy can:

- Improve board and staff performance by clearly defining roles and responsibilities.
- Provide continuity when there is a change in board members or staff.
- Avoid legal problems that can drain an organization’s limited resources.

Additionally, the Internal Revenue Service (IRS) takes the position that a well-governed organization is more likely to obey tax laws, safeguard charitable assets, and serve charitable interests than one with poor or lax governance. To that end, the IRS requires that tax-exempt public charities file an annual informational return with them called the Form 990. On Form 990, the IRS asks whether an organization has the following 3 specific policies in place: (1) a conflict-of-interest policy; (2) a document retention and destruction policy; and (3) a whistleblower policy. Although not required by law, the IRS thinks they are important enough to single them out on the Form 990 annual disclosure.

## Conflict of Interest Policy

Nonprofit board members have a **legal fiduciary duty to put the nonprofit’s interests above their own** (this is known as the duty of loyalty). If a board member’s obligation to further the nonprofit’s charitable purposes is at odds with their own self-interests, **that** is a conflict of interest.

A conflict of interest policy is arguably the most important policy a board can adopt. It outlines a process for disclosures of potential and actual conflicts of interest and lists the steps the board should take when addressing them. Essentially, a conflict of interest policy is designed to protect your organization's mission and integrity and aims to safeguard your organization from any appearance of impropriety and potential legal issues related to conflicts of interest.

On an ongoing basis, your Board should:

- (1) Be able to identify when a potential conflict of interest exists; and
- (2) Ensure your organization follows its conflict of interest policy every time a potential conflict arises.

Some common examples of a potential conflict are:

- Hiring a board member (or their company) to provide services to your organization.
- Approving a large purchase from a company where a board member's spouse works.
- A board member sitting on the board of another nonprofit with a similar mission, potentially creating a conflict when deciding on funding allocations or sharing prospective donor information.

However, many times board members are asked to join a board **because** of their connections and relationships with businesses and the larger community. Therefore, it is almost inevitable that at some point your board will have to address a conflict of interest situation. Keep in mind that a conflict of interest does not mean the relationship is doomed! It just means that the board needs to follow the conflict of interest policy to ensure it is a **permissible conflict**. For example, perhaps the board member's company that your nonprofit is considering hiring agrees to provide its services for a below-market rate because of its connection to you.

## Consequences

What is important is that the board knows it is responsible for ensuring that your nonprofit has a consistent process for how it will address an actual or perceived conflict of interest when one predictably comes up. If your nonprofit does not manage its conflicts of interest, the nonprofit and its board members can be held accountable by the Ohio Attorney General for failing to fulfill their legal fiduciary duties. In certain circumstances, individual board members and the nonprofit could also face financial penalties from the IRS and the organization could risk losing its tax-exempt status. At the very least, how the public perceives your nonprofit's handling of conflicts can ultimately affect the support it receives from donors.

## Best Practices

Practically speaking, every board member should get a copy of your organization's conflict of interest policy, sign a statement that they understand and will comply with it, and annually disclose any actual or potential conflicts of interest. "Disclosure" entails listing any relationships, positions held, or other circumstances the board member thinks are, or could develop into, a conflict of interest. The board, or a designated committee such as your governance committee, should review everyone's disclosures and keep a list. When a situation arises where a conflict may exist, the board then follows the process outlined in its policy. This should include a recusal by the conflicted board member, an open discussion among the remaining board members, the use of comparability data, a vote (if applicable), and documentation of the process and the board's decision in your meeting minutes.

## Document Retention and Destruction Policy

A document retention and destruction policy outlines how your organization consistently manages its documents, including electronic files, voicemails, emails, and storage in cloud-based systems. The goal is to ensure everyone within your nonprofit is consistent in what they keep and for how long; and equally consistent in what they delete as part of routine business practices.

The reason this policy is so important is because the federal government considers it a crime to destroy documents in anticipation of litigation or investigation. A written policy that outlines consistent retention and destruction timelines helps demonstrate that any action taken by your nonprofit was part of a clear and scheduled timeline for managing documents. Additionally, the implementation and use of this type of policy is part of a board's basic fiduciary duty of care.

Keep in mind that there is no one-size-fits-all policy. Things to consider for your nonprofit's document retention and destruction policy include state law, the types of documents your nonprofit generates, and the length of

time during which specific legal claims could be made against the nonprofit. For example, while a nonprofit's governing documents should be kept permanently, its receipts from a fundraising raffle may only need to be kept a certain number of years.

From a practical standpoint, most nonprofits can relate to feeling overwhelmed by the sheer volume of emails, files, and other documents that are amassed and added to every day. A document retention and destruction policy that fits the unique needs of your nonprofit can help control that stress by creating an organized and automatic approach to document management.

## Whistleblower Policy

Federal law prohibits an organization from retaliating against anyone that reports its illegal acts, improper use of assets, or violations of policies or ethical duties.

A whistleblower policy outlines how and to whom individuals should report potential misconduct, ensures confidentiality, and appoints responsibility for investigating any reports. In addition to helping an organization comply with the law, a policy can protect individuals from illegal retaliation – negative actions taken against them in response to their complaints. Adopting a whistleblower policy signals to both internal and external stakeholders that your nonprofit is willing to hear complaints, values transparency, and holds itself accountable.

## Conclusion

To recap, every nonprofit should consider adopting these three policies:

- Conflict of interest policy
- Document retention and destruction policy
- Whistleblower policy

Keep in mind that you should talk with legal counsel to consider whether additional policies are also appropriate based on your program, size, and needs.

## Additional Resources

This article is part of the series [I'm On a Nonprofit Board - Now What? The Legal Governance Lowdown for Nonprofit Board Members and Leaders So You Can Come to the Table Ready to Lead](#). Published by Pro Bono Partnership of Ohio, this series includes a 6-part webinar series and corresponding articles on important topics that will help you confidently take your seat at the board table and continue to make a positive impact in our community.

## Need Legal Advice?

Pro Bono Partnership of Ohio is here to help. We regularly draft and advise on conflict of interest policies, bylaws, and other areas of board governance.

If you are a PBPO client and have questions regarding the content of this article or need legal assistance, please contact us at [info@pbpohio.org](mailto:info@pbpohio.org) or (513) 977-0304.

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