

2023 RCOC BOARD GOVERNANCE CONFLICT OF INTEREST AND WHISTLEBLOWING TRAINING

PRESENTED BY:
David M. Lester Partner



BOARD GOVERNANCE



RESPONSIBILITIES OF GOVERNING BOARD

- Establish, disseminate, and keep current the Regional Center's Mission and ensure compliance with Lanterman Act and DDS contract
- Ensure policies, processes, and bylaws are current and properly implemented
- Recruit new members and provide them training
- Recruit, support, and evaluate Executive Director
- Ensure Regional Center fiscal integrity through financial audits
- Ensure quality of programs through reviews and report of senior management
- Conduct Board's business in exemplary fashion with transparency
- Periodically assess performance of Board, committees, and its members

SPECIFIC OBLIGATIONS

- Election of Directors — Cal. Corp. Code §§ 5220-5227
 - Length of Service (7 out of 8 years) § 4622(f)
- Selection of Corporate Officers — Cal. Corp. Code § 5213 (a) and (b)
- Adopt or Change Bylaws — Cal. Corp. Code § 5150
- Approve Regional Center Contracts in Excess of \$250,000 — Welfare & Institution Code § 4625.5 (i.e. Lender's Loan and Executive Director Contracts)
- Documentation to DDS concerning composition of Board — W&I § 4622.5
- Annual review of Executive Director Wel. & Inst. Code § 4622(8)
- Conflict of Interest Statement when chosen to Board and on annual basis
- Contract with independent accounting firm annually for audit W&I § 4639

RESPONSIBILITIES OF EXECUTIVE DIRECTOR

- Oversee day-to-day operations, including ensuring appropriate staffing
- Establish practices and procedures to implement Board policies
- Ensure compliance with Dept. Of Developmental Services “DDS” contract
- Provide leadership to RCOC staff and create positive organization culture
- Act as representative of RCOC by creating community presence
- Ensure RCOC’s fiscal integrity
- Provide Board with necessary information related to policy, RCOC activities, strategic decisions, and performance outcomes
- Serve as principal liaison between the Board and RCOC staff members

EFFECTIVE BOARD MEETINGS

- Stay on topic - - only address items on the agenda
- Use consent calendars - - item can be removed by director or public
- Avoid overflowing agendas
- Refer major topics to committees
- Board chair should not be afraid to call the question
- Be prepared by reviewing Board packet before the meeting
- Limit public comment to three minutes
- Don't micromanage - - heavy lifting should be done in committees
- Everyone attends and stays engaged for the entirety of the meeting

BOARD CONDUCT

- Board members must review meeting packets to be prepared
 - Minutes, agendas, and committee and executive director reports
- Board members must be informed, ask questions, and look for explanations when something is not clear
- Board members must listen to all comments, questions and opinions with an open mind
- All Board members must be treated with respect and patience and the board must create a safe haven for open discussion
- Once Board action is taken, members “speak with one voice.”
 - Governance decisions must be supported and not weakened by uncooperative action
- Discussions during and information disclosed during closed session must remain confidential

DUTY OF CARE

- **Duty of Care**: Must use such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. Cal.. Corp. Code § 5231
 - Must attend meetings and spend adequate time on Board duties like committee meetings and ensure using reasonable diligence and making reasonable inquiry
 - So long as acting in good faith , and acting after reasonable inquiry, directors are not personally liable for the decisions made in reliance upon information and reports by Officers or employees, committees or experts like lawyers, accountants, and consultants
 - Keep generally informed about RCOC's business and policies
 - Ensure that all questionable actions are investigated and satisfactorily resolved by management

DUTY OF LOYALTY

- Act in good faith, with fair dealing, and in the best interests of the corporation, taking care not to create liability for the corporation. Cal. Corp. Code § 5231
 - Do not engage in conflict of interest
 - Do not compete with Regional Center
 - Do not take personal advantage of Regional Center opportunities
 - Act as a body, not as individuals
 - Comply with laws, regulations, contracts
 - Share information with full Board
 - Conduct business at the formal meetings, not in private

OTHER DUTIES

- **Fiduciary Duty**: To act and speak “in the best interests of the corporation” and not to act out of self-interest.
- **Duty of Inquiry**: Exercise reasonable inquiry and ensure management investigates when evidence exists for the need to examine additional information
- **Duty of Obedience**: Ensure the Board is following its rules and policies

PRINCIPAL SOURCES OF DIRECTOR PROTECTION

- **Business Judgment Rule**: Court generally will not evaluate or disturb business decisions where director is disinterested and independent, sufficiently informed, reasonably diligent, acted in good faith, and has rational basis for decisions
- **Indemnification**
- **DDS Requirements Regarding Insurance**: The contract with the State requires insurance including DNO liability insurance
 - DNO typical coverage is 5 million per claim
 - CGL typical coverage is 4 million per claim and 7 million in aggregate
- **Statutory Right** to rely on reliable source of information. Cal. Corp Code § 5131(b)

