LEGAL AND LIABILITY ISSUES FOR PRIVATE CLUBS

PRESENTER

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BEST PRACTICES:

PROTECT THE CLUB AND ITS BOARD MEMBERS
BOARD DUTIES

(MEMBER OWNED)
(NONPROFIT CORPORATION)

OBSERVING CORPORATE FORMALITIES

• Know what the club’s bylaws say.
• Know what the club’s written policies say.
• If the bylaws or policies don’t work, amend them, but don’t ignore them.
• Keep official minutes of board and committee meetings
DUTY OF CARE

Under the duty of care, Board Members must act in “good faith” using the “care” that a prudent person would use in similar circumstances. In carrying out this duty, Board Members must regularly participate in the Club’s governance and must be familiar with the Club’s finances.

DUTY OF CARE

• In exercising the duty of care, responsible Board Members should, among other things, do the following:
  ▪ **Attend** all Board and assigned Committee meetings and actively **participate** in the discussions and decision-making process to ensure the Board is complying with the Club’s governing documents, including the Club’s Articles, Bylaws, Policies and applicable law;
  ▪ **Read the Board Packet** prepared by the General Manager for each Board Meeting;
DUTY OF CARE

- **Read the minutes** of all Board Meetings and review all reports related to the Club, including financial statements; and
- **Read any literature the Club produces.**
- Ensure that the organization has *proper written internal financial controls and written policies* to safeguard, promote and protect the Club’s funds and other assets; and
- **Engage in careful oversight** of the organization’s finances. This includes having the Chief Executive and/or Chief Financial Officer reporting at every Board Meeting.

DUTY OF LOYALTY

- Board Members are **charged with the duty** to act in the **best interest of the Club**. The **duty of loyalty** requires that a Board Member disclose any conflict of interest, including real or possible conflicts.
- Board members **must avoid transactions** in which they or their family members benefit personally, and if such transactions are unavoidable, disclose them fully and completely to the entire Board.
- In potential conflict situations, the Board Member must follow the Club’s Conflict of Interest Policy, which likely means **abstaining** from deliberation and voting.
DUTY OF OBEDIENCE

• A Board Member has a duty of obedience to ensure that the Club complies with its documents and all applicable laws, including:
  ▪ Dedicating the Club’s resources to its mission;
  ▪ Oversight of the Club to ensure that the Club carries out its purpose and does not engage in unauthorized activities;
  ▪ Complying with registration and reporting requirements and other applicable laws of the State; and
  ▪ Complying with the Club’s Bylaws or Membership Plan as applicable.

BUSINESS JUDGMENT RULE

• The Business Judgment Rule provides that the court will not review the business decisions of directors who performed their duties:
  ▪ in good faith;
  ▪ with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and
  ▪ in a manner the directors reasonably believe to be in the best interests of the corporation.
BUSINESS JUDGMENT RULE

• Board may rely on:
  ▪ Committees
  ▪ Executive Employees
  ▪ Professionals
  ▪ Consultants

RECENT PRIVATE STATUS CASES:

CLUBS PROCLAIMING TO BE “PRIVATE” DEEMED PUBLIC ACCOMMODATIONS BY COURTS
PRIVATE STATUS:
WHO JUST GOT IT WRONG
(PUBLICALLY)

PRIVATE STATUS: WHY DOES IT MATTER ANYWAY?

1. Federal Civil Rights Act
2. State Anti-Discrimination Laws
3. Americans With Disabilities Acts
4. Exemptions for “bona fide private membership clubs”
KEY FACTORS COURTS USE TO DETERMINE PRIVATE STATUS

1. Is the club owned and operated entirely by its membership?
2. Is the membership selection process limited?
3. Are the club’s facilities open to the public; i.e. a public accommodation?
4. Does the club advertise to the public?

*Private Club for Tax Purposes is not the same as Private for Discrimination Purposes*

This is not a percentage of income test!

