Nonprofit Boards: Fiduciary Duties, Responsibilities, and Operating Principles[1]

Basic Fiduciary Duties

A "fiduciary" is a trustee. A fiduciary relationship exists when a nonprofit Board member acts on behalf of the organization through a position of trust, and is legally accountable "to serve its interests before their own."[2] For nonprofit Board members, fiduciary duties are a legal responsibility stated in federal and state laws. The "general standard" of fiduciary duties is "to handle the affairs of others, minimally, with at least the same care and prudence that they apply to their own responsibilities."[3] Directors of nonprofit organizations are expected to carry out three basic fiduciary duties:

- **Duty of care:** Become knowledgeable about the organization and its finances, always acting with the care an ordinarily prudent person in a like position would exercise under similar circumstances, giving reasonable care and attention to their responsibility to provide organizational oversight.
- **Duty of loyalty:** Act in good faith and in the best interests of the organization, those it serves, and those who support it financially – rather than the member's own self-interest.
- **Duty of obedience:** Act to ensure that the organization is following its stated purposes, using its resources to pursue its mission, and complying with all local, state, and federal laws and regulations.

Specific Board Responsibilities:

1. **The Board of Directors is legally responsible and accountable for oversight of the nonprofit organization's operations.** This involves all three fiduciary duties. The Board is expected to ensure that the organization operates for the public good and for the benefit of the community, seeks to fulfill its mission, meets all legal requirements for tax-exempt nonprofits, and is publicly accountable. Board members are liable for the consequences of negligence on the part of the organization, although Board members are generally not held personally liable so long as they act responsibly, in good faith, and with the best interests of

---

[1] Prepared by Emily Gantz McKay for Mosaica: The Center for Nonprofit Development and Pluralism; revised and expanded for EGM Consulting, LLC, most recently in January 2022.

[2] Greg McRay, "Fiduciary Responsibility of Nonprofit Board Members," Foundation Group, CEO's Blog, February 8, 2021; https://www.501c3.org/fiduciary-responsibility-of-nonprofit-board-members/.

[3] Nick Price, "The Purpose and Function of Fiduciary Duties for a Nonprofit Board," BoardEffect, February 20, 2019; https://www.boardeffect.com/blog/purpose-function-fiduciary-duties-nonprofit-board/.

the organization as their primary concern. *An important legal principle is whether individual members discharged their duties in the manner that would be expected from a "reasonably prudent person," acting in good faith.*

2. **The Board is responsible for fiscal oversight, acting as stewards on behalf of its funders and the community it serves.** The Board and its individual members should provide active, informed fiscal oversight of staff budgeting and financial management. It is also responsible for preventing Board member mismanagement, non-management, or self-dealing:

   - *Mismanagement* is a failure by the Board to adhere to fundamental management principles – lack of planning, failure to set up adequate controls and reporting systems, failure to review reports to identify problems, drawing of improper conclusions from the information provided, or action that is in conflict with the available information. Such actions violate the duty of care.

   - *Non-management* is similar, but involves failure to use available opportunities and mechanisms for good management – failure to review data and reports, failure to use existing control systems, or failure to attend committee or Board meetings. Absence from meetings does not eliminate individual member responsibility for fiscal oversight. Again, such failure to carry out governance duties violates the duty of care.

   - *Self-dealing,* the most serious violation of a Board's fiduciary responsibility, involves action by Board members for their personal gain. Self-dealing refers to one or more Board members acting in their own best interest – generally but not always for their financial benefit – rather than in the best interests of the organization. It typically involves a violation of the duty of loyalty, and it almost always violates the nonprofit's conflict of interest policy (which the Internal Revenue Service requires every nonprofit to have) and can lead to fines and tax penalties. To avoid even the appearance of self-dealing, the Board's conflict of interest policy usually does not allow Board members to vote on – or otherwise try to influence – any decisions that might personally benefit them or their family members financially or in other ways.[4] In addition, Board members are expected to disclose any possible financial conflicts of interest they might have in Board decisions. For example, if a Board member were part owner of an entity being considered for a contract, to fail to disclose this relationship, or to vote to approve the contract, would give the appearance of self-dealing. The extremes of self-dealing involve illegal actions such as embezzlement.

   The Board should have, and consistently implement, written conflict of interest and other policies to help implement its fiduciary responsibilities, manage risk, and prevent fraud or mismanagement. An active committee structure, particularly a Governance Committee, can also help prevent problems related to fiscal management and Board oversight.

3. **The Board hires, supervises, and evaluates – and if necessary fires – the chief executive (Executive Director or President/Chief Executive Officer).** The chief executive generally hires, supervises, and evaluates all other staff. Once a Board makes the transition from a

[4] For example, under New York's not-for-profit law, a Board member with a conflict of interest may not be present for the discussion, vote, or otherwise attempt to influence the Board's decision on the issue involved.

group of volunteers to a policy-making body with paid staff, it usually delegates day-to-day direction and supervision of work, staff, and volunteers as well as organizational management to the chief executive. While the chief executive is supervised by the Board, not a single member, the Board Chair usually has primary responsibility for day-to-day contact with the chief executive, and should take responsibility for assuring appropriate communication and interaction between the Board and chief executive. By providing regular, structured evaluation of the chief executive, the Board ensures that the organization is well managed. The Board should develop an emergency succession plan in case something happens to the chief executive and should have a written process for executive transition.

