



# Guidelines to Shield Board Members of Nonprofit Organizations from Personal Liability

## Duty of Care:

Nonprofit organizations along with their governing board members are required by law to carry out their responsibilities "in good faith, in a manner that is in the best interest of the organization and such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under the circumstances." Accountability for this duty of care can be demonstrated by the following actions by board members:

- Know the nonprofit mission and keep it ever in mind when making decisions.
- Attend meetings of the board and the committees to which they are assigned. If a board member cannot be involved in a meeting, the minutes should reflect that fact.
- Prepare for board meetings by reviewing the agenda and reports.
- Carefully review the minutes and correct any errors.
- Record detailed meeting minutes so that the organization can document its conscientious review and approval of the budget, financial statements, auditing matters, insurance coverage, personal performance, compensation and the performance of the organization as a whole.
- Because the board acts as a whole, in accord with corporate bylaws, it is important to note the existence of a quorum and a proper vote on any actions of the board, including how many in favor or in opposition to a particular measure along with any abstentions, whether due to conflicts or otherwise.
- Dissent should be noted. Board members should participate in the decision making process. Silence is deemed to be concurrent. If a director is opposed to an action to be undertaken by the organization, the director should speak up and have his or her dissent noted in the minutes.
- Obtain information before voting to make appropriate decisions.
- Use independent judgement. Ask about information that is unclear.
- Avoid self-dealing. Board members of nonprofits need to be aware of the self-dealing rules.
- Review the organizations finances.
- Oversee the compliance with important tax filing requirements.

## Duty of Loyalty:

The duty of loyalty is about putting the interests of the nonprofit organization before the board members own interests. The duty of loyalty requires board members to exercise their power in the interest of the organization and not in their own interest, or another entity, particularly one in which they have a formal relationship. This duty is carried out by the following acts

- Adopt and maintain a conflict of interest policy to know about any potential conflict at the time the organization is entering into a transaction with the person. A conflict of interest policy can help protect the organization and board members by establishing a process for disclosure and voting when situations arise in which board members may actually or potentially derive personal benefit as a consequence of the organizations activities.
- Avoid self-dealing. Board members of nonprofits need to be aware of the self-dealing rules and avoid the use of the nonprofit organizations opportunities for individual's personal gain or benefit.
- Avoid disclosure of confidential information about the nonprofit organization.

## Duty of Obedience:

The duty of obedience requires that directors of a nonprofit organization comply with applicable federal, state and local laws, adhere to the entity's articles of incorporation and bylaws and follow the mission. The nonprofit organization must ensure that its originating legal documents are in good order. Thus, the following documents must be carefully prepared and maintained:

1. Create an Articles of Incorporation which articulates a nonprofit public purpose that will benefit the public. The prospective nonprofit corporation should assure that no specific individual will profit from the services rendered because nonprofits are designed to benefit the public.
2. File a Certificate of Incorporation with the State's Secretary of State. The certificate should recite the organizations intent to engage in tax-exempt business activities, to provide reasonable compensation to its employees and to distribute any remaining assets after debts upon dissolution for charitable purposes.
3. Select at least the minimum number of required found directors/incorporators willing to take fiduciary and legal responsibility for the corporation being formed.
4. Establish bylaws governing the operations and adhere to them closely. The bylaws establish important facts including how board members are designated, whether members have term limits and whether there must be one or more members representing specific interests.
5. Know and understand the Articles of Incorporation and Bylaws. Board members should be certain that board actions are consistent with provisions in these documents.
6. Comply with all regulatory and reporting requirements, such as overseeing the filing of annual information returns and payment of employment taxes.
7. Keep the IRS apprised of updates to the nonprofit mission statement. Technically, the mission of the nonprofit is what the organization reported to the IRS in its application for tax-exempt status, as well as what is reflected in the organization's governing documents (its articles of incorporation and bylaws). The organization may well have updated or amplified its mission statement at board meetings or in publications, but if these updates are inconsistent with the original statement of mission, the changes do not officially change the federal tax-exempt purposes unless the IRS is formally notified.

8. Maintain a Board Handbook. To establish that individual board members are adhering to the nonprofits duty of obedience as well as duty of care; each board member must maintain and update a "board handbook". Having these documents close at hand helps incoming and ongoing board members fulfill their responsibilities. Key documents that are often included in the board handbook are:

- Charter/Certificate of Incorporation
- Tax-exempt determination letter from the IRS
- Bylaws
- Board policies, including "conflict of interest" policy
- Organization chart of board and key staff
- List of board members with contact information
- Current Strategic Plan
- Recent and/or key resolutions
- Minutes from recent and/or key meetings
- Fundraising information and expectations
- Current annual budget and long-term capital plan
- Most recent annual state report
- Most recent form 990 filing
- Media relations policy

