

Charity & Nonprofit **BOARD SERVICE**

IN WASHINGTON STATE

A QUICK GUIDE

Presented by:



Washington State Office of the
ATTORNEY GENERAL

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Guide for Charity or Nonprofit Board Service

Presented by
The Office of the Secretary of State and the Attorney General's Office

The Office of the Secretary of State and the Office of the Attorney General have prepared this *Quick Guide for Board Service* to help board members understand their responsibilities as stewards of their organizations. Under Washington law, board members of a Washington nonprofit organization are responsible for the management of the business and affairs of the organization. This does not mean that board members are required to manage the day-to-day activities of an organization or to act in the role of an Executive Director. It does mean that they must appoint officers and assign responsibilities to them so that the officers can effectively carry out the daily tasks of running the organization. It also means that board members must supervise and direct the officers and govern the organization's efforts in carrying out its mission. In carrying out their responsibilities, the law imposes on board members the fiduciary duties of care, loyalty and obedience to the law. Washington courts have held that the law imposes the highest standard of integrity on the bearers of these duties.

This *Quick Guide for Board Service* is only a guide and is not meant to prescribe the exact manner that board members must act in all situations. It is not a substitute for legal advice. Each organization possesses a distinct composition and experiences different circumstances and outcomes. This guide is provided only as a reference tool to assist board members in performing their duties. It does not contain all of the provisions, exceptions, limitations and requirements of the law. For the exact requirements of the law, please refer to the source of the law itself. Many of the guidelines in this publication are taken from the [Washington State Nonprofit Corporation Act](#), located in the Revised Code of Washington (RCW), Chapter 24.03.

Board members of Washington state nonprofit organizations must discharge their duties in good faith, in a manner the board reasonably believes to be in the best interests of the organization, and with the care that an ordinarily prudent person in a like position would exercise under similar circumstances. Good governance requires the board to balance its role as an oversight body with its role as a force supporting the organization.

Under well-established principles of nonprofit corporation law, a board director must meet certain standards of conduct and attention in carrying out his or her fiduciary responsibilities to the organization. Several states have statutes adopting some variation of these duties that a court of law would consider to determine whether a board director acted improperly. These standards are usually described as the Duty of Care, Duty of Loyalty and Duty of Obedience.

Duty of Care:

The Duty of Care describes the level of competence that is expected of a board director, and is commonly expressed as the duty of "care that an ordinarily prudent person would exercise in a like position and under similar circumstances." (See [RCW 24.03.127](#)) This means that a board director owes the duty to exercise reasonable care when he or she makes a decision as a steward of the organization.

1. **Active Participation.** A director should actively participate in the management of the organization including setting direction, attending meetings of the board, evaluating reports, reading minutes, reviewing the performance and compensation of the executive director and so on. Persons who do not have the time to participate as required should not agree to serve on a board.
2. **Committees.** A board of directors may establish committees having the authority of the board and may rely on information, opinions or reports of these committees. Committees operate subject to the direction and control of the board members. As a result, board members are still responsible for the committees and should periodically scrutinize their work.
3. **Board Actions.** A board member who is present at a meeting when an action is approved by the entire board is presumed to have agreed to the action unless the member (1) objects to the meeting because it was not lawfully called or convened and doesn't otherwise participate in the meeting; (2) votes against the action; or (3) is prohibited from voting on the action because of a conflict of interest.
4. **Minutes of Meetings.** Written minutes should be taken at every board meeting, by someone other than the chair. The minutes should accurately reflect board discussions as well as actions taken at meetings. The minutes should be reviewed and approved by all board members by the next board meeting.

5. **Books and Records.** A board member should have general knowledge of the books and records of the organization as well as its general operation. The organization's articles, bylaws, accounting records, voting agreements and minutes must be made available to board members who wish to inspect them for a proper purpose.
6. **Accurate Record Keeping.** The board of directors should not only be familiar with the content of the books and records, but should also assure that the organization's records and accounts are accurate. This may mean the board might take steps to require regular audits by an independent certified public accountant. At the very least, the board should be aware of what the financial records disclose. The board is ultimately responsible to ensure that internal controls are adequate in order to help prevent fraud.
7. **Trust Property.** The board of directors has the duty to protect, preserve, invest and manage the corporation's property and to do so consistent with donor restrictions and legal requirements. Instituting proper internal controls will aid in the protection of assets and the prevention of fraud.
8. **Resources.** The board of directors should assist the organization in obtaining adequate resources to enable it to further its mission.
9. **Charitable Trusts.** A trustee of a charitable trust has a higher standard of care than a director of a nonprofit corporation. A trustee has the duty to exercise the care an ordinary person would employ in dealing with that person's own property. A trustee with a greater level of skill must use that higher skill in carrying out the trustee's duties.
10. **Investigation.** The board of directors has a duty to investigate warnings or reports of officer or employee theft or mismanagement. In some situations the board may have to report misconduct to the appropriate authorities, such as the police or the Attorney General. Where appropriate, a director should consult an attorney or other professional for assistance.