OBLIGATIONS OF BOARD ARISING FROM CONTRACT WITH STATE

- Obligations under contract with state generally met by management
- Contract provisions requiring direct action by Board
 - Board approved policy regarding transparency and access to public information on the Contractor's internet web site
 - Posting of a Board approved conflict-of-interest policy on the web site
 - Post Board approved policy specifying the circumstances under which the Regional Center will issue requests for proposals to address a service need
 - Contractor's policy for disbursement of start-up monies must be approved by Board
 - Adopt a written policy that Board must approve any contract of \$250,000 or more
 - Properly established trust accounts that are approved by the Board for administering employee benefits does not have to be in the name of the State provided State has the power of reviewing trust records

WHISTLEBLOWER



TYPES OF COMPLAINTS

- Person Served Rights Complaints
- Early Start Complaints
- Due Process Requests
- Mediation Conference Requests
- Lanterman Act Fair Hearing Requests
- Title 17 Complaints
- Citizen Complaints and Comments
- Vendor Appeals
- Whistleblower Complaints

TYPES OF WHISTLEBLOWER COMPLAINTS

- **Improper Regional Center Activity**

- Activity by RC or an employee, officer, or board member in the conduct of RC business that is a violation of state or federal law or regulations, violation of contract provisions, fraud or fiscal malfeasance, misuse of government property, or constitutes gross misconduct, incompetency, or inefficiency.

- **Improper Vendor/Contractor Activity**

- Activity by a vendor/contractor, employee, officer, or board member of a vendor/contractor in the provision of DDS funded services that is a violation of state or federal law or regulation, violation of contract provisions, fraud or fiscal malfeasance, misuse of government property, or constitutes gross misconduct, incompetency, or inefficiency.

TO WHOM CAN YOU COMPLAIN

- **RCOC's Senior Management**
 - Executive Director, Director of Case Management, Chief Financial Officer, Director of Community Services, Clinical Director, General Counsel, HR Director, IT Director
- **RCOC's Board of Directors' Executive Committee**
 - Board Chair, Vice-Chair, Secretary, Treasurer, or Counsel to the Board
 - Method is via phone, email, or attendance at Board meeting
- **DDS Community Operations Division or the Community Services and Supports Division**

COMPLAINT PROCESS

- Clear and concise statement of improper activity
 - Should be factual and not speculative
 - If name is not provided for bad actor, investigating party may not have sufficient information to investigate
 - Evidence should consist of original documents and not copies
- Anonymous complaints are permissible
 - If insufficient information is provided, a thorough investigation may not be possible

INVESTIGATION PROCESS

- Recipient of complaint shall obtain sufficient information to refer the complaint to the appropriate person for review and resolution.
 - Verbal complaints must be documented
- All complaints will be promptly investigated and appropriate corrective action will be taken.
- The recipient of the complaint will notify the person who made the complaint of its conclusions and any action taken if complaint is not anonymous.
 - The information will be provided as long as it does not breach confidentiality

CONFIDENTIALITY

- Investigating party will make best efforts to maintain confidentiality
 - Sometimes cannot because of statutory responsibilities like ensuring the health and safety of persons served or contract compliance
 - Inform complainant of need to disclose prior to actual disclosure of information
 - Identify to appropriate law enforcement agencies conducting criminal investigations
 - All mandatory abuse reporting requirements remain in effect as an exception to confidentiality

NO RETALIATION

- Purpose of policy is to encourage and enable persons to raise serious concerns in good faith
 - Good faith means reasonable grounds to believing the information disclosed supports a finding of inappropriate behavior
 - Unsubstantiated allegations which are made maliciously or to be knowingly false can be subjected to discipline
- No reporter shall suffer harassment, retaliation, or adverse consequence as a result of filing a complaint
 - Any RCOC employee who engages in such behaviors will be subject to discipline up to and including termination

NOTIFICATION

- Whistleblower policy posted on website
- Notification of policy and complaint process will be provided annually to employees, board members, persons served, their families, and the vendor community
 - Can remind employees when they sign their annual performance review
 - Board members can receive copies of the Policy in board packets
 - Individuals served and their families can receive notification of how they can access the policies in their annual Services Cost Statement
 - Vendors can receive their annual notification in the payment process of how they can access the policies



CONFLICT

OF

INTEREST

WHAT IS A CONFLICT OF INTEREST

- Regional center employees cannot place themselves in a position where their private, personal interests may conflict with their official duties.
- Employees must be guided solely by the interests of the regional center and its persons served

