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WHAT EVERY DIRECTOR OF A NON-PROFIT ORGANIZATION SHOULD KNOW ABOUT PERSONAL LIABILITY

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Most directors of non-profit organizations do not know what their responsibilities are as directors. This is not from any lack of intelligence or lack of diligence, but rather from the fact that most directors come from other walks of life – they are business, civic and community leaders – and are not accustomed to the rules that govern non-profit organizations.

How directors carry out their responsibilities is commonly referred to as the “fiduciary duties” of directors.

There are two standards that govern all actions taken by directors: (1) the duty of care, which requires, first, that the director be informed and second, that the director exercise independent and reasonable judgment; and (2) the duty of loyalty, which requires that the director act in good faith and in the best interest of the organization, rather than in their own interest or that of another person or entity.

This article will focus on the director’s duty of care, including a recent change in New Jersey law which limits the personal liability of a non-profit director (or officer) under certain circumstances.

DUTY OF CARE: ATTEND MEETINGS

Regular attendance at board meetings is considered a basic requirement under the duty of care. The idea is that if directors are unable to regularly attend board meetings, they will be unable to provide guidance to the organization.

In New Jersey, a director who is absent from a board meeting or committee meeting is presumed to have concurred in the action unless he files a dissent with the secretary of the organization within a reasonable time after learning of the action.

Most states permit directors to attend meetings by conference telephone or other means of communication that allows them to hear and communicate with everyone participating in the meeting. This is true under New Jersey law for board meetings and committee meetings “unless otherwise provided in the certificate of incorporation or the bylaws.”

DUTY OF CARE: CONDUCT MEETINGS

What about the responsibility of the non-profit organization to conduct meetings? If the Certificate of Incorporation or bylaws do not specify how often a meeting of the board shall be held, then it must be held annually.

DUTY OF CARE: VALIDITY OF INFORMATION

What happens if a director questions the validity of information provided to him or her?

Directors do not normally gather the information; they typically rely on information provided by officers and employees, experts retained by the organization and board committees.

Unless there is some reason to suspect the reliability or confidence of management, directors can rely on the information furnished. However, if there is reasonable doubt, directors must satisfy themselves as to the validity of the information.

New Jersey law states that directors shall not be liable if, acting in good faith, they rely on the opinion of the attorney for the organization; financial reports by an independent public accountant or certified public accountant, or financial reports represented to them to be correct by the President, Financial Officer or Chairperson.

PERSONAL LIABILITY

New Jersey law changed recently in a way that helps directors. Certificates of Incorporation for the non-profit organization may provide that a director (or officer) shall not be personally liable to the organization or its members or shall have limited liability, except for a breach of duty based on an act or omission:

- 1) in breach of the duty of loyalty;
- 2) not in good faith or involving a knowing violation of law; or
- 3) resulting in receipt of an improper personal benefit

So, non-profit directors can avoid personal liability (or at least limit their liability), except if they breach the duty of loyalty; they do not act in good faith or knowingly violate the law, or they receive an improper personal benefit.

But the Certificate of Incorporation for the non-profit organization must provide for it.

Each director should therefore read the Certificate of Incorporation (as well as the bylaws and Constitution) to determine if it contains this provision. If it does not, the Chairman of the Board should ask the full Board to approve the preparation of an amendment to the Certificate of Incorporation.

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