

Charitable Roundtable
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**Legalities According to the
Ohio Attorney General**

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**1702.01 Nonprofit corporation
law definitions**

(C) "Nonprofit corporation" means a domestic or foreign corporation that is formed otherwise than for the pecuniary gain or profit of, and whose net earnings or any part of them is not distributable to, its members, directors, officers, or other private persons, except that the payment of reasonable compensation for services rendered and the distribution of assets on dissolution as permitted by section 1702.49 of the (Ohio) Revised Code is not pecuniary gain or profit or distribution of net earnings. In a corporation all of whose members are nonprofit corporations, distribution to members does not deprive it of the status of a nonprofit corporation.

Disclaimers...

1. I am not an attorney
2. This presentation does not constitute legal advice; it is intended as information only.
3. All information came from publically accessible information sources.

The 3 Duties of Board Members

Duty of Care

Duty of Loyalty

Duty of Obedience

PRIMARY SOURCE

Ohio Revised Code - Title [17] XVII
CORPORATIONS - PARTNERSHIPS

**Chapter 1702: NONPROFIT
CORPORATION LAW**

The Ohio Attorney General's
Duties of Board Members

Duty of care

Duty of compliance

Duty of loyalty

Duty to maintain accounts

Duty of Care

“A trustee (or director) has a responsibility to be active in the charity’s affairs.”

Duty of Care – 6 Action steps

1. **Prepare for board meetings** by reading and reviewing reports, minutes, and other materials distributed for the meeting.
2. **Attend board and committee meetings** and record all actions taken or decisions made.
3. **Ask questions and obtain the information** necessary to make informed decisions.

Duty of Care – 4 Responsibilities

1. Attend and participate in board and committee meetings.
2. Stay informed about organizational operations to ensure that staff members follow the board’s policies.
3. Make good-faith efforts to establish organizational policies and revisit them regularly to review how well they are working.
4. Conduct themselves with the level of care, skill, and diligence exercised by prudent people in the handling of their own affairs.

Duty of Care – 6 Action steps

4. **Review the performance** of the charity’s Executive Director or chief executive officer.
5. **Exercise independent judgment** rather than blindly follow the staff’s requests.
6. **Oversee the Executive Director** and ensure that the charity’s purposes are fulfilled efficiently and follow sound business standards.

Fulfilling the Duty of Care

Board members who know the facts, analyze the probable result of their actions, exercise sound judgment, and keep reasonable records fulfill their duty of care.

Those who are regularly absent from meetings, who are inactive, or who fail to conduct adequate research prior to making decisions do not.

Duty of Loyalty

“The duty of loyalty requires that the interest of the charity and its objectives take precedence over a board member’s personal interests or those of family or friends.”

**Duty of Loyalty...
7 Responsibilities**

- 1. **Act fairly** and in the best interest of the organization without concern for their own interests.
- 2. Establish a **written policy** for dealing with conflict-of-interest situations, including procedures for written disclosures from board members concerning business dealings with the charity or those seeking to do business with the charity.
- 3. **Do not engage in any transaction that hurts the charity** or in any activities that compete with the interests of the charity or result in any personal advantages based on the charity's business dealings.

**Duty of Compliance...
4 Responsibilities**

- 1. **Adhere to the organization's governing documents and to laws and regulations** that relate to the charity and its operations.
- 2. **Understand** the charity's articles of incorporation, constitution, bylaws, codes of conduct, codes of ethics, and any other **governing documents**.

**Duty of Loyalty...
7 Responsibilities**

- 4. **Use caution** when entering into any business relationship between the organization and a board member. (Avoid this scenario entirely unless the board determines that the transaction is in the best interest of the charity.)
- 5. Establish and comply with a **written policy** for disclosing conflicts of interest, appearances of impropriety, and business dealings involving board members.
- 6. **Disclose any financial interest and abstain from discussions and votes** on transactions when the charity proposes to enter into a business relationship in which a board member holds an interest.
- 7. **Avoid diverting opportunities** available to the charity for personal gain.

**Duty of Compliance...
4 Responsibilities**

- 3. **Be familiar with state and federal laws** relating to nonprofit entities, fundraising, and tax-related issues as well as legal issues connected with the organization's charitable purposes and operations.
- 4. **Comply** with state and federal registration and reporting requirements, including filings with the Ohio Attorney General, the Ohio Secretary of State, and the Internal Revenue Service.

Duty of Compliance

"Board members have a duty to be faithful to the organization's purpose and mission."

Duty to Manage Accounts

"Board members are responsible for the charity's financial stability and accountability."

**Duty to Manage Accounts...
10 Actions**

- 1. **Establish procedures** to help the organization operate in a fiscally responsible manner.
- 2. **Develop policies** and procedures that protect the organization’s business interests and operations.
- 3. **Develop annual budgets** that provide clear direction for all organizational spending.
The budget should be a blueprint of the board’s program plans and should be routinely monitored, tracked throughout the year, and revised as necessary.

