
Practice 3A: Board Responsibility

- The board is responsible for establishing the organization's mission, determining strategic direction and setting policies to carry out the mission, and, as required by law, the oversight of the organization's finances and operations.
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The board has the ultimate management and fiscal responsibility for the nonprofit corporation. Board responsibilities include oversight of finances and fundraising, operations, programs, long-range planning, staff and volunteer conduct, and public relations. The board of an all-volunteer land trust takes on many of the day-to-day program and operations tasks. The board of a large staffed organization will focus on setting overall policies and management oversight. Regardless of size, a board that understands and meets its basic responsibilities provides a firm foundation for the land trust, builds public confidence, paves the way for financial success, and allows the land trust to focus its energies on creative, effective ways to accomplish its land conservation mission. A strong and informed board leads to a strong and effective organization.

While this practice outlines the major responsibilities of the board and its members, there are many other places within *Land Trust Standards and Practices* that describe the responsibilities of the board for specific actions.

Legal Standards for Nonprofit Board Members

The legal standards of behavior for board members of nonprofit organizations vary from state to state. Board members must be familiar with and follow applicable state law. The discussion below addresses many of the legal standards found in state laws, and the current thinking on nonprofit board members as embodied in the [Revised Model Nonprofit Corporation Act](#). (This is a model law drafted by the Committee on Nonprofit Corporations of the American Bar Association to offer direction to state legislators in developing individual state laws.) This discussion is intended as a general layperson's guide to board members' legal duties. It is drawn from *Board Liability: Guide for Nonprofit Directors*, by Daniel L. Kurtz, 1988, and *Nonprofit Organizations: Rights and Liabilities for Members, Directors and Officers*, by Elaine N. Hadden and Blaire A. Finch, 1987 (out of print), which land trusts may want to refer to for further general information on board liability. For definitive guidance, a land trust must look to its own state law.

State law generally embodies the following as major duties that board members owe their organizations:

- Duty of care,
- Duty of loyalty, and

- Duty of obedience.

These legal duties define the standards of behavior of board members. The organization or someone acting on its behalf, such as another board member or member, may enforce them. In general, they require honesty, good faith, and ordinary reasonable care and diligence.

Duty of care

A board member owes what in legal terms is called a “duty of care” to the land trust in the actions or decisions he or she undertakes on the land trust’s behalf. The duty of care concerns the competence with which board members serve the land trust.

PRUDENT PERSON RULE

The Revised Model Nonprofit Corporation Act states that a board member shall discharge his or her duties as a board member “with the care an ordinarily prudent person in like position would exercise under similar circumstances.” Many state laws currently employ the “prudent person” standard.

“Ordinarily prudent person” means that board members are expected to possess and exercise sound, practical judgment, to employ common sense and to reach sound, informed conclusions—although the conclusions may not necessarily be correct. Thus, board members do not need to guarantee the success of every action they take. Nor is prudence to be equated with excessive caution.

CONSIDERATIONS FOR VARYING CIRCUMSTANCES

The phrases “in like position” and “under similar circumstances” are intended to allow consideration of a variety of factors. “Like position” refers to how an ordinarily prudent board member of a similar (small, large, established, etc.) organization would act.

“Under similar circumstances” reflects the particular setting in which the board members make decisions. Thus allowances may be made, for example, for a board member who has been invited to participate primarily in the land trust’s fundraising. *However, the courts do not make allowances for a nominal board member*—for example, one whose only involvement consists of making a single large donation each year. The phrase also takes into account the size and complexity of the organization, the urgency of a decision, potential risks and rewards, and information available at the time.

STAYING INFORMED

At a minimum, the standard of care requires that board members be attentive and stay informed. This does not require board members to do exhaustive research on every issue themselves. The Revised Model Nonprofit Corporation Act provides that, in discharging his or her duties as a board member, a board member is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by specifically listed persons, officers or committees of the board. But it does imply that board members will review materials provided them, request additional materials if necessary and make their own special inquiries into reports or explanations that appear incomplete. Board members generally may rely on information

and recommendations generated by others as long as they do so in good faith after reasonable inquiry.

