

NABE-News



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CALENDAR

from www.nabenet.org

NABE Administration and Finance Section Meeting

When: Feb. 7 - 8
Where: Salt Lake City, UT

NABE/NCBP/NCBF Midyear Meeting

When: Feb. 8-12
Where: Salt Lake City, UT

CSE Retreat

When: March 8 - 9, 2005
Where: Chicago, IL

Bar Leadership Institute

When: March 10 -12, 2005
Where: Chicago, IL

ANNOUNCEMENTS

MIDYEAR MEETING UPDATE: 182 NABE members have registered to attend the Midyear Meeting in Salt Lake City! If you're not one of them – and you're planning to go – there's still time to register and get your hotel room. Go to www.nabenet.org to download the registration/hotel form.

If you are one of the 176 people registered for the meeting, this is your chance to ski "The Greatest Snow on Earth." To help anyone interested in realizing such a dream, Toby Brown at the Utah State Bar is arranging for a group of NABE people to go skiing on Monday, February 7. The plan is to take a shuttle up to Solitude Ski Resort (about a 30-45 minute ride), ski the day, then shuttle back to the Marriott Hotel. Ski rental options and discount lift passes are available as part of the deal. If you're interested, contact Toby at toby@utahbar.org or 801/297-7027.

(Editor's Note: To those folks from Colorado, Montana, California, etc., I did not coin the phrase "The Greatest Snow on Earth." That came from Toby, so take it up with him!)

LEXISCARES PROJECT: NABE is partnering with LexisNexis on a children's book drive for the Family Support Center in Salt Lake City. Persons attending the Midyear Meeting are asked to bring a new or gently used book appropriate for children from infancy to age 11. There will be a collection bin at the registration desk where you can drop off your book or books (yes, you're allowed to donate more than one!) Lexis will be sending a postcard to everyone registered for the meeting about this project.

BYLAWS CHANGE: At the business meeting in Salt Lake City, NABE members will vote on a change to the bylaws relating to the composition and terms of the Program Committee. Since the Program Committee is such an integral part of NABE's mission and success, all NABE members attending the Midyear Meeting are asked to acquaint themselves with the proposed bylaws amendment and be prepared to discuss and vote on it. The proposed amendment is posted on the NABE website (www.nabenet.org), along with comments regarding the rationale for the change. I would encourage each of you to go to the website and read the proposed amendment and comments in full.

Briefly, the proposed amendment affects the Program Committee in the following three ways:

- The present requirement of four committee members from local bars, four from

state bars, and one from each of the four sections is eliminated. (There are only three sections since the demise of the CLE Section a few years ago.) The new requirement is that the NABE President seek nominations of new committee members from the sections, forums, and CSE Committee, with the admonition that the president strive to maintain appropriate representation from different types of bars.

- The term of a committee member is changed from three years (with no option of re-appointment) to a two-year term with the option of re-appointment if the member wishes to serve another term and is making a positive contribution to the committee.
- The time for appointing the new committee members and the chair and vice-chair of the Program Committee is moved forward, so that these important appointments can be announced earlier and the new committee leaders and members have more time to think about and prepare for their assignment.

CHANGING EXPECTATIONS FOR NONPROFIT ORGANIZATION

GOVERNANCE: On January 12-13, 2004, an audience of approximately 150 association CEOs, lawyers, accountants and other senior staff from across the U.S. convened in New York City for the first-ever National Consensus Conference on Nonprofit Governance, hosted by ASAE and the New York Society of Association Executives' Education Research Foundation. The Conference was developed as a forum for leaders in the nonprofit community to address the increasing attention being given to the governance standards of their organizations and to discuss ways to voluntarily enhance their own fiduciary practices and accountability to members, donors, grantors, and other stakeholders.

In particular, conference participants examined the effect of the Sarbanes-Oxley Act on the nonprofit sector. Even though most provisions of the act apply only to large public companies (there are two exceptions that will be mentioned later) and Congress did not mandate that states adopt the Sarbanes-Oxley provisions for nonprofits, it has been broadly recognized that the act, whether intentionally or not, has highlighted perceptions and changed expectations for leadership and governance of all organizations generally.

According to ASAE General Counsel Jerald A. Jacobs, two areas are demanding increasing attention from nonprofit executives and volunteer leaders:

- Financial monitoring and disclosure. The need for timely and accurate financial reporting to officers and governing boards is reinforced by recent developments, and the expectation is growing that dues-paying members and contributing donors have a right to at least some financial reporting. Nonprofits may want to consider establishing a governing board committee whose principal function is to ensure that appropriate financial controls are in place and that reliable accounting and auditing are conducted. Some organizations also may want to ask their CEOs and CFOs to personally certify that financial reports are accurate.
- Codes of ethics and conflicts of interest. Sarbanes-Oxley requires that investors in a publicly-traded company be told whether the company has a code of ethics for governance. Most professional societies already have codes of ethics, but these provide direction for the business or professional conduct of members, not for governance by the executive and volunteer leadership. Nonprofit organizations should consider whether it is appropriate to establish codes,

policies, standards, or guidelines to address financial management and disclosure, as well as leadership authority and responsibility.

