

Responsibility & Liability of Nonprofit Board Members



Virginia Society of
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Introduction

Charitable organizations range from uncomplicated clubs or associations to groups with a full national scope. The work of nonprofit organizations is socially beneficial, and as a result, social policy articulated by case law decisions and acts of legislatures have afforded certain protections for these organizations and their officers and directors. While service with these organizations can be rewarding, in today's litigious society, officers and directors must know their responsibilities and what could expose them to litigation.

This guide includes brief discussions of the duties and liabilities of nonprofit officers and directors. This guide also provides information on various corporate structures under state law and explains how the corporate structure influences the duties and liabilities of nonprofit officers and directors.

Duties Owed by Nonprofit Officers and Directors to Their Organizations

Corporations, both for-profit and nonprofit, and unincorporated associations, are generally governed by their boards of directors. Day-to-day operations are generally managed by a small group of executive officers, typically board members elected to serve as president, vice president, secretary and treasurer. Although statutory and common-law immunities provide protection against liability for acts of board members in the conduct of business

on behalf of the organization, courts generally have held that the following duties are owed to organizations by board members:

Duty of loyalty: Directors of organizations owe a duty of loyalty prohibiting secret profits and requiring full disclosure of personal financial interests in transactions where the organization is a party.

- **Corporate opportunity** — A corporate opportunity is any present or prospective business opportunity belonging to the corporation.
- **Use of inside information** — Confidential information cannot be used by a director for personal gain or to the detriment of the corporation or organization or its members.
- **Conflicts of interest** — Directors may not enter into contracts with the organization without full disclosure and approval, nor should organizations enter into contracts with past directors without disclosing such arrangements in the financial footnotes.

Duty of obedience: Directors should not exceed their delegated authority or direct the organization beyond its exempt purpose or mission as set forth by the articles, by-laws or constitution. Such actions violate the trust invested by those who hold memberships or support the organization and can imperil the organization's tax-exempt status.

Duty of care: Generally, the duty of care requires directors to exercise reasonable care in the exercise of their responsibilities. In Virginia, with respect to directors of non-stock, nonprofit corporations, Code of Virginia statute 13.1-870 adheres to the general rule that a director will not be found liable for his actions as a director as long as he follows what is called the "business judgment rule."

This rule affords directors complete protection from liability for taking actions they believe, in exercising their business judgment, are in the best interests of the organization, so long as there is some rational basis for their decisions, no conflicting interest is involved and a reasonably informed decision is made. As a practical matter, this provides a subjective test. When in doubt, officers should seek approval from their entire board of directors and have the secretary document the approval process in the organization's minutes.

The Code also provides that the director can rely upon information, opinions, reports or statements, prepared by officers, employees, legal counsel and committees, provided that the director acts in good faith — that is, he has no knowledge that his actions are inappropriate. This is, essentially, a gross negligence standard.

In contrast, there is no equivalent Virginia statute specifying the standard of care owed by directors of unincorporated associations. General case law decisions are unclear — whether the more lenient subjective good faith standard discussed above applies, or whether a more stringent standard of care is required. Again, the wise officer seeks documented approval in the minutes before pursuing any actions not clearly within the scope of the organization’s articles and bylaws.

Liabilities of Nonprofit Officers and Directors to Others

Contract liability: In accordance with the law of agency, which governs corporations and unincorporated associations, officers and directors are normally deemed to be merely agents of the organization and therefore not personally liable on the contracts made on behalf of the organization. Personal liability can arise when the officer intentionally agrees to contract liability (guaranty co-signing, intentional co-signature) or unintentionally agrees because of inadequate disclosure. An example of this might be an officer who signs a document or debt instrument and fails to identify herself as an officer acting on behalf of the organization. Officers should sign contracts using both their names and their positions (e.g., Mary K. Smith, President of XYZ Charity).

Tort liability: Officers and directors of corporations normally are not liable for conduct of the corporation that causes harm or injury. The rules vary with respect to unincorporated associations.

Of course, officers and directors can have personal liability for their own conduct or criminal acts, but this liability does not arise from the status of merely being an officer or director. For example, conduct such as physical violence or embezzlement could result in felony charges against a specific officer.

Limitations of liability: Because officers and directors are frequently named as additional defendants in litigation arising from an act of a nonprofit organization, the Virginia Code has specified many statutory immunities. Officers and directors of non-stock, nonprofit corporations will have no liability for acts of the corporation if they are uncompensated. If they are compensated, liability is limited to one year’s prior compensation.

Further, directors, trustees and officers of all organizations exempt from taxation under §501(c) or §528 (homeowners associations) of the Internal Revenue Code (IRC) are provided charitable immunity. As is the case with directors

of non-stock, nonprofit corporations, directors, trustees and officers of any such organization who act in good faith without compensation are immune from liability in any civil actions brought against them, while serving in their official capacities. If compensation is received, any damages assessed in such actions cannot exceed the last 12 months of their compensation.

NOTE: This charitable immunity statute does not limit liability for (a) willful misconduct; (b) knowingly violating criminal law; (c) operation of a motor vehicle; or (d) violation of a fiduciary duty (see Duties Owed by Nonprofit Officers and Directors to Their Organizations). Further information on the Virginia standards of conduct for directors can be found under the Code of Virginia statute 13.1-870. Additional information on the limitation of liability for officers and directors can be found under the Code of Virginia statute 13.1-870.1.

