

Legal Alert: The Fiduciary Duties of Nonprofit Directors

General Board Duties

Are the members of your Board of Directors familiar with their fiduciary duties?

All not-for-profit board members have three general fiduciary duties to the corporation: the duty of care, the duty of loyalty, and—unique to nonprofits—the duty of obedience. Board members are required to carry out these duties “in good faith,” meaning honestly, openly, and faithfully in all organizational actions.

What are the directors' duties?

Duty of Care: Board members have a duty to use at least the same level of care in conducting the business of the nonprofit organization as would a reasonably prudent person in conducting his or her own personal affairs.

Board members fulfill this duty by regularly attending board meetings, becoming knowledgeable and informed about matters before the board, and using independent judgment to make objective decisions in the organization's best interest.

Duty of Loyalty: Stated simply, board members must act in the best interests of the not-for-profit and not for their own advantage. This means that directors must put the not-for-profit's interest in any transaction ahead of their personal interests, and attempt to avoid or resolve any potential conflict of interest related to any transaction.

Boards often aim to fulfill this duty by adhering to clear conflict of interest policies that govern disclosure of potential conflicts as well as processes for dealing with these conflicts whenever they arise. In addition, the duty of loyalty requires that the not-for-profit be given the opportunity to take advantage of any transaction or opportunity before a director can take that opportunity privately.

Duty of Obedience: Board members of a nonprofit must be true to the organization's purposes and goals, as stated in the articles and bylaws. Each board member must be faithful to the organization's mission.

Board members must ensure that all actions taken by the organization are consistent with the organization's articles of incorporation, bylaws, and status as a not-for-profit, tax-exempt corporation. They must also abide by the terms of any specific instructions, including the terms of gifts or bequests to the not-for-profit, or those from any purpose statements describing how the not-for-profit's funds are to be used.

What should we do?

The fulfillment of fiduciary duties should be an area of constant focus for all board members of nonprofit organizations. Though there is no magic bullet that can ensure fulfillment of these duties, characteristics of an organization that demonstrate adherence and fulfillment of all of these duties include strategic planning, oversight and accountability among the board of directors, and the maintenance of strong, clear and consistent internal policies. And highly effective organizations frequently discuss these duties and offer training regarding these duties at the board level.

Has your organization filed its required annual 990 informational tax return?

Every tax-exempt organization must file an information return, regardless of size. If your organization fails to file the required 990 for three consecutive years it will lose its exemption.

The IRS has recently announced, however, a one-time amnesty program for small exempt organizations that failed to file their information returns.

Where can I find out if my organization has failed to file and is in danger of losing its exempt status? And what should I do?

Information about filing requirements, the one-time amnesty program, and even a list of organizations in danger of losing their exemptions can be found at the IRS website for charities and other non-profits:

<https://www.irs.gov/charities-non-profits>

Can the Community Law Project help my organization?

The Community Law Project is a project of the Chicago Lawyers' Committee for Civil Rights under Law, Inc. The Community Law Project provides pro bono legal services to community-based organizations who meet our eligibility requirements by matching eligible nonprofit organizations with pro bono legal counsel. For additional information about issues involving tax-exempt organizations or to request pro bono legal counsel, please contact clp@clccrul.org or 312.939.3638, or visit us online at www.clccrul.org/community-law-project.

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