TO WHOM IS COI REGULATIONS DIRECTED

- **Regional Center Employees with “Decision or Policy Making Authority**
 - People who make final decisions, compel decisions, make substantive recommendations, vote on obligations, or vote to approve selection of any director, trustee, agent employee contractor for his or her entity.
 - not solely secretarial or clerical
 - Service Coordinators
 - They participate on planning teams that make decisions, they make decisions about which programs and services to recommend to consumers and finally, that they are listed in WIC § 4626(e) as persons who must complete the conflict of interest reporting statements.
- Family members of decision makers
 - “spouse, domestic partner, parents, stepparents, grandparents, siblings, step-siblings, children, stepchildren, grandchildren, and in-laws.” Title 17, Section 54505(f)



- Tempting to refer a family member to a job an employee knows to exist in the system
- Doing so may indeed threaten the position of the employee by creating a conflict

TO WHOM IS COI REGULATIONS DIRECTED

- **Governing Board Members**
 - Controlled by WIC §§4626(a), 4626(g), and Title 17, Section 54532
- **Executive Director**
 - Controlled by WIC §§4626(a), 4626(g), and Title 17, Section 54532
- **Advisory Committee Board Members**
 - Appointed pursuant to WIC §4622(i) controlled by Title 17, Section 54521
- **Contractors, Agents and Consultants**
 - §§ 54526, 54527, 54528, 54529, and 54530 identify what will constitute a conflict, § 54531 describes the obligation to complete a Conflict of Interest Reporting Statement., and § 54533 addresses resolution of such conflicts.

Conflict by Holding a Position with a Provider

- Under Title 17, § 54526, a conflict exists when a person with decision making authority, or family member of such person, is any of the following for a provider:
- (1) a governing board member, (2) a board committee member, (3) a director, (4) an officer, (5) an owner, (6) a partner, (7) a shareholder, (8) a trustee, (9) an employee, (10) an agent, (11) a contractor, (12) a consultant, (13) holds any position of management, or (14) has decision or policy making authority for a business entity, entity, or provider.

CONFLICT ARISING FROM FINANCIAL INTEREST IN PROVIDERS

- If an employee attempts to make or influence a decision in which the employee or a family member has a financial interest
 - Any employee not just limited to decision makers
 - A Financial Interest is defined to include an ownership interest of \$2,000 or more, sources of income or future interests for income of \$500 or more within the prior 12 months. See Section 54527.

CONFLICT MAKING CONTRACT IN WHICH FINANCIALLY INTERESTED

- Under § 54528, employees shall not be guided by personal interests and shall not be financially interested in any contract they make in their official capacity.
- RC employees shall not make any contract which financially benefits a family member, unless benefits associated with the contract are available to RC persons served or their families generally.
- In interpreting and applying this section, the common law doctrine against Conflict of Interest and the authorities interpreting the doctrine shall govern.

CONFLICTS WORKING WITH FAMILY MEMBERS

- Under § 54530(a), A Conflict of Interest exists where a regional center employee **participates in the evaluation of an application for employment or bid for position or contract at the RC, submitted by a family member.**
- Under Section 54530(b) a potential Conflict of Interest exists when a **regional center employee supervises his or her family member.**
- Note: The DDS Conflict of Interest Reporting Statement, in question 10, asks about evaluating family applications, but, in an apparent oversight, it fails to ask about supervising a family member. Employees should report on the statement when supervision of a family member exists.

SECTION 54529 – GENERAL PROHIBITION AGAINST CONFLICTS

- **General Integrity** - Under 54529(a), employees must discharge their responsibilities with integrity and fidelity, and must not place themselves in a position where their private, personal interests conflict with their official duties.
- **Perform with Diligence** - Under 54529(b), an employee must exercise powers conferred on the employee with disinterested skill, zeal and diligence for the benefit of RC persons served.
- **Conflicts Not Addressed by Regulations** - In 54529(c), this subsection contains a novel approach when an employee becomes aware of a present or personal conflict of interest regarding a particular transaction that the regulations do not address. In that situation, the employee must not participate in any discussion and must refrain from making any recommendation or decision regarding the present or potential conflict of interest that has not been specifically addressed in the regulations.

IDENTIFYING CONFLICT OF INTERESTS

- Conflict of Interest Reporting Statement (Form DS 6016)
- Which Persons Should Submit Conflict Statements
 - WIC § 4626(e) requires Board members and decision-making employees
 - WIC § 54531(b) requires contractors, agents and consultants,
 - Since some of the conflicts do not depend on having decision-making” authority, most regional centers require all employees to complete the Conflict of Interest Reporting Statement.

