

# A LOOK AT THE LEGALITIES

## YOUR LEGAL AND FIDUCIARY RESPONSIBILITIES AS A BOARD MEMBER.

In the wake of recent corporate accounting scandals, you may, understandably, be anxious about your responsibilities as a board member. Although you should steadfastly resist the temptation to micromanage your organization's daily operations, which is the staff's job, you and your board colleagues are ultimately responsible for the board's – that is the organization's – decisions and actions. Here are the basics of what you must know and do.

### THE LEGAL FRAMEWORK

A director's responsibilities generally encompass the following duties.

- 1) **THE DUTY OF CARE** requires you to use the care that a reasonably prudent person would exercise in a like position and under similar circumstances. At its most basic, the duty of care requires you to participate in board decisions, ask questions to gain the information you reasonably need to make a decision, and exercise independent judgement. In other words, you share in all the responsibilities and powers of the directors, and although you may delegate work to staff and committees, you should monitor their work.
- 2) **THE DUTY OF LOYALTY** requires you to place the organization's financial and operational interests above your own or those of other persons or organizations. The duty of loyalty also requires you to refrain from using your position of trust, or information gained from participating on the board, to further your financial interests. If you have an interest in a transaction the board is considering, you must disclose it. Moreover, although it is not inherently illegal for you to perform work for the organization, you must follow the conflict-of-interest rules, and the arrangement's terms must be fair.
- 3) **THE DUTY OF OBEDIENCE** requires you, within the bounds of the law, to support the board's decisions and to abide by the organization's mission and purposes, as expressed in its articles of incorporation, bylaws, and policies. Vigorous debate around the board table is expected and encouraged. Once the board's decisions or actions are final, however, you are obliged not to publicly undermine the decisions, but to support and implement them.

### OTHER LEGAL REQUIREMENTS

You as a director must also comply with certain statutory requirements. For example:

- Many organizations are subject to federal employment tax withholding, or other tax requirements, and must file annual exempt organization information returns. Under certain circumstances, board members could be liable for the organization's failure to comply with those requirements.
- Organizations are also subject to antitrust laws, which prohibit contracts, combinations, or conspiracies in restraint of trade. An organization's members, directors, or employees cannot as a group set prices, establish discounts, divide customers or territory, unreasonably deny access to membership or association services, establish unreasonably standards for the industry or profession, or take similar actions that restrict competition. Violation can result in severe criminal penalties, including imprisonment and treble damages in suit brought by competitors or consumers.
- You and your organization must also comply with civil rights laws, including laws that prohibit discrimination on the basis of gender, race, religion, disability, and age. Personal liability may result if you have actively participated in discrimination or harassment.

### BASIC RESPONSIBILITIES

Here is a checklist to help you faithfully discharge your legal and fiduciary duties.

- **Determine and Follow your Organization's Mission and Purposes.** As its governing body, the board sets broad policy and the staff carries out day-to-day operations.
- **Disclose Conflicts of Interest.** When you have an actual or potential interest in a transaction the board is considering, whether related to an organizational program or a contract for purchasing goods or services, you must disclose that interest before a decision is made and generally refrain from

participating in the decision making. If the conflict is so pervasive that disclosure or recusal is not enough, it may be appropriate for you to resign or be removed from the board (or from the conflicting activity).

- **Maintain Confidentiality.** You should not disclose information about the board's decisions or the organization's activities unless they've been made public. As a corollary, do not speak for the board unless you have been specifically authorized to do so.
- **Attend Board Meetings Regularly.** Read reports and other materials presented for consideration. If questions arise, make reasonable further inquiries.
- **Seek Outside Advice from Accountants, Attorneys, and other Professionals.** If you are uncertain whether a proposed board action has legal ramifications, seek advice before making the decision, not after.
- **Ensure Effective Short- and Long-term Organizational Planning.** This also includes determining and monitoring programs and services.
- **Select your Organization's Top Management.** Support the staff, and review leaders' performances.
- **Ensure adequate Financial Resources.** The board should manage the organization's resources effectively and adopt guidelines for financial investments.
- **Enhance the Organization's Public Image.**
- **Resolve issues that cannot be handled at a lower level.** In other words, the board acts as a court of appeals.
- **Assess the board's own performance.**

## **PROTECTION FROM LIABILITY**

As a practical matter, volunteer directors and officers generally have little exposure to personal liability for actions they take on their organizations' behalf. The business-judgement rule protects you from liability for your decisions if you act in good faith, with reasonable care, and in the organization's best interests, even if an action turns out to be a mistake. Liability would result only if you acted in bad faith or with deliberate disregard for the duties of care, loyalty, and obedience or other requirements.

The best protection from liability is prevention through steps like the ones outlined here. Where prevention is not enough, your organization may provide indemnification and insurance to help protect you.

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