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TCBF – MISSION POSSIBLE 2012
NONPROFIT PRO BONO SUMMIT

THE MISSION: CREATE A CLIMATE FOR EFFECTIVE GOVERNANCE

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Darren B. Moore
Bourland, Wall & Wenzel, P.C.
Attorneys and Counselors
301 Commerce Street, Suite 1500
Fort Worth, Texas 76102
(817) 877-1088
(817) 877-1636 (facsimile)
E-mail: dmoore@bwwlaw.com

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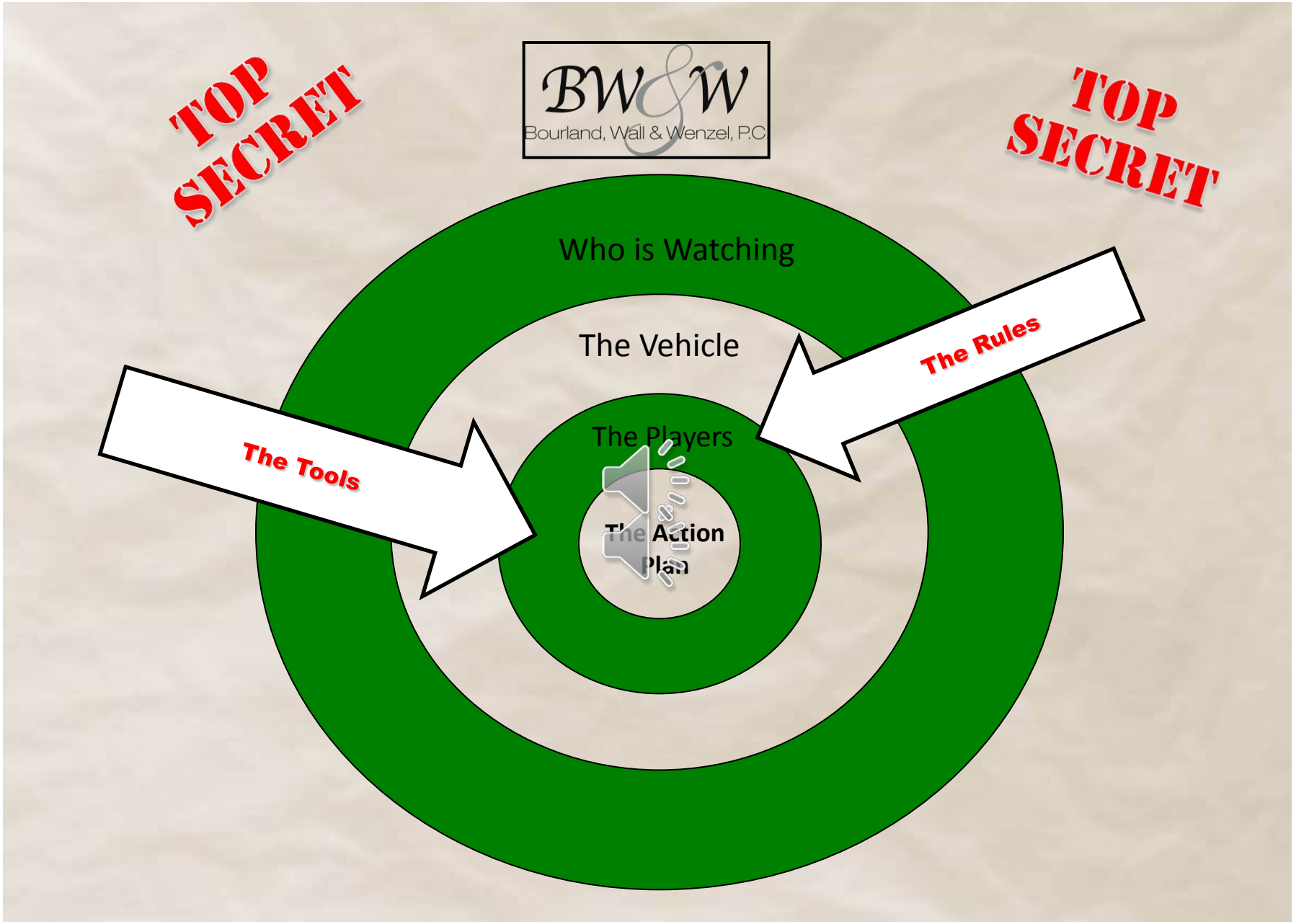
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Who is Watching
The Vehicle
The Players
The Action Plan
The Tools
The Rules

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WHO IS WATCHING:

Attorney General, IRS,
Watchdog Groups,
Public (your donors/future donors)

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Governance is No Joke!