SUBMISSION OF COI FORMS

- **Annually:** Regional Center employees shall complete and file an annual Conflict of Interest Statement by August 1 of each year. 54531(b).
- **New employees:** New employees shall file a COI statement within 30 days of assuming the position. 54531(c).
- **Change in Status:** Regional Center employees shall complete and file a COI statement with the Regional Center within 30 days of any change in status that creates a COI. 54531(d).
- **Executive Director Review:** The executive director shall review the COI reporting statement of each employee and within ten working days of receipt of the statement, shall determine whether a COI exists. 54531(e). 4626 (k).
- **Obligations When COI Discovered:** Regional Centers who learn of an employee with a present or potential conflict of interest must either (1) require the employee eliminate the conflict, or (2) mitigate and manage the conflict through a conflict resolution plan, or the individual shall resign. 54533(a).
- **For Waiver, Regional Center Must submit COI Resolution Plan to DDS:** within 30 calendar days of receipt of the COI statement. 54533(a) and (b)

OBLIGATIONS TO RESPOND TO COI

- **Executive Director Reviews Conflict Statements**

- Under § 54531(e), the Executive Director is required to review the completed Conflict of Interest Reporting statement of each employee within ten (10) working days of receipt and determine whether a present or potential conflict exists.
- Under § 54533(c), when DDS independently identifies an employee conflict, DDS shall notify the regional center of an employee's present or potential Conflict of Interest.

- **Regional Center Must Eliminate Conflict or File Conflict Resolution Plan**

- Under Section 54533(a) employee with a present or potential COI must eliminate the conflict, manage and mitigate the conflict through a Conflict Resolution Plan, or resign.

- **Submission of Conflict Resolution Plan**

- Must be submitted within 30 days of awareness of conflict

OBLIGATIONS TO RESPOND TO COI

- **Content of Conflict Resolution Plan**

- It must describe the precise nature of the conflict, including the type of conflict, the relationship between the individuals involved (when a family member is involved), and the roles and identity of each person.. Section 54533(g)(1)
- Under Section 54533(g)(2) the Plan must then identify **the actions the regional center will take** to eliminate or mitigate and manage the conflict. This can involve either, resignation of the family member creating the conflict, refraining from participation in a certain category of matters that create the conflict, a change of position, duties, or assignment, or a divestiture of financial interests.
- the Plan must “provide a detailed explanation of how each of the proposed actions will eliminate, mitigate or manage the conflict. Section 54533(g)(3).
- The Plan must provide the name, position, and duties of the individuals who will be responsible for monitoring the Plan, Section 54533(g)(4), and the Plan must be signed by the individuals subject to the Plan under Section 54533(g)(4).

OBLIGATIONS TO RESPOND TO COI

- **Postings On Website Of The Conflict And Of Policy**

- Under § 54533(f), RCOC shall post on the internet each COI reporting statement that identifies a present/potential COI that cannot be resolved within 30 calendar days.
- Posting continues until the conflict has either been eliminated or the individual has resigned.
- Additionally the COI policy must be posted on web site . WIC § 4626.5.

- **Use of Discretion in Seeking Waivers by Conflict Resolution Plan**

- Regional Center has complete discretion to demand elimination of conflict or to seek waiver by means of a Conflict Resolution Plan
 - Such plans are difficult to administer and impact duties of more than one person
 - The more plans that are filed the less likely the newer ones will be approved

ROLE OF DDS IN MONITORING CONFLICTS

- **Review of Conflict Resolution Plan by Department**

- Under Section 54534(f), DDS shall issue a modification, approval or denial of the proposed Conflict Resolution Plan in writing to the RC governing board or RC designated party within 30 calendar days of receipt of an employee's proposed Conflict Resolution Plan.
- Section 54534(g) provides that if DDS denies an employee's Conflict Resolution Plan, the individual shall have 30 calendar days to eliminate the conflict or to resign.
- The employee shall fully comply with all the elements set forth in the approved Conflict Resolution Plan. Section 54534(j).
- under Section 54534(k), a new Conflict Resolution Plan shall be submitted to DDS on an annual basis, and upon any change of status that creates a present/potential conflict of Interest.
- Section 54534(d) makes very clear that the submission of Conflict Resolution Plan does not authorize the employee to engage in the activities that created the conflict.

ROLE OF DDS IN MONITORING CONFLICTS

- **Sanctions**

- Under Section 54535(a), If the Department finds a violation of these provisions, it can provide 30 days to eliminate or resolve the violation.
- Under subsection (b), if the violation is not so resolved or eliminated, DDS may “take immediate action to commence procedures for termination or nonrenewal of the regional center contract pursuant to W&I Code, Section 4635.”

Question & Answer
Session

Thank You

For questions or comments, please contact:

{ David M. Lester }

aalrr
Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation

Disclaimer

This AALRR presentation is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed may differ substantially in individual situations. Receipt of this or any other AALRR presentation/publication does not create an attorney-client relationship. The Firm is not responsible for inadvertent errors that may occur in the publishing process.

©2020 Atkinson, Andelson, Loya, Ruud & Romo