Duty of Loyalty:

The duty of loyalty is a standard of faithfulness; a board member must give undivided allegiance when making decisions affecting the organization. This means that a board member can never use information obtained as a member for personal gain, but must act in the best interests of the organization.

1. **Conflicts of Interest.** Under certain circumstances, a contract or transaction between a nonprofit corporation and a board member or an organization in which a board member has a material financial interest is acceptable. However, if the transaction is challenged, the board member will have the burden of establishing that the contract or transactions was fair and reasonable, that there was full disclosure of the conflict and that the contract or transaction was approved by other board members in good faith.
2. **Written Policy.** Boards should establish a written policy on avoiding conflicts of interest.
3. **Loans.** Washington state law disfavors a nonprofit corporation making a loan to a board member or the board member's family members. If a loan is made, all officers and board members who participated in making the loan will be liable for the amount until the loan is repaid.
4. **Charitable Trust.** In charitable trusts, transactions which otherwise might constitute a conflict of interest are permissible if the conflict was clearly contemplated and allowed by the original settler of the trust.
5. **Corporate Opportunity.** Board members of business organizations are under a fiduciary obligation not to divert a corporate business opportunity for their personal gain. A board member of a nonprofit corporation is also subject to this duty. This duty means that a board member may not engage in or benefit from a business opportunity that is available to and suitable for the corporation unless the corporation decides not to engage in the business opportunity and conflict of interest procedure is followed.
6. **Internal Revenue Code.** Other prohibitions relating to the duty of loyalty are specified in the rules of the Internal Revenue Code regarding self-dealing. These rules apply to private foundations.

Duty of Obedience:

The duty of obedience requires the board of directors to be faithful to the organization's mission. They are not permitted to act in a way that is inconsistent with the central goals of the organization. A basis for this rule lies in the public's trust that the organization will manage donated funds to fulfill the organization's mission.

1. **State and Federal Statutes.** Board members should be familiar with state and federal laws relating to nonprofit corporations, charitable solicitations, sales and uses taxes, FICA and income tax withholding, and unemployment and worker's compensation obligations. They should also be familiar with the requirements of the Internal Revenue Service. Directors should see to it that their organization's status with state and federal agencies is protected and current.
2. **Filing Requirements.** Board members must comply with deadlines for tax and financial reporting, for registering with the Secretary of State, for making Social Security payments, for income tax withholding and so on. Additionally, if an organization is incorporated under RCW Title 24, its directors have a duty to maintain its corporate status by submitting timely filings to the Office of the Secretary of State.
3. **Governing Documents.** Board members should be familiar with their organization's governing documents and should follow the provisions of those documents. Board members should be sure proper notice is given for meetings, that regular meetings are held and that members are properly appointed. They should also ensure that the organization's mission is being accomplished in accordance with the stated purpose in the organization's [articles of incorporation](#).
4. **Outside Help.** Where appropriate, board members should obtain opinions of legal counsel or accountants.

In addition to the three general fiduciary duties (Care, Loyalty and Obedience), there are a number of specific responsibilities that should be observed by the board of directors.

Reducing the Risk of Liability

Although lawsuits against board members of nonprofit corporations occur less frequently than those against board members of for-profit business corporations, they are not unknown. Recent widespread publicity and, in some cases, criminal convictions have highlighted the fiduciary role of board members and officers of nonprofit organizations.

It is possible that board members of a charitable/nonprofit corporation will find themselves sued as personal defendants in a lawsuit filed by an “outside third party” that has incurred some personal injury or financial loss as a result of dealings with the organization. To encourage citizens to serve as board members for charities, the law cloaks volunteer board members with qualified immunity. (See [RCW 23B.17.030](#)) They cannot be sued for negligent acts. They may, however, be subject to lawsuits alleging that a loss was due to their gross negligence, willful or fraudulent acts.

NOTE – The [IRS](#) may also hold board members personally liable if the organization violates federal tax law. The most likely situation is the failure of the organization to perform mandatory payroll withholding.

Because there is some degree of risk, including the cost of defending a frivolous claim, board members should discuss with the organization’s legal counsel the prospect of purchasing [Directors and Officers \(D & O\) liability insurance](#), and/or including indemnification provisions in the organization’s governing documents.

The organization should carry insurance appropriate to its activities (including, for example, general liability, errors and omission, automobile or malpractice) in amounts to meet its needs. The absence of appropriate insurance may cause an injured person to seek recourse from board members. If adequate insurance is in force, an injured person is less likely to seek damages from a board member.

Twelve Principles of Governance That Power Exceptional Boards

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Exceptional boards add significant value to their organizations, making a discernible difference in their advance on mission. Good governance requires the board to balance its role as an oversight body with its role as a force supporting the organization. The difference between *responsible* and *exceptional* boards lies in thoughtfulness and intentionality, action and engagement, knowledge and communication. The following twelve principles offer **chief executives** a description of an empowered board that is a strategic asset to be leveraged. They provide **board members** with a vision of what is possible and a way to add lasting value to the organization they lead.

1. CONSTRUCTIVE PARTNERSHIP

Exceptional boards govern in constructive partnership with the chief executive, recognizing that the effectiveness of the board and chief executive are interdependent. They build this partnership through trust, candor, respect, and honest communication.

