

Your Legal Duties

What the law expects of you as a board member

By agreeing to serve on your association's board of directors, you have made a significant commitment that brings with it several important responsibilities. Some of these responsibilities are imposed by state law; others came about as a result of years of court decisions that have imposed various fiduciary duties on directors.

Fiduciary comes from a Latin word meaning trust. This is fitting because your association's assets are held in trust for the accomplishment of its mission. These assets do not belong to your board, the association staff, or even the members. Even so, the ultimate authority for managing your association's affairs is vested in your board. Because the law grants you such authority, the law also imposes on you a standard of performance--an obligation to act in the organization's best interests.

The three essential duties

Here is a summary of the fiduciary duties you must carry out to meet that standard of performance.

1. Duty of care. As a board member, you must exercise the care that an ordinary prudent person in a like position would be expected to demonstrate under similar circumstances. The most frequent source of liability for board directors concerns the duty of care. Fulfilling this duty involves the following issues:

- **Attendance.** Courts have no sympathy for directors who claim they did not know of a particular issue or did not participate in a particular action because they failed to attend board meetings.

It surprises directors who are new to the nonprofit world that they are bound by actions taken at meetings that they did not even attend. Not only will you be held responsible if any such actions are deemed negligent, but failing to attend board meetings may in itself be deemed to be negligent behavior. You should only miss board meetings when you encounter unavoidable emergencies. If you repeatedly miss meetings, consider resigning.

- **Delegation versus abdication.** Even though your board makes the important policy decisions that guide the association's activities, you must rely on others to carry out the decisions. Such delegation--to staff, committees, and outside parties such as accountants and attorneys--is necessary and legal. Nevertheless, you must monitor those to whom you delegate authority to make sure they act responsibly. It is not a sufficient defense to claim that your board asked someone else to accomplish a task or supervise its execution.

- **Information.** Courts will not tolerate directors who are not sufficiently informed about their association's activities. On the other hand, courts will not generally second-guess board decisions that were based on thorough research and business judgment. You and your fellow directors must ensure that the association possesses information and reporting systems that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to reach informed judgments.
- **Decision making.** In addition to being informed, your board must follow a thorough, reasoned process for making decisions. This means that:
 1. Materials concerning decisions should be sent out for review in advance, and all board members should read, understand, and be prepared to comment on those materials.
 2. All board members should be actively involved in deliberation at board meetings.
 3. The board must maintain written, though not necessarily paper, records of its preparations and deliberations.
 4. Independent evaluations and appraisals should be prepared by experts and presented to the board.
 5. When major transactions arise, the board should review the basic documents and the experts' analyses.

2. Duty of loyalty. By assuming office, you commit to acting in good faith. You declare allegiance to your association's purpose and well-being and acknowledge that its best interests must prevail over your interests as well as the interests of your employer, family, and associates.

You transgress the duty of loyalty when you use your office to promote, advance, or effectuate a transaction between the organization and yourself, your relatives, or your associates that is not substantively fair to the organization. If a case arises in which you may be influenced by a private interest, you are required to make full disclosure and refrain from related discussions and votes.

3. Duty of obedience. You have a duty to follow your association's global governing documents (such as articles of incorporation and bylaws) to carry out its mission and to ensure that funds are used for lawful purposes. You must also comply with state and federal laws relating to the organization.

Financial controls and you

One of your board's responsibilities is to oversee your association's financial affairs, which includes making sure that it has adequate internal accounting systems and controls.

The board must be responsible for approving the annual budget. And staff members should produce timely and adequate income and expense statements, balance sheets, and budget status reports to enable you to do so. In addition, you should employ independent accounting professionals and review their annual report. Your board or audit committee will also want to set aside time to meet with the accountants, without the staff present, to review the audit work and get the accountants' impressions of internal controls.

The association's assets

Because your board oversees the effective use of the organization's resources, you must adopt internal policies and review large transactions to ensure that assets are not misapplied or wasted.

Board members often worry about personal liability for bad investment decisions. However, you are not expected or legally required to be an expert on investing or to ensure the adequate performance of the organization's funds. And, of course, the board cannot guarantee that investment decisions will be profitable. The decisions must, however, be reasonable and defensible. Retention of advisers with good reputations is considered the exercise of prudence.

Your board must also safeguard intangible assets, such as good will. The board should evaluate activities and proposed activities with the overriding goal of protecting the association's brand.

At base, fiduciary duties can be summarized in one sentence: The association's assets do not belong to you. If you as a board member always focus on the fact that you hold your association's assets in trust for the accomplishment of its mission, you are likely to make the right decisions about how to fulfill your fiduciary obligations.

Paula Cozzi Goedert is a partner with Jenner & Block, LLC, Chicago.