



AMERICAN INSTITUTE OF FLORAL DESIGNERS

Board of Directors Legal Orientation

June 29, 2018

C. Michael Deese, Esq.

Howe & Hutton, Ltd.



LEGAL OBLIGATIONS - DIRECTORS

∞ State Law Applicable to Nonprofit Corporations

- Law of the state of incorporation
- You are incorporated in California

LEGAL OBLIGATIONS - DIRECTORS

⌘ Fiduciary Duties to the Institute

- **Duty of Care - level of competence**
 - Reasonable inquiry required
 - Attendance at Board meetings part of this duty
 - No Board votes by mail or email unless unanimous
- **Duty of Loyalty - faithfulness to the Institute**
 - Corporate opportunities may not be taken advantage of
 - Conflicts of interest – disclosure required



LEGAL OBLIGATIONS - DIRECTORS

∞ **Fiduciary Duties to the Institute**

- **Duty of Obedience**
- **Duty to Respect Confidential Information**
 - **Attorney-client privilege**
 - **Executive sessions**
 - **Board of Directors discussions**



AVOIDING PERSONAL LIABILITY

- ⌚ **Act in good faith after reasonable inquiry**
 - Mistakes are not punished if not reckless
- ⌚ **Volunteer Protection Act of 1997**
 - Acting within scope of responsibilities
 - Not willful or reckless
 - Believed in Institute's best interest
- ⌚ **California statute has similar protection**
- ⌚ **Indemnification by AIFD**
- ⌚ **Insurance should be in place to cover directors**



INSTITUTE STRUCTURE AND GOVERNANCE

⌚ Advantages of Incorporation

- Reduced personal liability
- Perpetual existence
- Needed governing documents for tax exemption

⌚ Effect of revocation of corporate charter

- Treated as an unincorporated association
- Officers/directors personally responsible



INSTITUTE STRUCTURE AND GOVERNANCE

⌚ Articles of Incorporation

- **Filed with the state**
- **Amendment is rare and requires member vote**

⌚ Bylaws

- **Procedures for Institute governance**
- **Applicable only if consistent with CA law**
- **Amendment process is unusual**
- **Board role is to set policy, with staff to execute**



INSTITUTE STRUCTURE AND GOVERNANCE

⌚ Institute Policies

- Subordinate to Bylaws
- Superior to Robert's Rules
- More easily changed than Bylaws

⌚ Parliamentary Procedure

- Robert's Rules of Order – Bylaws Article 7.4.2
- Apply only when issue not already addressed

ANTITRUST LAW ISSUES

⌘ Basics of Antitrust Law

- **Agreements tending to limit competition**
- **Sherman Act - Section 1**
 - **Contracts, combinations and conspiracies which unreasonably restrain trade**
 - **Civil and criminal penalties**
 - **Private party treble damage actions**
 - **Associations under antitrust scrutiny**
- **Federal Trade Commission Act - Section 5**
 - **Unfair or deceptive acts/practices/methods**
 - **Consent order jurisdiction - \$11,000/day/violation**

ANTITRUST LAW ISSUES

⌘ Compliance Policy and Program

- Defense to a criminal charge
- Must be more than on paper
- Requires involvement of legal counsel/staff/officers

ANTITRUST LAW ISSUES

∞ Avoiding Antitrust Problems

- **Review of meeting agendas by legal counsel**
 - Must be somewhat detailed to facilitate review
- **Conducting/controlling Institute meetings**
 - What can we discuss or do regarding prices?
 - Right to have negative vote recorded by name
- **Review of meeting minutes**

ANTITRUST LAW ISSUES

⌚ Avoiding Antitrust Problems

- **Membership restrictions**
 - Must be reasonable and objective
 - Must be applied in a nondiscriminatory manner
- **Member expulsion for cause**
 - Due process required

INSTITUTE TAX STATUS

Ω Tax-Exempt Business League

- **501(c)(6) vs. 501(c)(3) (Foundation)**
- **Non-profit organization, but “profit” OK**
- **Promote common business interests in an entire profession or line of business**
- **Not primarily engaged in for-profit activity**
- **Assets upon dissolution**
- **Contrast with Foundation**



ROLE OF INSTITUTE LEGAL COUNSEL

- ∩ **Institute (Board) is the client**
- ∩ **Communications generally with staff**
 - **Control of cost**
 - **Professional staff should know when to involve counsel**
- ∩ **Board and staff determine counsel's role**
- ∩ **Preventive use of legal counsel is prudent**



DIRECTOR DO'S

- Do attend Board meetings**
- Do ask questions at Board meetings**
- Do decide based on the Institute's best interest**
- Do disclose actual and apparent conflicts**
- Do keep Board discussions confidential**
- Do become familiar with the Bylaws**
- Do treat directors and staff with courtesy**



DIRECTOR DON'T'S

- ⌚ Don't be afraid to ask a "stupid" question**
- ⌚ Don't discuss prices, margins, suppliers**
- ⌚ Don't speak on behalf of the Institute unless specifically authorized to do so**