**Duty to Manage Accounts...
10 Actions**

- 10. **Ensure board minutes are kept** to indicate board approval of expenditures and investments and to show that informed discussions were held prior to approval of such transactions.

**Duty to Manage Accounts...
10 Actions**

- 4. **Ensure maintenance of accurate records** of all income, expenditures, transactions, and activities throughout the year — for the board and in all organizational operations.
- 5. **Establish appropriate internal accounting systems**, including checks and balances, so one staff member or volunteer does not have total control over finances and so theft and improper spending can be identified quickly.
- 6. **Prudently invest** and reinvest assets.

Three Consequences...

**Duty to Manage Accounts...
10 Actions**

- 7. **Develop fundraising goals and policies** and assist the organization in acquiring resources for its programs.
- 8. **Make certain** fundraising appeals are presented honestly and fairly by monitoring the performance of fundraising professionals and volunteers.
- 9. **Insist upon getting the best value** for goods and services through comparisons and an informed bidding process.

#1 - Trustees can be held individually responsible for breaches of fiduciary standards within a charity.

For example, if charitable assets are sold at less than their fair market value, trustees may be held accountable for any shortfalls.

#2 - Transactions involving conflicts of interest can result in fiscal penalties.

Criminal fraud charges can result when board members and key staff ignore their charitable obligations and personally profit from assets that should be used for community purposes.

Organizational questions

- Do board members understand the ways in which they could be exposed to personal liability for breaching fiduciary duties?
- What areas of liability exposure are of greatest concern to our board members?

#3 - The public can lose faith in an organization that doesn't appear accountable.

Service on a charity's board requires being a responsible steward of its funds. Donors and the public place their trust in board members, and regulators are watching.

Ohio and Columbus registrations...

- **Ohio Secretary of State**
 - Initial filing (name, articles of incorporation/Bylaws) and "Continued existence"
- **Ohio Attorney General** - "Ohio requires charitable organizations located in Ohio and groups that ask Ohioans for contributions to file annual reports with the Attorney General's Office. These filings are public and contribute to accountability and transparency within the charitable sector."
 - Charitable Trust Act (ORC 109.23)
 - Charitable Solicitations Act (ORC 1716.02) - <http://codes.ohio.gov/orc/1716.02>
 - "Certificate of Good Standing" verification
 - Professional solicitors
- **City of Columbus Charitable Solicitations Permit**

Organizational questions

- Does your board understand these duties?
- How is your board educated on these duties?
- Do board members understand how their fiduciary duties relate to their particular responsibilities in overseeing the nonprofit?
- How does your board discuss these matters?

Capacity assessment

- Is the board is composed of individuals who have the skills, experiences, and resources needed to be of the most value to the organization?
- Is the Board is involved with goal setting and planning for the organization?
- Does the Board regularly review financial reports that clearly show the organization's financial position?
- Do Board members attend 80% of board meetings?
- Are the organization's bylaws kept up-to-date and reviewed by the Board every 1 – 2 years?

Capacity assessment

- Does the board maintain accurate meeting minutes that include decisions?
- Does the organization have a board manual that includes board member job descriptions?
- Do board members contribute their own financial resources to the organization?
- Are board members involved in raising financial resources for the organization?

Recommendations...

- Establish meaningful orientation programs for new board members (and a refresher for long-serving members) that include an explanation of fiduciary duties and a discussion of the institution’s mission, vision, and strategic plan.
- Develop and implement an up-to-date conflict of interest policy.
- Ensure appropriate communication between the governing board and legal compliance officers and programs (if they exist at your organization).

Capacity assessment

- Is there a current conflict of interest policy?
- Does the composition of the board represent the diversity of constituents served by the organization?
- Does the board evaluate its own performance and make improvements based on its evaluation process?
- Does the board have a systematic, objective, and supportive process for evaluating the Executive Director on a yearly basis?

Recommendations...

- Secure on a timely basis the advice of knowledgeable experts who can increase the level of understanding and competence of board members on key issues.
- Commission board committees to regularly assess, through self-evaluation and review of board-member conduct, the effectiveness of the board in adhering to its fiduciary duties.

Recommendations for nonprofit organizations

- Implement a year-round director-recruitment program in which a pool of prospective candidates is developed and vetted, and in which candidates have an opportunity to learn more about the institution.
- Engage in thoughtful and advance planning regarding board development and composition to avoid conflicts of interest, ensure adequate independence of board members, and secure an appropriate balance of skills and experience among board members.

Information Sources

- “Guide for Charity Board Members” - Ohio Attorney General
<http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Non-Profits/GuideforCharityBoardMembers>
- Association of Governing Boards, “GUIDELINES FOR IMPLEMENTING THE DUTIES OF CARE, LOYALTY, AND OBEDIENCE”
- www.BridgeSpan.org
- BoardSource.com

Questions? | Comments!

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