

# DUTIES OF BOARD MEMBERS

## Duty of Care

### Is exercised properly when a director

- Keeps reasonably informed
- Prepares for making decisions
- Asks questions
- Participates in discussions
- Makes decisions in good faith with good business judgment

### Situations where the duty of care may be compromised

- Delegating without establishing limits and controls
- Failing to oversee the implementation of decisions
- Not choosing capable staff
- Not establishing financial controls and scrutinizing financial reports
- Not reviewing the Form 990 prior to submission to IRS
- Not protecting and preserving the organization's assets
- Not utilizing donor funds consistent with donor intent
- Not immediately investigating allegations of impropriety
- Relying on information from unreliable sources
- Not attending meetings
- Not reading materials that are provided
- Failing to oversee operations of affiliates and partners

### General Standards under Virginia Law (Va. Code § 13.1-870)

A. A director shall discharge his duties . . . in accordance with his good faith business judgment of the best interests of the corporation.

B. Unless . . . reliance is unwarranted, a director is entitled to rely on information, opinions, reports or statements . . . if prepared or presented by:

1. Officers or employees . . . whom the director believes, in good faith, to be reliable and competent in the matters presented;
2. Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence; or
3. A committee of the board of directors of which the director is not a member if the director believes, in good faith, that the committee merits confidence.

## SANDS ANDERSON MARKS & MILLER A PROFESSIONAL CORPORATION

### Non-Profit Practice

The attorneys at Sands Anderson Marks & Miller have significant experience in representing business, professional, and community associations, foundations, charitable, educational, and religious organizations, environmental and historic preservation organizations, non-profit hospitals, governmental entities, and other tax exempt organizations. Our attorneys routinely advise on the formation and merger of non-profit organizations as well as the governance, tax, employment, contracting/contract compliance, fundraising/financing issues that arise within the life cycle of a non-profit organization. We understand the constraints that a non-profit organization faces; we provide practical and useful advice on working within those constraints.

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## Duty of Loyalty

### Is exercised properly when a director

- Acts in faithful pursuit of the organization's interest
- Avoids conflicts of interest
- Does not appropriate "business" opportunities for personal benefit
- Avoids transactions that provide benefits to insiders
- Preserves the confidentiality of information

### Situations where the duty of loyalty may be compromised

- Transactions that are not made at "arms length"
- Self-dealing or self-benefiting transactions
- Transactions with friends and related persons
- Contracts with highly unfavorable terms
- Opportunities that are not brought to the board's attention
- Unduly-influenced decision making
- Excessive compensation and benefits payments
- Loans of property, assets, or money to insiders
- Immobilization due to insider fighting

## Duty of Obedience

### Is exercised properly when a director

- Has read the organization's articles of incorporation, charter, bylaws, and other governing documents
- Understands what standards are imposed by law and applies those standards in all decision making
- Acts in accordance with the bylaws
- Assures that the organization files all reports with regulatory agencies in a timely manner and with accuracy
- Files annual reports with governmental agencies
- Keeps accurate minutes of all meetings and record votes taken
- Preserves the documents voted upon
- Reviews the Form 990 before it is submitted to IRS
- Has a copy of the articles of incorporation, charter, or governing documents at each meeting
- Amends governing documents and tax exempt application as organization's mission and purpose change
- Holds annual meetings
- Educates new board members on responsibilities, obligations, and organizational culture
- Adopts a conflict of interest, whistleblower, and document retention and destruction policy

*This information is "provided" for informational purposes and includes both legal requirements and generally recommended best practices. It is not intended to be legal advice, however, and an attorney should be consulted when developing policies and procedures for specific entities.*

# BEST PRACTICES

## Financial Accountability

- Ensure timely and secure handling, depositing, and protecting of assets and receivables
- Certify that the financial statements fairly represent the financial condition of the organization
- Establish adequate checks and balances
- Segregate duties by ensuring that no single individual is permitted to request, authorize, verify, and record expenditures
- Receive timely, reliable, and comprehensive financial reports
- Maintain inventory records of real and personal property
- Have an annual financial audit
- Ensure that the administration of grants and donations adheres with grantor/donor restrictions
- Develop an investment policy for the growth and oversight of assets
- Carefully evaluate all joint ventures/relationships with for-profit entities
- Look behind the reports prepared by staff

## Conflict of Interests and Ethics

- Every organization should have a conflict of interest policy
- A conflict of interest policy should identify or address
  - Types of interests that would be a conflict
  - Persons covered
  - Procedures to be followed to when a conflict of interest might arise
  - Handling business opportunities that might be of interest to organization
  - Dual loyalties when serving in representative capacity
  - Non-pecuniary conflicts that could arise
  - Other ethical standards that are appropriate for the organization
  - Providing each board member with a copy of the policy
  - Having a copy of the policy at all board meetings
  - Monitoring and enforcing compliance
  - Keeping a record of each transaction that the organization reviewed under the policy

## Compensation

- Compensation paid to officers and employees must be reasonable
- Compensation practices should be determined by persons knowledgeable in compensation matters and who have no financial interest in the determination
- Comparability data should be revised to determine compensation
- Documents on how compensation decisions made should be retained
- Compensation includes cash and non-cash payments, loans, grants, payments for personal housing, social club dues, and expenses paid for spouses or companions
- Any "special" compensation should be approved by board
- Loans and other diversions of assets to officers, directors, and key employees should be prohibited
- Federal and state laws on withholding, minimum wage, overtime, wage withholding, record keeping, and reporting of income should be complied with

## Meetings

- Record every vote or abstention by name
- Keep verbatim record of all action items (either in the minutes or as an attached document to the minutes)
- Have all minutes reviewed and approved by board
- Adopt rules of order
  - Appropriate for type of organization, e.g., membership organizations should have different rules from non-membership organizations
  - Easy to use
- Follow the rules
- Have a copy of the rules at every meeting
- Safeguard the records of all meetings, governmental filings, contracts, grants
- Establish a document retention and destruction policy

## Fundraising

### General

- Supervise and control all activities
- Monitor and control how organization's name is used
- Report all donations and fund solicitation activities
- Keep expenses reasonable
- Ensure all solicitation materials are accurate
- Comply with state laws on charitable solicitations
- Use prudence in contracting with outside fundraising firms
- Control the message and the means of soliciting funds
- Protect donor information
- Do not use any for profit entity to solicit funds unless the entity is acting as an agent of the organization under strict guidelines
- Provide donors with written receipt of donation

### Internet

- Register in each state where active solicitation occurs
- Try to maintain a "passive" webpage
- If donations are sought on the webpage, periodically consult with legal counsel on the operations of the webpage
- Have sponsors, not advertisers
- Auctions- Have goods donated. Do not regularly hold auctions.
- When holding bingo and other legal gaming activities, register with the state agency and comply with state laws

## Reporting Improprieties

- Have a system for the reporting of fraud, misappropriation of assets, and other financial improprieties within the organization
- Cover officers, directors, employees, contractors, and affiliated entities
- Investigate and remediate all complaints
- Impose sanctions, including removal from office, for all founded complaints
- Protect against retaliation
- Distribute policy to staff, officers, and directors
- Maintain records of all complaints and how resolved

## Records

- Establish a document retention and destruction policy
- Implement safeguards for information in files
- Preserve confidentiality of personal/confidential information