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# Three Legal Duties of a Nonprofit Board Member

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One of the important challenges that many board members and boards have: they lack a strong understanding of their legal duties.

## Three Duties at the Root of All Board Member Actions

At the root of conflicts of interest, non-independence, and self-dealing are three simple standards: *duty of loyalty, duty of care, and duty of obedience* (Herrington, 2017).

As a board member you should start with understanding these three fundamental legal duties.

Duty of Care – Board members have a legal responsibility to participate actively in planning and making decisions on behalf of the organization and to exercise their best judgment while doing so.

- A board member must be active in organizational planning and decision making. Board members must exercise reasonable care when he or she makes a decision for the organization. Reasonable care is what an "ordinarily prudent" person in a similar situation would do (Fritz, 2020).

Duty of Loyalty – When acting on behalf of the organization in a decision-making capacity, board members must put the interests of the organization first, before personal and professional interests. Board members must recuse them from conversations/voting where there is a conflict of interest. The organization's needs come first.

- A board member must never use information gained through his/her position for personal gain and must always act in the best interests of the organization. Board members must avoid conflicts of interest or the appearance of conflicts (Fritz, 2020).

Duty of Obedience – Board members have a legal responsibility to make sure the organization complies with all applicable federal, state, and local laws and adheres to its mission.

- If board members breach the Duty of Obedience, they can be held personally liable for financial damages. Board members who behave in compliance with this duty escape personal liability for their action(s) on behalf of the organization.
- This "duty" recognize the possibility of error, so they judge only unintentional negligence—not whether the decision was fruitful or intelligent. The application of these principles in a court of law prohibits second-guessing as long as the board member made their decisions in good faith. This is called the business judgment rule (Herrington, 2017).

## A More Comprehensive Explanation of the Three Duties

### Duty of Care

The duty of care requires board members of nonprofits to act in a manner of someone who truly cares. This means that meetings must be attended, the board member should be informed and take appropriate action when needed, and the decisions must be prudent (Herrington, 2017).

In some states, the board members of nonprofits follow the same rules that govern board members of for-profit corporations. For these nonprofit board members, care can be construed to mean making decisions like those expected of any other for-profit board member that is faced with relatively the same "business" facts and circumstances (Herrington, 2017).

While In other states, nonprofit board members are held to a higher standard, where care means using the same wisdom and judgment that one would if his or her own personal assets were at stake. The first is called the corporate model and the second is called the trust model (Herrington, 2017). South Dakota operates under the Corporate Model: To read more http://www.statebarofsouthdakota.com/page/nonprofit

The duty of care can deny using ignorance as a defense. In other words, it is the board/board member's responsibility regardless if the board or board member was aware or not. To know is the duty. It is this duty that makes many compassionate but busy people reluctant to serve on nonprofit boards (Herrington, 2017).

### Duty of Loyalty

The duty of loyalty means that while acting in the capacity of a board member of a nonprofit, the board member should be motivated by what is good for the organization, not by personal, business, or private interest. The use of the assets or goodwill of the organization to promote a private interest at the expense of the nonprofit is an example of disloyalty; in such cases, an individual places the nonprofit in a subordinate position relative to his or her own interest (Herrington, 2017).

Self-dealing is a form of disloyalty. Self-dealing means using the organization to advance personal benefits when it is clear that the personal gains outweigh the gains to the organization Herrington, 2017).

Board members are not prohibited from engaging in an economic or commercial activity with the organization. However, such a transaction could be construed as self-dealing if it can be shown that:

- the trustee gained at the expense of the nonprofit
- the trustee offered the nonprofit a deal inferior to what is offered to others or what the nonprofit could acquire on the open market
- the nonprofit was put in a position of assuming risks on behalf of the trustee

Another form of self-dealing can occur when two or more nonprofits merge assets or transfer assets from one to the other, and they have the same trustees. Here, the issue is whether a good purpose is being served. Therefore, before consummating a merger, or any other major transaction, it is wise to set a barrier against self-dealing (Herrington, 2017).

It is not unusual to find that after years of personal sacrifice in calling the public's attention to a good cause, founders of organizations confuse the assets of the nonprofit with their own, confuse the interests of the organization with their own, and begin to take dominion over these assets or install themselves or relatives in highly favorable tenured positions. Operating under the burden of loyalty, boards must separate these persons from the organization (Herrington, 2017).

### Duty of Obedience

The duty of obedience holds the board/board members responsible for keeping the organization on course. The organization must be made to stick to its mission. The mission of a nonprofit is unlike the mission of a for profit company. The mission is the basis upon which the nonprofit and tax-exempt status are conferred. Unlike a for profit business, a nonprofit cannot simply change its mission without the threat of losing either its nonprofit or tax-exempt status, or both (Herrington, 2017).

Nonprofit organizations board members should follow these duties of obedience:

- Make sure that the organization follows the law (Fritz, 2020)
- Approve all key contracts (Fritz, 2020)
- Attend most board meetings, thus indicating a dedication to the organization (Fritz, 2020)
- Hire and supervise the executive director who then hires staff (Fritz, 2020)
- Make sure the organization remains financially solvent by evaluating financial policies, approving budgets, and reviewing financial reports (Fritz, 2020)

## References


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