The conference participants recognized that the sizes, types and resources of various nonprofit organizations will affect the necessity for, as well as the ability to implement, many of the governing practices now mandated for large public companies by Sarbanes-Oxley. Rather, the eight key concepts considered at the conference may be useful as starting points for discussions on improving nonprofit governance. They are:

- 1) The central role of the nonprofit organization's governing board in setting policy and providing oversight. The major message of Sarbanes-Oxley is that boards must not be complacent and reactionary or "tools" of employed executive management. Board members have the authority and responsibility to actively govern.
- 2) Independence of the governing board from management. This is usually a more delicate question in nonprofit organizations than in business corporations, as volunteer boards of nonprofits tend not to be experienced or knowledgeable about either nonprofit organization management or the details of the singular programs of the organization. In short, they must rely extensively on employed executives to provide continuity. However, Sarbanes-Oxley demands periodic oversight and consideration by boards of the "independence" issue. The bottom line is that the governing board of a nonprofit organization must be in charge not only of this relationship, but also, ultimately, of all aspects of the organization.
- 3) Audit Committee existence, composition, and role. Whether to form an Audit Committee and how to decide its functions are purely optional and voluntary decisions for nonprofits; however, the issue should be considered in view of the growing influence of Sarbanes-Oxley on all corporate governance standards. For larger nonprofit organizations, an independent Audit Committee - a standing committee of the board - is the right way to go. For many, if not most, nonprofits, this approach is probably unnecessary and unworkable. A hybrid approach - having an existing finance or executive committee assume the functions of an audit committee - may be workable and preferable for some nonprofits. Two other provisions of Sarbanes-Oxley also may affect nonprofits: the need for nonprofit boards to have "financial literacy" and the role and responsibilities of auditors themselves.
- 4) Code of organizational conduct for nonprofit organization governance. A set of policies and procedures for governance of a nonprofit organization is desirable, whether or not the Sarbanes-Oxley "code" formula and denomination are accepted. These policies and procedures are probably not appropriate for inclusion in the bylaws, and board approval is sufficient to give the document the necessary authority and legitimacy. This "handbook" for governance should include at least the basics of officer and board member responsibility: meeting attendance, review of financial information, and fiduciary responsibility issues (basic loyalty to the organization, avoidance of conflicts of interest, maintaining confidentiality of sensitive organization information, etc.) Special attention should be given to the conflicts policy and a procedure to effectuate that policy to avoid the personal and emotional issues that may arise.
- 5) Chief executive compensation review. CEO compensation in nonprofit organizations has been a focus of volunteer boards for a long time, with volunteer leadership taking pains to balance rewarding successful performance, maintaining "market-rate" compensation, and avoiding the appearance of extravagance. For nonprofits, the important issues are not so much who makes the decisions; rather,

- attention should be given to independent and unbiased decision-making.
- 6) Financial disclosure. The emphasis should be on financial reporting that aids in financial management – information that is “materially correct” and useful in a practical sense. Other issues are whether to disclose financial information to others than the volunteer leadership (e.g., members, donors, etc.) and whether to require the CEO and/or CFO to certify the financial reports.
 - 7) Whistleblower retaliation. This is one of the two provisions of Sarbanes-Oxley that applies to nonprofit organizations. The law mandates no instances of retaliation against individuals who have complained to the federal government about the commission or possible commission of federal offenses by their organizations or their organizations’ leadership. All nonprofit organizations should have policies and procedures in place to ensure that there is no retaliation against “whistleblowers.”
 - 8) Document destruction. This is the other provision that applies to nonprofits. Governance provisions should be in place to avoid the destruction of potentially pertinent documents when an organization knows or suspects that there will be a federal investigation of a policy or program. Violation of this provision is subject to criminal penalties. An even broader principle for prudent nonprofit management is to have a carefully developed “document management” or “document retention” plan.

To get a copy of the full report, go to the ABA Division for Bar Services’ clearinghouse (abanet.org/barserv).

A JOKE TO END: A lawyer goes into a bar and sits down next to a good-looking woman. The woman says, “For \$50, I’ll do anything for you.” The lawyer reaches into his wallet, pulls out a \$50 bill, and says, “Great – go paint my house.” That’s all folks!