

Legal Aspects of Serving on the Board

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I. LEGAL RESPONSIBILITY AS A DIRECTOR

General Summary of Duties. Under the North Carolina General Statutes, the board of directors has the duty and responsibility for the exercise of all corporate powers and the affairs of the nonprofit corporation, except as otherwise provided in the Articles of Incorporation. [G.S. § 55A-8-01(b)]. These corporate duties may be summarized as:

1. Duty of Care.
2. Duty of Obedience.
3. Duty of Loyalty.
4. Duty of Confidence.

II. FIDUCIARY DUTIES AS DIRECTOR OR OFFICER

A. Definition of Fiduciary The word “fiduciary” comes from the Roman word for trustee. Other definitions include: A person having a duty to act for another’s benefit. A person having a fiduciary duty is held to a higher standard than the ordinary and prudent person. A fiduciary is expected to act with candor, trust and in good faith. With the higher degree of responsibility also comes a higher expectation of care and therefore an increased potential for liability for failure to exercise that higher degree of care. All directors, including the Chair, have a fiduciary duty to the nonprofit corporation and its members.

B. Duty of Care – N.C.G.S. § 55A 8-30(a) provides that: A Director shall discharge his duties as a Director, including his duties as a member of a committee:

1. In good faith;
2. With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
3. In a manner the Director reasonably believes to be in the best interest of the corporation.

As a practical matter, a Director should:

- attend Board and committee meetings;
- study material distributed in advance of meetings;

- make inquiries to ensure that you understand matters about which you are being asked to vote;
- reasonably rely on professionals such as attorneys, CPA's, etc.;
- if disagree, ensure that your opposition vote is included in the minutes.

Liability & Right to Rely on Others

By law, unless a Director has actual knowledge otherwise, the director is entitled to rely on:

1. Officers and employees of the nonprofit whom the director reasonably believes to be reliable and competent in the matters presented to the Board.
2. Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence;
3. A committee of the Board of which he or she is not a member, if the director reasonably believes that the committee merits confidence.

If the director acts in good faith, with ordinary care and in a manner he or she reasonably believes to be in the best interest of the corporation or in reliance on the three categories, then the director cannot be held liable for any action as a director, or any action not taken as a director.

- C. Duty of Loyalty.** The Duty of Loyalty means that the Director must give priority to the needs of the non-profit and act in the non-profit's best interest. He or she should exercise their powers for the benefit of the corporation and not for their own personal financial benefit.
1. Avoid conflicts of interest. NCGS defines conflict of interest as "a transaction with the corporation in which a director has a direct or indirect interest, particularly a material financial interest. However, if the nonprofit is informed of the director's conflict and the material facts of the transaction and if the transaction is fair to the nonprofit, and if with such knowledge the board approved or ratified the transaction, without participation of the director, then the transaction cannot be voided.
 2. If there is a conflict of interest, you must disclose it and abstain from voting and have your abstention entered into the minutes.
 3. Do not accept loans from the corporation. If you do, the Director must be full time, must abstain from voting and the Board must approve by majority vote. NCGS § 55-8-32.
 4. Do not make loans or cash or property distributions to directors without compliance with statutory procedures. Personal liability may accrue. Or, the transfer may be invalidated.

E.g. *Mountain Top Youth Camp v. Lyon*, 20 NCApp. 694, 202 S.E.2d 498 (1974). A president/director signed a deed transferring 10 acres from the nonprofit to her. Later, the nonprofit sued to invalidate the transfer because of the failure to follow proper procedures. The court invalidated the deed. "...as a general rule, he [sic] will not be permitted to make a profit by purchasing or leasing the property of those toward whom he occupies a fiduciary relation without affirmatively showing full disclosure and fair dealing."

D. Duty of Obedience. Directors have a duty to follow the Articles, Bylaws and policies and procedures of the corporation. Also attention must be paid to nonprofit statutes and the Application to the IRS for Recognition of exemption to ensure that there is no loss of tax exempt status.

E.g. William Aramony's problems with United Way of America; various union leaders' problems with misuse of union funds; NAACP firing Rev. Chavis because of an out-of-court settlement.

In addition, because of the unique political nature of NCAE, there are NCAE policies that limit the political activity of an Officer or Director and the duty of obedience requires such persons to follow their requirements. For example,

- Campaign guidelines have been set for candidates for NCAE or NEA office; see Board Policy Sections 8.7 – 8.8.
- NCAE officers and directors may not participate in a political campaign in their officer capacity until an endorsement is made.
- The President serves as the official representative of the Association at meetings of educational bodies and other groups working toward the advancement of education. NCAE Constitution, Article IV, Section 4.a(4).
- The President is the sole spokesperson for NCAE on political matters, especially before the Governor, State Superintendent, and the General Assembly.

E. Duty of Confidentiality. Directors frequently come to possess confidential information. As part of their duty to the non-profit corporation and its members, they must keep such information confidential.

E.g. - Personnel information, such as salaries, evaluations, disciplinary action, termination, references; union bargaining matters; financial information from budgets and audits.

F. Fiduciary Duty to Members and Local Affiliates

NCAE is a unique non-profit organization because membership in NCAE also involves membership in other organizations, i.e. local affiliates and NEA. As a Director and officer of NCAE, you also have a duty to these organizations and the joint members of them. Those directors who are elected to represent districts which include those local affiliates have a unique duty that involves dual representation.

Article VI of the NCAE Constitution specifies how local affiliates are to operate. Article VI, Section 3.d states that: "The constitutions of all local affiliates in the Association shall contain no provision contrary to the provisions of the Constitution of the State Association. The activities of local affiliates shall not be in conflict with the purposes and policies of the State Association."