2. MISSION DRIVEN

Exceptional boards shape and uphold the mission, articulate a compelling vision, and ensure the congruence between decisions and core values. They treat questions of mission, vision, and core values not as exercises to be done once, but as statements of crucial importance to be drilled down and folded into deliberations.

3. STRATEGIC THINKING

Exceptional boards allocate time to what matters most and continuously engage in strategic thinking to hone the organization's direction. They not only align agendas and goals with strategic priorities, but also use them for assessing the chief executive, driving meeting agendas, and shaping board recruitment.

4. CULTURE OF INQUIRY

Exceptional boards institutionalize a culture of inquiry, mutual respect, and constructive debate that leads to sound and shared decision making. They seek more information, question assumptions, and challenge conclusions so that they may advocate for solutions based on analysis.

5. INDEPENDENT-MINDEDNESS

Exceptional boards are independent-minded. They apply rigorous conflict-of-interest procedures, and their board members put the interests of the organization above all else when making decisions. They do not allow their votes to be unduly influenced by loyalty to the chief executive or by seniority, position, or reputation of fellow board members, staff, or donors.

6. ETHOS OF TRANSPARENCY

Exceptional boards promote an ethos of transparency by ensuring that donors, stakeholders, and interested members of the public have access to appropriate and accurate information regarding finances, operations, and results. They also extend transparency internally, ensuring that every board member has equal access to relevant materials when making decisions.

7. COMPLIANCE WITH INTEGRITY

Exceptional boards promote strong ethical values and disciplined compliance by establishing appropriate mechanisms for active oversight. They use these mechanisms, such as independent audits, to ensure accountability and sufficient controls; to deepen their understanding of the organization; and to reduce the risk of waste, fraud, and abuse.

8. SUSTAINING RESOURCES

Exceptional boards link bold visions and ambitious plans to financial support, expertise, and networks of influence. Linking budgeting to strategic planning, they approve activities that can be realistically financed with existing or attainable resources, while ensuring that the organization has the infrastructure and internal capacity it needs.

9. RESULTS-ORIENTED

Exceptional boards are results-oriented. They measure the organization's progress towards mission and evaluate the performance of major programs and services. They gauge efficiency, effectiveness, and impact, while simultaneously assessing the quality of service delivery, integrating benchmarks against peers, and calculating return on investment.

10. INTENTIONAL BOARD PRACTICES

Exceptional boards purposefully structure themselves to fulfill essential governance duties and to support organizational priorities. Making governance intentional, not incidental, exceptional boards invest in structures and practices that can be thoughtfully adapted to changing circumstances.

11. CONTINUOUS LEARNING

Exceptional boards embrace the qualities of a continuous learning organization, evaluating their own performance and assessing the value they add to the organization. They embed learning opportunities into routine governance work and in activities outside of the boardroom.

12. REVITALIZATION

Exceptional boards energize themselves through planned turnover, thoughtful recruitment, and inclusiveness. They see the correlation between mission, strategy, and board composition, and they understand the importance of fresh perspectives and the risks of closed groups. They revitalize themselves through diversity of experience and through continuous recruitment.

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Twelve Principles of Governance That Power Exceptional Boards excerpted with permission from www.boardsource.org. BoardSource, formerly the National Center for Nonprofit Boards, is the premier resource for practical information, tools, and training for board members and chief executives of nonprofit organizations worldwide. For more information about BoardSource, visit www.boardsource.org or call 800-883-6262. BoardSource (c) 2010.

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CONTACT INFORMATION FOR CHARITIES AND NONPROFITS

Office of the Secretary of State Charities Program	Financial information on registered charities or the registration of charities and commercial fundraisers	Telephone: (360) 725-0378 Toll-Free: (800) 332-GIVE (Washington only) www.sos.wa.gov/charities/
Office of the Secretary of State Corporations Division	Registration of profit and nonprofit organizations	Telephone: (360) 725-0377 www.sos.wa.gov/corps/
Department of Licensing	Master Licensing Service Business License	Telephone: (360) 664-1400 www.dol.wa.gov/business/
Department of Revenue	Washington State taxpayer services (Annual Reporting, Exemptions, Excise, sales, B&O taxes, etc.)	Telephone: (800) 647-7706 www.dor.wa.gov
Washington State Gambling Commission	For those nonprofit organizations that hold raffles, bingo, casino or other games of chance.	Telephone: (360) 486-3440 www.wsgc.wa.gov/
Washington State Liquor Control Board	For those nonprofit organizations seeking a special license to raffle or sell liquor at specified date, time and place.	Telephone: (360) 664-1600 www.liq.wa.gov/
Internal Revenue Service	For Exempt Organization Division	Telephone: (877) 829-5500 www.irs.gov/charities
Washington Attorneys Assisting Community Organizations (WAACO)	For assistance in organizational capacity-building in Washington state	Telephone: (866) 288-9695 www.waaco.org/
Washington Nonprofit Handbook (WAACO Publication)	Handbook providing guidance on many legal issues facing nonprofit organizations in Washington state	Washington Nonprofit Handbook