Board of Trustees – Duties & Breach 2013

Fiduciary Duty:
In a not-for-profit organization, the board of directors owes a fiduciary duty to the organization itself. Although directors are accountable to the members of the organization — the body who elected the directors and usually has the ability under the by-laws to remove the directors, directors do not owe the members a fiduciary duty. There are situations where the interests of the members and the interests of the organization are at odds and it is important to realize that directors' duty is to the organization, not to the members.

As noted above, the position of a director with respect to the not-for-profit corporation is that of a fiduciary. As a result, a director is considered to be acting for the corporation's benefit, and must subordinate his or her personal interests to the best interests of the corporation.

Duty of Loyalty:
This duty of loyalty involves good faith, trust and special confidence, and is the same whether the corporation is a business corporation or a not-for profit corporation. It requires high standards of honesty and good faith in the exercise of a director's powers and discretions. It means that a director must always use his or her powers in the best interests of the corporation. The director may not delegate his or her duty, except under certain circumstances and with adequate supervision; the director must not profit from his or her position and must always disclose the entire truth in his or her dealings with the corporation; and, the director must avoid all conflicts of interest.

The duty of loyalty requires that a director act honestly and in good faith in the best interests of the organization. The duty of loyalty is a personal duty and cannot be delegated (the "no-delegation rule"). This means, among other things, that a director generally is not allowed to profit from his/her office and must avoid all situations in which his/her duty to the organization conflicts with his/her interests or duties to others (the "no-conflict" rule).

The duty of loyalty is often considered the most important fiduciary duty and arises most often in the context of a conflict of interest. A conflict of interest can develop in two general ways:
• A personal conflict between the director's duty to act in the best interest of the organization and the director's own self-interest. Not only must a director avoid actual conflict, but also the appearance of conflict.

Good Faith:
- resign as a director where the director has any personal prejudices or beliefs that are inconsistent
- with the corporation's mission and that might interfere with the duties owed to the corporation;
- place the interests of the corporation above personal self-interest in all dealings with the corporation
- and actively avoid all potential conflicts of interest;
- ensure that all corporate decisions are implemented in accordance with the applicable board resolution;
- accurately portray the corporation's programs and objectives to the general public and to any requesting government authority;
- not disclose any information acquired in connection with their position as directors that might be harmful to the interests of the corporation and that is not already available to the public;

Conflict of Interest:
A director must give undivided loyalty to the corporation he or she serves. Directors should not put themselves in a

position that would create a conflict between their duty to act in the best interests of the corporation and their own personal interest. In general terms, this means that a director should not have any personal interest in any proposed contracts with the corporation. Nor should a director take personal advantage of opportunities that arise because of his or her association with the corporation. While a conflict of interest can result from many circumstances, there are two general ways in which a director can find himself or herself in a conflict of interest:

There can be a personal conflict between a director's duty to act in the best interest of the corporation and his or her own self-interest, such as where a director stands to gain financially from a proposed contract between the director (or his/her company or firm) and the corporation;

Duty of Care:
Fulfilling the duty seems simple enough:
1. Directors must act in the best interests of the organization and not their own interests; and
2. They must avoid situations in which they have competing fiduciary duties. In other words, directors must not engage in transactions or conduct that creates a conflict between their duty to act in the best interests of the organization and their own personal interests — or the interests of another corporation to which they owe a fiduciary duty.

Personal self-interest conflicts:
Directors should not put themselves in a position that would create a conflict between their duty to act in the best interests of the corporation and their own personal interest.

The common law principle with respect to directors' conflicts is straightforward – directors may not have an interest in a contract or transaction being entered into by the corporation. Personal self-interest can include a situation in which the director stands to gain personally, either directly or indirectly, through a business or corporation involved in the transaction

What should a director do if faced with a conflict of interest?
If faced with a potential conflict of interest, a director should:
- Immediately declare the conflict and abstain from voting where the conflict arises at a board meeting;
- Review the organization's conflict of interest policy to determine if there are additional requirements imposed by the organization or whether there is an identified process which must be followed with respect to declaration of the conflict;
- Speak to the chair of the board or another officer identified by the conflict of interest policy concerning the nature of the conflict, particularly where the director is unsure if a conflict truly exists;
- If not a charity, look to the corporate legislation to determine if there is a declaration of conflict process which can be followed;
- Where the conflict places you in a situation in which you believe you cannot act in the best interests of the organization as a result of the conflict, resign;

Practical implications:
The duty of loyalty and duty to avoid conflicts of interest have a number of practical implications.

Directors should:
- demonstrate full allegiance to the corporation's mission and further its cause;
- approve a conflict of interest policy which includes guidelines on the circumstances in which directors will be considered to be in conflict and the appropriate remedies for failing to disclose a conflict;
- not disclose any information acquired in connection with their position as directors that might be harmful to the interests of the corporation;

- not disclose or use any information relating the affairs of the corporation for personal profit or
- advantage;
- place the interests of the corporation above personal self-interest in all dealings with the corporation;
- carry out all of their duties in the best interests of the corporation;
- actively avoid all conflicts of interest and immediately disclose any actual or potential conflict, real or perceived, to the board of directors

Liability for Breach of Fiduciary Duty:
Directors who breach any of their duties to the corporation may be liable if the corporation suffers a loss that can be directly attributed to their actions or omissions. To protect themselves from such liability, directors should always consider whether the decision(s) or action(s) being taken are in the best interests of the corporation. They must discharge their duties of skill and diligence, as well their duty of loyalty, including acting honestly and in good faith, not improperly delegating their responsibilities, and avoiding conflicts of interest.

Directors who breach their fiduciary duties are at risk of being found personally liable if the organization suffers a loss which can be attributed to the actions or omissions of the directors. If a director breaches his/her fiduciary duty, in order to be held liable (and to pay damages), the breach has to result in a loss which can be traced back to the individual director.

What if a director disagrees with the decision taken by the rest of the board?

It is important to remember that a decision made by the board of directors, whether a majority, two-thirds or some other level of decision-making, means that the board has spoken on behalf of the organization. Every director is responsible for the decision, whether or not the director is present at the meeting. It also means that every director is jointly and severally liable along with the remaining directors should a loss occur as a result of the decision.

What can a director do?
If a director disagrees with a decision, silence is never a prudent course. It is important for a director who disagrees with a decision made by the board to voice his or her objection at the meeting and to ensure that his or her dissent is recorded in the minutes of the meeting, preferably with reasons. Follow up to ensure that the minutes properly record the dissent should be done at the beginning of the next board meeting. A properly recorded dissent may, depending on the circumstances, result in the director limiting his or her personal liability. In addition to discharging the duty of diligence, attendance at board meetings can be helpful in limiting director liability in certain instances and provided appropriate steps are taken when the director disagrees with the rest of the board.

In-camera discussion:

Motion:

Without prejudice, to request that ________________ resign as member of the Board of Trustees of the Factory Media Centre effective immediately on ____.