CONCERNS FOR CLUBS CLAIMING “TRULY PRIVATE”

1. Non-member use of the club facilities
2. Member “for a day”
3. Internet soft marketing
4. Corporate Outings
5. Reciprocal Golf arrangements
6. Wedding Capital of the World

*Evaluation is completely separate from any tax status*
CONCERNS FOR “PUBLIC ACCOMMODATION” CLUBS

Focus is on Protected Classes – race, religion, national origin, sex (or sexual orientation), handicap, marital status

1. Men’s only (grille, tee-times, etc.)
2. Ladies Day
3. Failing to meet ADA requirements
4. Refusing privileges to domestic partners

NON-TRADITIONAL ACTIVITIES:

WHAT’S THE RISK?
WINE SALES:
UNCORKING THE LIABILITY ISSUES

OFF SITE WINE SALES –
UNCORKING THE REAL ISSUES

• Three major concerns:
  ▪ Loss of Private Tax Status
  ▪ Loss of Liquor License
  ▪ Loss of Insurance Protection
LOSS OF PRIVATE TAX STATUS IS A MATHEMATICAL EQUATION; LOSS OF LIQUOR LICENSE IS A FACTUAL / LEGAL ANALYSIS

1. What type of Liquor License does the Club hold?
2. Is it a Private Club Liquor License?
3. Does it allow off-site sales or “on premises consumption” only?
4. Does it allow for sales to non-members or ONLY MEMBERS?
5. Does it specifically prohibit “packaged sales”?
6. What type of alcohol beverage sales in the club actually engaging in?

RISKS

Violations of Liquor License could result in:

1. Club and individuals subjected to fines, penalties and potentially criminal charges
2. Suspension or revocation of the liquor license and loss of the right to sell any alcoholic beverage
3. Loss of insurance coverage for related claims
ACTION PLAN

1. Determine need / desirability of Off-Site Wine Sales
2. Determine scope of permissible activities under current Club license
3. Compare permitted activities to alcohol sales actually being made
4. If conducting sales beyond scope of license, discontinue those sales or seek a different license

OTHER NON-TRADITIONAL ACTIVITIES

• Food to go
• Off site catering
• Off site events
• Sale of gas (yacht clubs)
NEW COURT DECISIONS
AND OTHER
DISCUSSIONS
ON THE LIABILITY SIDE

GOLF CAR LIABILITY
CAN DRIVE YOU CRAZY
GOLF CARS: LAWS

• State Laws:
  ▪ Who can drive on private streets
  ▪ 14 or 16 years, etc.
  ▪ Courts have applied to private roads
• Case Laws:
  ▪ Interpreting the standard

GOLF CAR – INSURANCE

• Car Insurance: uninsured motorist exclusion
• Car Insurance:
  ▪ golf car not an “auto”
  ▪ No coverage = no duty to defend
  ▪ Modified car (>20 mph) IS a “motor vehicle”
GOLF CAR – RISKS

Duty to Maintain: broken parts, etc.
“Intended Use” - following manufacturer’s instructions

GOLF CAR EXAMPLES

• Modifications: failure to modify safely (added back seats)
• Broad General Release: have been enforced (or not)
• Choice of Law Issues: you win some, you lose some

GOLF CAR – COMMON CLAIMS

• Negligence
  ▪ Duty to plaintiff by defendant
  ▪ Breach
  ▪ Breach caused damage
• Negligent Entrustment
GOLF CAR – DEFENSES

• Defense
  ▪ Assumption of Risk
  ▪ “principle of no duty”
  ▪ Risks “fully comprehended” / perfectly obvious
  ▪ Not enhanced / unique, unusual

GOLF CAR

• TAKEAWAYS:
  ▪ Duties: inspect, maintain, warn
  ▪ Rules: educate, enforce
  ▪ Releases: review, revise, require
  ▪ Insurance: review, audit, expand
  ▪ Records: record compliance
OTHER LIABILITY ISSUES

- Dram shop
- Personal injury
- Membership structure
  - Refunds
  - Mandatory members
  - Changes to documents

SUMMER PROGRAM
RISKS AND BEST PRACTICES
SUMMER (ETC.) PROGRAMS

• Kids!
  ▪ Licensing
  ▪ Liability
  ▪ Forms
  ▪ Insurance
• Introduce potential members
• Limited years
• Privacy

INSURANCE ISSUES

• Exceptions / Exclusions
• Independent Contractors
• New services / new facilities
ARBITRATION & MEDIATION: OPTIONS IN ALTERNATIVE DISPUTE RESOLUTION

HOW DO CLUBS SUFFER FROM LITIGATION?