Federal and State Regulation Exposure

Employment and discrimination litigation: Except for very small organizations, nonprofit organizations are also subject to federal and state discrimination law. Certain exemptions apply for small entities and religious organizations. Generally, plaintiffs have not been successful in naming directors as defendants in employment litigation, although there are some instances where liability has been imposed. Further, Virginia law governing wrongful discharge can apply to directors and officers.

Federal taxation: In general, nonprofit organizations report their revenue to the IRS with Form 990, but they do not pay taxes on such revenue. However, some revenue may be taxable if it is not directly related to the nonprofit’s mission. Virtually all payrolls are taxable.

The IRC makes the “responsible person” liable for failure to withhold and remit applicable income and payroll taxes. While special provisions may apply to limit most liability for outside directors, this personal liability for taxation can result in criminal consequences for the nonprofit’s responsible party. For more information on responsible persons and the scope of liability, visit the Internal Revenue Service (IRS) website, www.irs.gov.

State taxation: Nonprofit entities are not automatically exempt from sales and use tax. Virginia state sales and use tax code requires that an exemption certificate be obtained by the organization, maintained and not misused. Find out more and apply for the retail sales and use tax exemption for nonprofit organizations at the Virginia Department of Taxation (TAX) website, www.tax.virginia.gov.

Other federal regulations: Directors and officers may be subject to potential individual liability under additional federal statutes that include:

- Antitrust laws (government laws to regulate or break up monopolies in order to promote free competition)
- Bankruptcy
- Environmental statutes (as set forth by the Comprehensive Environmental Response, Compensation and Liability Act to control hazardous substances, pollutants and contaminants)

Choice of Operating Entities

The organizational structure of a business may influence the level of responsibility and liability placed upon its directors and officers. Essentially three organizational structures exist for tax-exempt organizations: non-stock corporation, unincorporated association and charitable trust.

Non-stock corporation: The non-stock corporation requires many statutory formalities, including articles, bylaws and board of director resolutions. Members are not liable for corporate liability; the powers and duties of officers and directors are spelled out by the Code, and there are limitations of liability and special indemnity provisions for officers and directors. This is the safest structure for a board member. All legal documents are safeguarded by the corporation's secretary.

Unincorporated association: The unincorporated association is governed by the articles of the association and/or its constitution and/or bylaws, and requirements are not specifically spelled out by statute. Therefore, case law decisions governing officer and director responsibility and liability must be relied upon.

Charitable trust: Usually limited to family-trust situations for estate planning considerations, the issues of responsibility and liability of officers and directors are not usually matters of concern for charitable trusts.

Advantages and Disadvantages of Operating Entities

Non-stock corporation is the more prevalent form of organization for nonprofit entities and offers the advantage of statutory certainty regarding operation. For individual board members, this means greater certainty regarding their responsibilities and liabilities. For the corporation as a whole, compliance with the more numerous and more complicated requirements may be a minor inconvenience compared to all the statutory benefits it receives.

Indemnity: Non-stock corporate directors have the benefit of a specific statute providing for mandatory and permissive indemnity (and provisions where it cannot be provided). No statute exists for unincorporated associations, but the association, by its articles, can provide for indemnity. Indemnification of a director generally will be limited to reasonable costs incurred in a legal proceeding.

Insurance: Non-stock corporations are permitted to provide Directors' and Officers' Insurance (D&O) by statute. Unincorporated associations may provide liability insurance if directed by their operational documents. A board member not covered by a D&O policy should request such coverage or buy a personal umbrella policy. Volunteers should be very cautious in serving without insurance.

NOTE: The cost of defending any legal action may be significant. Insurance may be the only resource available to the organization to pay indemnified legal costs.

Conclusion — Avoiding Exposure

Officers and directors of nonprofit organizations continue to be named as defendants in lawsuits for acts of their organizations. Although immunities have been provided by statute, officers and directors are encouraged to pay special attention to the authority granted them by the organization and not deviate from it without the permission required by the organization's operating documents.

Under general agency law, officers and directors owe a duty of loyalty to the organization and must refrain from self-dealing, conflicts of interest and receipt of corporate opportunities without consent.

Directors are required to exercise good business judgment and always operate in good faith. Directors are encouraged to use best efforts to attend all meetings, familiarize themselves with the operating documents to determine the scope of their authority and make notation at meetings of any position with which they disagree. At the same time, directors should avoid the pitfalls of exceeding organization authority, ignoring formalities and self-dealing by themselves or any others on the board.

Many issues can be discussed freely and at length in committee meetings. Board meetings, however, are best served by very short discussions, with conflicts tabled for future discussions in appropriate committees.

With these general notions in mind, service as a board member or officer for a nonprofit charitable entity can be most rewarding, both for the board member and the community the organization serves.

For additional information, contact the American Bar Association (ABA) at www.abanet.org or the Virginia Society of CPAs (VSCPA) at www.vscpa.com.

This guide was last updated in September 2011 by CPAs serving on the VSCPA Nonprofit Resource Guides Task Force. CPAs and nonprofit organizations are freely encouraged to email or copy this guide to share with officers and directors serving on nonprofit boards. For permission to duplicate this guide or modify it for any other purpose, please contact the Virginia Society of CPAs at 4309 Cox Road, Glen Allen, VA 23060, (804) 270-5344 or vscpa@vscpa.com.



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