The following list contains some of the most important areas in which board members must stay informed to manage the land trust's affairs:

- **Financial.** Board members have a fiduciary responsibility to the land trust. The standard that applies for day-to-day financial decisions is usually the same prudent person standard discussed above. Some states apply a heightened standard for investment of assets.
- **Tax-exempt status.** The protection of a land trust's tax-exempt status is crucial to its operation. Board members should pay close attention to maintenance of this status. (See practice 2C for further discussion of maintaining tax-exempt status.)
- **Land trust programs.** The programs of the land trust should be in direct pursuit of the purposes stated in the land trust's corporate charter. Board members should know what the land trust's mission is and question activities that deviate from it.
- **Property ownership.** Property ownership among land trusts varies from office leasing to fee ownership of land. Board members should learn as much as they reasonably can about a property before approving a transaction. They must also keep abreast of new issues arising from property ownership, such as toxic liability.
- **Staff.** The employment of staff involves legal issues and requirements relating to personnel policies, benefits and income tax withholding. Board members need to be sure these responsibilities are met.
- **Volunteers.** Board members may be responsible for volunteers' actions. Volunteers need to be appropriately trained and supervised by the land trust.

(See practice 3C for further discussion of how to ensure informed participation.)

VIOLATIONS OF THE DUTY OF CARE

The type of behavior that would violate the duty of care can be generalized as mismanagement resulting from negligence or incompetence. Some examples of this type of behavior include the following:

- Failure to attend meetings at which the consequences of a property acquisition were discussed, and then voting on the acquisition without having read past minutes or having discussed the matter with other board members.
- Hiring new staff without checking past employment references.
- Representing to contributors that contributions are tax deductible without having received a determination of status from the Internal Revenue Service (although an

advance ruling is sufficient).

Duty of loyalty

The Revised Model Nonprofit Corporation Act also specifies that board members, in discharging their duties, must act “in a manner the board member reasonably believes to be in the best interests of the corporation.” This means that board members owe a duty of loyalty to the land trust they serve. This duty requires that board members, in conducting the organization’s business, faithfully pursue the interests of the land trust over their own personal interests, financial or otherwise, or the interests of any other person or organization, including another land trust or conservation organization. Any opportunities for benefits or advantages based on service as a board member must accrue only to the organization, and never to the individual. Board members also must act “in good faith,” which generally means acting with honesty, openness, and fairness. The duty of loyalty is also discussed in Standard 4 on conflicts of interest and compensation of board members.

Duty of obedience

The duty of obedience requires board members to adhere to the land trust’s purposes as set forth in its charter, bylaws and other documents such as its tax-exemption application, fundraising appeals, grant applications, etc. Board members must understand the land trust’s mission and act in its pursuit. A land trust may be laudably concerned about other social needs in the community, but acting to address those needs, if they are not part of the land trust’s mission, is a breach of the duty of obedience. (Of course, a land trust may modify its purposes by amending its charter.)

Deviation from the stated mission of the land trust makes the organization and the board members vulnerable to liability. There are practical as well as legal drawbacks. A land trust’s ability to raise funds and conduct its operations depends on the confidence and support its donors and members have in those who manage their funds. If individuals, foundations or corporate grant makers believe an organization is not using the funds for the intended purposes, they may cut off such funding.

Board Member Liability

Individual board members can be sued. Liability may occur in three different situations. (The following discussion is drawn from *Board Liability: Guide for Nonprofit Directors*, by Daniel L. Kurtz, 1988.)

Breach of duties

Board members may be liable for breaching the duties—care, loyalty, obedience—that they owe to the corporation if, as a result of the breach, the corporation has been injured. These duties are enforceable only by the corporation or one acting on behalf of the corporation, including other board members, officers, members, and the state attorney general (to protect the state’s/public’s interest in the corporation.)

Wrongful conduct

The protection of limited liability offered by the land trust's status as a corporation shields board members from most tort liability—that is, the claim of injury to a third party or its property—such as bodily injury. To prevail in such a claim, the damaged individual would need to prove that the corporation or its board members engaged in wrongful conduct that led directly to the injury. If a board member was engaged in wrongful conduct that led to the injury, he or she could be held personally liable for damages.

Statutory liabilities

Finally, board members may be held liable for the violation of other civil or criminal laws. Some states impose sanctions on officers and board members for the submission of false or inaccurate information filed in connection with state regulatory and reporting requirements. Board members have been held personally responsible to the Internal Revenue Service for the violation of payroll withholding tax obligations (including the failure to pay taxes withheld) and for the failure to pay required state sales and use taxes. Other areas where board members have been held personally accountable include antitrust activities and civil rights violations. The limited liability of nonprofit corporate status does not shield a board member from his or her own illegal or fraudulent conduct.