• Costs
  ▪ Litigation is expensive
    o Dollars
    o Emotionally disruptive
    o Time and opportunity
    o Clubs’ and members’ reputation
GUIDING PRINCIPLE: CLUB BUSINESS IS NOT LIKE HOLLYWOOD

Good results do NOT come from bad press

BENEFITS OF ARBITRATION

- Private
- Cost Effective
- Fast Pace
- No Appeals
- Controlled Selection of Decision Maker
- Limited Discovery
- Commercial Arbitration Rules
- Overall, generally less costly and more time efficient.
TIPS TO AVOID LITIGATION:

1. Acknowledge the likelihood of dispute and face it directly. Recognize that the best time to develop a process for resolving a dispute is before it arises.

2. Avoid the exception to the rule. Resist the urge to make special exceptions.

3. Recognize responsibility. Clubs are responsible for taking reasonable steps to prevent injury and address foreseeable risks.

4. Contractually. Utilize disclaimers and liability waivers for personal injuries and other potential liabilities, as well as ADR provisions in Club’s bylaws, rules and regulations and membership agreements.
MEMBER DISCIPLINE:

BEHAVE OR BE SPANKED
(THE BOARD AND CLUB, NOT THE MEMBER!)

MANDATORY DISCIPLINE

- Member behavior can lead to legal liability
  - Employment issues
  - Slander / libel
  - Personal injury
  - Non-enforcement
WHAT LAWS AND RULES GOVERN THE MEMBER DISCIPLINE PROCESS?

- State law
  - Non-profit corporation laws apply to Equity Clubs
- Common law
- Bylaws/plan
- Contracts between Club and Member
- Club rules

MODEL NONPROFIT CORPORATION ACT

- American Bar Association Sections
- Form statutes adopted by many states
- Some states modified provisions when they adopted it
- Some states do not follow it
MODEL NONPROFIT CORPORATION ACT

• Termination, Expulsion and Suspension
  ▪ No member may be expelled or suspended, and no membership or memberships may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith
  ▪ A procedure is fair and reasonable when either:

MODEL NONPROFIT CORPORATION ACT

  ▪ The articles or bylaws set forth a procedure that provides:
    o not less than fifteen days prior written notice of the expulsion, suspension or termination and the reasons therefore; AND
    o an opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension or termination by a person or persons authorized to decide that the proposed expulsion, termination or suspension not take place; or
  ▪ It is fair and reasonable taking into consideration all of the relevant facts and circumstances
MODEL NONPROFIT CORPORATION ACT

• Termination, Expulsion and Suspension
  ▪ Notice – first class mail
  ▪ One year to challenge
  ▪ Liable for commitments (dues, etc.)

THE CLUB SERVES AS:

• Rule Maker
  (legislature)
• Rule Enforcer
  (police and prosecutor)
• Judge and Jury
TIP: PLAN AHEAD

• Update bylaws
• New member documents
• Written policies
• Publish the requirements and policies
• Document infractions and enforcement actions

TIP: BE CONSISTENT

• Consistency
• Empower the staff
• Enforce the Rules (or change them)
• Follow up on each complaint
5 STEPS TO MEMBER DISCIPLINE

1. Investigation
2. Board Action
3. Notice
4. Hearing or other opportunity to be heard and/or appeal
5. Consequence

STEP 1: INVESTIGATION

- Who conducts the investigation?
  - General Manager
  - Lawyer
  - President
  - Grievance Committee
STEP 2: BOARD/OWNER ACTION

• Board:
  ▪ By written consent
  ▪ At regular meeting
  ▪ At special meeting

• Owner:
  ▪ Process in documents
  ▪ Contract issues

STEP 3: NOTICE

• Timing:
  ▪ Club bylaws or rules
  ▪ Statutes (for Equity Club)
  ▪ Usually 10-30 days

• Notice:
  ▪ Written letter
  ▪ Proposed discipline
WHAT YOU SHOULD KNOW ABOUT NOTICE UNDER THE LAW?

• Make sure that your Equity Club’s documents comply with the statutes in your state for notice.
• For licensee club, ensure your procedures are fair and reasonable under the circumstances.

STEP 4: HEARING / OPPORTUNITY TO BE HEARD

• Can the member have counsel?
• Who presides?
• Do you present witnesses?
STEP 5: CONSEQUENCES

- Censure
- Fine
- Suspension
  - Term?
- Request resignation
- Expulsion/termination

WHEN DO YOU CALL YOUR LAWYER?

- Illegal activity
- Employee involvement
- Liability concern
QUESTIONS
AND
CONCLUSIONS