4. **The Board provides strategic direction for the organization: it sets the mission and vision, agrees on organizational goals, authorizes programs to be operated, and sets policy.** It plays a key role in strategic planning, and often approves an annual work plan with program objectives. If the organization does advocacy, the Board sets policy priorities and approves a public policy framework or broad positions. Staff are responsible for implementing policy and programs. When Board members also act as program volunteers, they work under staff supervision, functioning like other volunteers and not as Board members.

5. **The Board evaluates the results of the organization's operations – as well as its own performance.** It helps determine whether plans are implemented and objectives met. It receives periodic performance and progress updates, reviews formal evaluation results, and looks broadly at programs individually and together, to see how they contribute to the organization's mission and goals. It ensures that the nonprofit meets ethical standards. It also monitors the involvement of individual Board members, often based on a Code of Ethics or Conduct, and evaluates its own performance as a Board; often a Governance Committee takes the lead on these tasks.

6. **Board members play a crucial role in resource development, approving fundraising goals and helping to identify, contact, and approach potential donors.** It is sometimes said that Board members should "give, get, or get off." All Board members should make a personally significant contribution each year, so the organization can tell funders that it has "100% Board giving." The Board does most of its fundraising under the direction of staff. However, the Board may take primary responsibility for some resource development tasks, such as a special event or an annual campaign. Fundraising is typically the one "operational" area in which Boards should be deeply involved – but with staff direction. In addition, if the organization does broad fundraising to attract individual donors, the Board is responsible for monitoring the process to ensure that it meets legal and ethical standards, and that fundraising costs are not excessive.

7. **The Board of Directors establishes (approves) personnel policies and procedures, and serves as the last point of appeal in the grievance process.** The staff implements personnel policies. Boards should ensure that personnel policies are regularly updated to reflect current local, state, and federal laws and regulations; reflect organizational values; and protect both employees and the organization. The distinction between policy making and policy implementation is important here. While the Board sets personnel policies and hires and evaluates the Executive Director, the Executive Director hires and evaluates other staff

and assures that personnel policies and procedures are followed. However, many nonprofit organizations have a grievance procedure that allows staff to go to the Board as a last step, after staff review and action have occurred; this can help prevent lawsuits.

Principles for Effective Boards:

1. **A Board's officers must be its leaders**. They should be elected by the Board and be among its most knowledgeable, experienced, and active members. Typically, these leaders are the core of the Executive Committee, which may also include committee chairs or other Board members. While some states do not require specific officers, most nonprofits should have a Chair, Vice Chair, Treasurer, and Secretary. In small organizations, sometimes one member has two roles, but some states limit this practice.[5]
2. **Board Committees should divide and share the work.** Use of committees helps ensure that all Board tasks are performed efficiently and effectively and the special talents of all Board members are used. Ideally, much of the work of the Board is done in standing committees or time-limited *ad hoc* committees or task forces. The full Board may review the committee's work but usually follows its recommendations. Typically, each Board member is expected serve actively on at least one committee, and the Board's leaders are also members of the Executive Committee. That Committee may have authority to act on behalf of the Board between meetings, with certain limitations stated in law or in the Bylaws. State nonprofit laws sometimes define the extent to which committees may act on behalf of the Board, and whether non-Board members can serve on committees with such authority. For example, in New York, under 2013 legislation, any committee that has corporate authority – a committee allowed to act on behalf of the full Board rather than simply making recommendations to it – must include only Board members. Executive and standing committees must be appointed by a majority of the entire Board. No committee may elect or remove officers or directors, fill Board or committee vacancies, approve a merger or plan of dissolution, or amend or repeal the Bylaws.
3. **Meetings require careful planning and attention, since they are the principal mechanism through which Boards carry out their legal responsibilities.** Most decision making is done by the Board acting as a body, not by individual members or committees, unless the committee has specific authority to act on behalf of the Board in certain situations. Boards carry out their governance responsibilities through the decisions and direction they provide at meetings. Individual Board members do not have the authority to give direction to staff or to act on behalf of the Board between meetings, unless the Board authorizes such action for a specific purpose. Sometimes the Chair may be delegated such authority. Often the Board adopts written policies to help guide meetings, rather than relying solely on the Bylaws or use of documents like *Robert's Rules of Order.* The most effective Boards hold efficient, well-planned meetings, where Board members have received and reviewed materials before the meeting and are well prepared for decision making.

[5] For example, New York and Rhode Island laws do not permit the same person to serve as Chair and Secretary. In California, the Chair may not also serve as secretary or treasurer.