Directors and trustees are fiduciaries with real responsibilities

Nonprofit governance matters

- To the community
- To the beneficiaries of the charity
- To state and federal regulators

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THE VEHICLE:

Choice of Form

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Choice of Form – State Law

- Charitable trust
- Nonprofit unincorporated association
- Nonprofit corporation
- LLC acceptable as disregarded entity or a stand-alone if all members exempt

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Charitable Trusts

Fiduciary relationship with respect to property created by declaration of trust by trustor investing trustee with legal title to property for the benefit of a charitable beneficiary

Ascertainable or public beneficiary	Governed by state's trust act	Trustee owes fiduciary duties	May have one or more trustees who may be corporate or individual

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Nonprofit Unincorporated Associations

Unincorporated association, other than one created by a trust, consisting of three or more members joined by mutual consent for a common, nonprofit purpose

Governed by the Texas Business Organizations Code (Ch. 252)

Formation *not* governed by statute (usually have Constitution, Articles of Association, or Bylaws)

Powers: Promote aims and purposes and advance members' interests by all legitimate and legal means (not necessarily charitable, e.g. trade association, unions)

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Limited Liability Company

- Entity organized under Ch. 101 of the BOC
- Members (owners), managers (directors) shielded from debts, obligations, liabilities of the LLC
- May be managed by members or managers
- Can create problems with franchise tax and property tax

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Nonprofit Corporations

- A corporation whose income may not be distributed to its members, directors, or officers in the form of dividends or otherwise (note: salaries paid must be reasonable)
- May be organized for any lawful purpose (with limited exceptions)
- Governed by the Texas Business Organizations Code (specifically Chapter 22)
- Note: While purposes are broad, care should be taken if later applying for 501)(c)(3) recognition (must be organized exclusively for charitable, educational or religious purposes)

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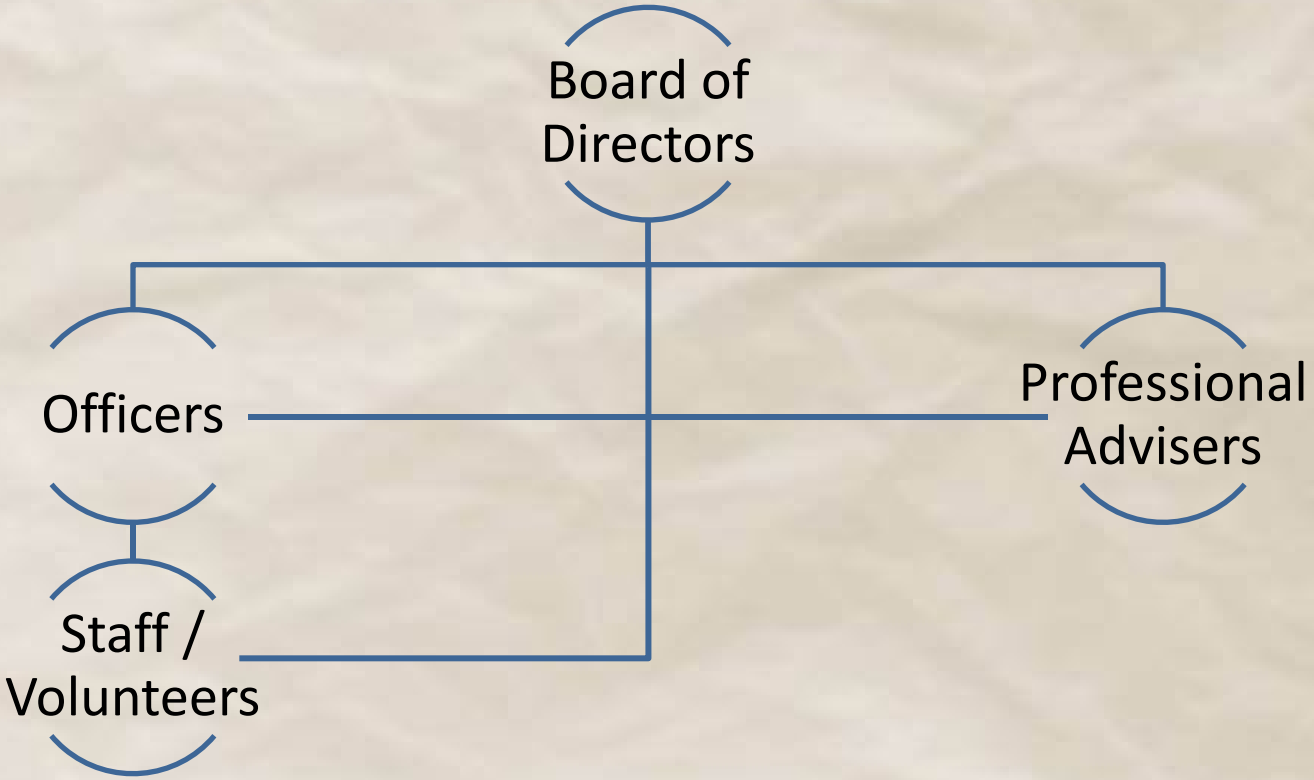
THE PLAYERS:



