

The Deep End of the Charity Board Conference Table

11.04.14 | Linda J. Rosenthal, JD



Congratulations! You've just been asked to serve on the board of directors of a local charity.

But they've thrown you in at the deep end. You're at your first meeting – and they must have thought you'd done this before, because they didn't provide any training or orientation.

You know a bit about the organization, but mainly what you've read in newspaper puff pieces. It's a great cause, though, so you're pleased and honored to be a part of this great group doing worthwhile things.

But there, at that first board meeting, you likely feel you're in way over your head. So we'll toss you a rope: Everything you eventually will need to know about serving on the board of a non-member, California charitable ("nonprofit public benefit") corporation flows from just two key legal concepts:

- 1. A corporation can act only through the (collective) action of its board of directors; and
- 2. Each individual director is a "fiduciary" of the corporation, and has two key duties: (1) care and (2) loyalty.

The rest is detail: Important in many respects, but we're trying to keep it simple and basic here.

A Corporation Acts Through Its Board

The statute that sets out the first concept is California Corporations Code section 5210. Generally, "[t]he activities and affairs of a corporation shall be conducted and corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the affairs of the corporation to any person or persons, management company, or committee however, composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board."

Translated into simpler English, here's what it means: A corporation doesn't have arms or legs or brains. So it acts through the majority vote of a group of humans called the board of directors.

Must it be a group of humans? Is it ok to have just one director? Technically, a corporation may, under state law, operate with a sole director. But the various federal and state agencies that have regulatory authority over tax exemptions like to see that charities have several – preferably unrelated and independent – directors.

Who is in charge? The board of directors – collectively – are in charge. The President may run the meetings and the paid Executive Director may run the entire operation, but the board makes the ultimate policy and governing decisions. Things work out best when everyone connected with the organization understands this.

You all want to get along and work smoothly toward a common goal, but the board sets the policy. Things work out better when everyone understands this.

Directors Have Fiduciary Duties

The statute that sets out this second basic concept is California Corporations Code section 5231(a): “A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

Translated into simpler English, here's what it means: Each member of the board of directors has a fiduciary relationship with the corporation. The word “fiduciary” comes from the Latin word for “trust.”

A fiduciary duty is a legal obligation to act solely in *another party's* interests.

Each director has twin fiduciary duties: care and loyalty. These duties are personal and can't be handed off or ignored. The statute reads as if there are three duties: good faith, acting in the corporation's best interests, and due care – but the “good faith” element is another way of indicating the fiduciary relationship.

- **Duty of Care:** It means “acting in a reasonable and informed manner under the given circumstances” in a way that any other “prudent” person would act if he or she were magically plunked down at that conference table making that decision for this particular corporation under these circumstances. A director has to attend meetings, get and stay informed, request more information and ask questions (when appropriate and necessary), and exercise independent judgment.
- **Duty of Loyalty:** It means acting solely in the best interests of the corporation; that is, putting the interests of the corporation ahead of the director's own interests or the interests of anyone else. In particular, a director has to avoid conflicts of interest or “self-dealing” – that is, sweetheart deals.

Conclusion

Remember, too, the important bottom line: A charitable corporation that gets goodies like tax exemptions and other benefits is acting for, and in the interests, of society and the general public as a whole. So there is an *overriding duty* to act in the public interest.

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