Protections Against Board Members' Liability

The best protection against liability is a board of conscientious and committed board members who understand and meet their responsibilities. Board members should not be overly concerned about the prospect of personal liability. One legal guide notes, "Broadly speaking, courts are reluctant to hold nonprofit directors liable except in the clearest cases of dereliction of duty or misuse of corporate funds or property." (*How to Form Your Own Nonprofit Corporation*, by Anthony Mancuso, published by Nolo Press, now in its 6th edition 2004.)

Immunity

Nevertheless, board members do get sued—sometimes for cause, sometimes by a disgruntled party without cause. The cost of defending even one lawsuit against the land trust or any of its board members could bankrupt most land trusts and many board members. Fortunately, several legal protections exist to reduce this risk, as described below.

Since 1986, under the label of tort reform, many states have changed state law to add some protection from personal liability for board members of nonprofit organizations. This additional protection shields board members against claims of injury to persons or property, except where gross negligence on the part of the board member is involved. Most of these new statutes protect only uncompensated board members and apply in suits for monetary damages only, not suits for equitable relief such as an injunction. Board members should investigate their state's law to ascertain if they have this legal protection.

This immunity applies only in the case of a tort claim against a board member. Board members remain liable for other types of suits such as negligence in business matters, fraudulent actions or failure to comply with statutory requirements.

Indemnification

By enacting immunity statutes, many states recognized, and attempted to remedy, the fact that perceived exposure to liability deterred potential board members from serving nonprofit organizations. Indemnification is the land trust's attempt to remedy the same situation. Indemnification is a promise by the land trust to use its resources to pay the legal costs, judgments, fines, or settlements incurred by a board member in defending an actual or threatened claim. Insurance, as discussed below, usually can be purchased by the land trust to cover the costs of indemnification and any direct costs to the board member (although the insurance may be expensive).

The promise of indemnification is generally made in the charter, bylaws, by board resolution, or in a contract between the land trust and its board members. In most states, a land trust's ability to indemnify is limited and may also be limited by its tax-exempt status. In some states, the board members must have met certain standards of conduct, often the standards described above, and a majority of the board must vote to indemnify. Thus even with an indemnification clause in the charter or bylaws, indemnification may not be automatic. And, of course, it only provides protection if the land trust has the financial ability to pay. The land trust's attorney should research relevant state law before drafting indemnification provisions.

Insurance

If a land trust indemnifies its board members, it should consider carrying insurance—generally called “directors and officers” or “association” insurance—to cover the potential costs. This will prevent a situation where a lawsuit brought against its board members could force the land trust to sell its conservation properties to defend the board members.

Directors and officers or association insurance may be expensive and, for new land trusts, difficult to obtain. Most large land trusts with substantial assets have this coverage. Some individuals may insist the land trust carry this coverage before they will agree to serve as board members. Each land trust must decide—in consultation with its attorney and insurance agent, and considering its overall liability, risk management and insurance situation—whether to purchase this insurance. A land trust should certainly purchase general commercial liability insurance, which provides the first line and most common defense against liability suits.

The best protection against liability is for the board members and the land trust to be sure to operate in a way that meets legal standards.

(See practice 6I for a detailed discussion of risk management, liability and insurance.)

Links to Other LTA Resources

- [LTA group liability insurance program](#)

Links to Other Helpful Resources and Publications

- [Revised Model Nonprofit Corporation Act \(1987\)](#)
- [State Liability Laws for Charitable Organizations and Volunteers](#), 4th edition, 2001. Compiled by the Nonprofit Risk Management Center. It is not a substitute for a land trust's attorney's review of the specific implications of its state law.

More Helpful Publications

- *Board Liability: Guide for Nonprofit Directors*, by Daniel L. Kurtz, 1988. Published by Moyer Bell Limited.
- *How to Form a Nonprofit Corporation*, by Anthony Mancuso, Diana Fitzpatrick and Mari Stein, 6th edition, 2004.
- *The Ultimate Board Member's Book: A 1-Hour Guide to Understanding and Fulfilling Your Role and Responsibilities*, Kay Sprinkel Grace, 2004. Published by Emerson & Church.

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