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What's the Right Size Board?

Too Large

- "Letterhead board"
- Quorum problems
- Lack of responsibility – executive committee becomes the *de facto* board
- Unintended consequences

Too Small

- Not enough people to get the work done
- Not enough expertise when you need it
- Not reflection of community attitude

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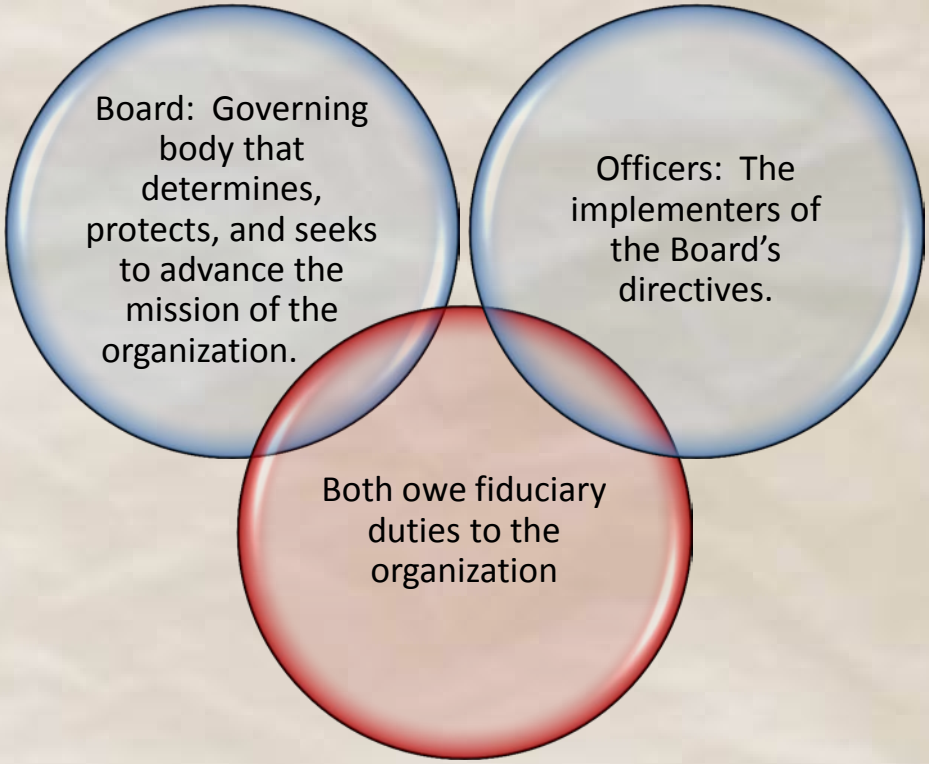
Relationship Between Board and Officers



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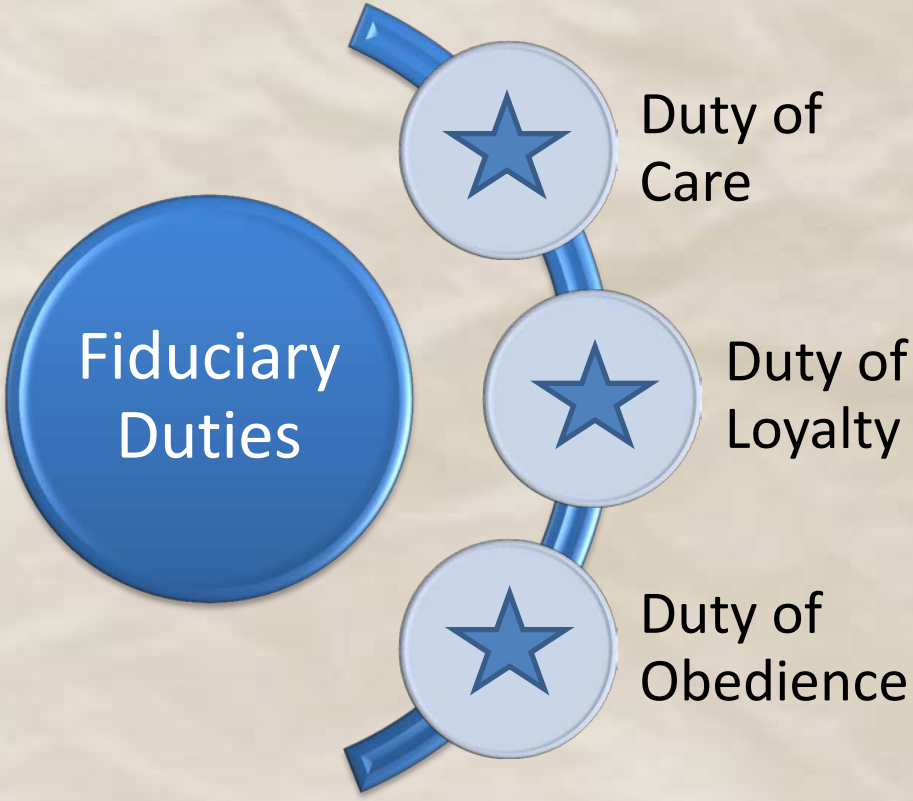
THE RULES:



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THE TOOLS:

Governing Documents

and

Policies

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Certificate of Formation

- Also known as the Charter
- Formerly known as the Articles of Incorporation
- Bylaws are subject to the Certificate of Formation, govern the corporate aspects of the organization
- Policies and Resolutions are subject to the Certificate of Formation and Bylaws govern specific operational issues
- Minutes are the permanent record of Board and committee meetings

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Policies and Corporate Records

Too Detailed

- Words don't match reality
- Administrative burden means lack of compliance
- "He said, she said" minutes

Missing in Action

- Insufficient written policies
  - No conflicts policy → hard to deal with conflicts of interest responsibly
  - No travel policy → invitation to trouble
- No minutes → tough to prove Board was paying attention – in most audits, minutes are at the top of the IRS document request list

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MINUTES:

Minimalist vs. Comprehensive

- Drafter should be skilled
- Document compliance with fiduciary duties and exercise of business judgment
- Tapes do not replace minutes

Always Include

- Date, time, location, duration, nature (regular or special), participants, quorum, materials distributed, agenda discussed, actions taken, conflicts/dissents/abstentions, professionals who provided advice

And Finally

- Circulate to Board prior to or at the next meeting to be approved and signed

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How Much Should We Worry About Legal Compliance?

Too Worried

- Paralyzed by paranoia
- Every decision means calling the lawyer - delay/expense
- Can't set priorities – everything is urgent

Now Worried Enough

- Nobody's looking at us, so it doesn't matter
- Eyes wide shut
- We mean well – misguided reliance on the "halo effect"

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ACTION PLAN:

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MISSION ACCOMPLISHED

The information set forth in this outline should not be considered legal advice, because every fact pattern is unique.
The information set forth herein is solely for purposes of discussion and to guide practitioners in their thinking regarding the issues addressed herein.
Non-lawyers are advised to consult an attorney before undertaking any issues addressed herein.

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