Board Policy, which is adopted by the Board of Directors, also regulates the structure and activities of local affiliates. Article VI of Board Policy establishes certain policies and procedures that local affiliates must follow. NCAE, acting through its Board of Directors and staff, must ensure compliance with these policies and procedures and the minimum standards outlined in Article VI of the Constitution.

III. POWERS & DUTIES OF BOARD UNDER NCAE CONSTITUTION

Article V, Section 4 of the NCAE Constitution lists 18 specific duties of the Board of Directors as to the governance of NCAE. These are:

- a. To supervise and control the affairs of the Association;
- b. To hold as trustees and directors all real and personal property of the Association with full power to use, hold, bargain, sell and convey, lease, mortgage, or otherwise dispose of said property for the use and benefit of the Association;
- c. To elect an executive director and other members of the professional staff of the Association, fix their compensation, and require such bonding as is deemed necessary;
- d. To authorize the execution of contracts and other agreements necessary to the efficient conduct of the business of the Association;
- e. To approve a balanced budget and the annual auditing of the accounts of the executive director and require the publication of the summary of the official journal of the Association;
- f. To fix the amount of the membership dues as stipulated in Article III, Section 2;
- g. To designate and announce publicly the time and place of the annual meeting of the Association at least three months before the time of the meeting. The Board of Directors shall compose the program committee for the annual meeting;
- h. To determine policies for the governance structure of the Association;
- i. To approve the appointment of chairpersons and other personnel of standing and special commissions and committees;
- j. To determine and assign the duties of commissions and committees;
- k. To approve the formation or discontinuance of local affiliates, commissions and committees, districts, and divisions;
- l. To make all necessary rules and regulations concerning affiliated organizations;
- m. To determine the date for holding the election of state officers in the local affiliate, after the close of the annual meeting of the NCAE Representative Assembly, and to make rules and regulations regarding the election;
- n. To create new local affiliates and districts/clusters, or authorize changes in boundaries at any time such changes become desirable and/or necessary for the furtherance of the Association;
- o. To call a meeting of the Representative Assembly of the Association when such a meeting seems advisable;
- p. To fill district/cluster office vacancies;
- q. To serve as delegates to the meetings of the Representative Assembly; and

- r. To apportion representatives to district, cluster, state, regional, national and other meetings, conference, conventions, workshops, etc., in proportion to the ethnic minority-white membership.

IV. SUPERVISION OF EXECUTIVE DIRECTOR

- A.** The Board of Directors has the duty to select the executive director and establish his or her compensation.
- B.** In practice, the Executive Director and Associate Executive Director have written contracts. The other NCAE managers also have written contracts.
- C.** The duties of the Executive Director and Associate Executive Director are also established by the NCAE Constitution, Article IV, Sections 4c and 4d.
- D.** The NCAE Constitution makes no provisions for the manner of supervision and evaluation of the Executive Director or Associate Director.

V. LEGAL RIGHTS OF EXECUTIVE DIRECTOR & OTHER EMPLOYEES

- A.** All employees in a non-profit have just cause rights the same as other employees.
- B.** Because there is a written contract for a specific period of time, then the NCAE managers are not employees at will, but employees under contract for that specified period of time.
- C.** While the Board has the right to terminate any employment contracts, if the Board does so contrary to the contract and its just cause terms, then the non-profit could be held to be in breach of contract. In the event of unsuccessful litigation about a breach of contract, the measure of damages is the compensation and benefits that would have been paid for balance of the contract term.

- D.** The Statute provides that:

Contract rights of Officers.

G.S. § 55A-8-44(a) states that: "The appointment of an officer does not itself create contract rights." The Commentary notes that: "This Section makes clear that the appointment of an officer does not itself create contract rights in the officer. ... The mere appointment of an officer for a term does not create a contractual obligation on his part to complete the term."

G.S. § 55A-8-44(b) states that: "An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer."

VI. MEETINGS

A. Meetings & Action by the Board of Directors

1. **Regular vs. Special Meetings.** The Board of Directors may hold regular or special meetings and such meetings may be held in or out of State. [G.S. § 55A-8-20(a)]. Unless the Articles of Incorporation or Bylaws provide otherwise, any or all of the directors may participate in the regular or special meeting "through the use of any means of communication by which all directors participating may simultaneously hear each other

during the meeting.” *(Some nonprofit corporations that receive State funding may be required to comply with the Open Meetings Law, N.C.Gen.Stat. § 143, Article 33C. This requirement may be imposed by statute, e.g. Smart Start partnerships; see N.C.Gen.Stat. § 143B-168.14(a)(2) or by a condition of the contract or grant. These statutory requirements DO NOT APPLY to the meetings of the NCAE Board of Directors.)*

NCAE has used this provision to conduct telephone meetings. See also Board Policy Section 5.1.6 regarding telephone meetings.

The NCAE Constitution, Article V, Section 5, provides the procedures for regular and special meetings. Although the Constitution states that the Association shall hold not less than four meetings annually, in practice the Board meets every other month.

Special meetings may be called at any time by the President or by a majority of the Board of Directors. Five working days’ notice is required for a special meeting and must be sent to every director. The notice shall state the time and place of the meeting.

2. **Action without Meeting.** Unless the Articles of Incorporation or Bylaws provide otherwise, action either required or permitted by the statutes to be taken by a Board of Directors may be taken without an actual meeting, if: (1) the action is taken by all members of the Board; (2) the action is authorized by one or more written consents signed by the directors prior to the action; and (3) the action taken is recorded in the minutes or corporate records. [G.S. § 55A-8-21].

- B. **Quorum.** Unless the Articles of Incorporation or Bylaws provide otherwise, a quorum of the Board of Directors consists of a majority of the directors immediately before the meeting begins. In no event may the Articles of Incorporation authorize a quorum of less than one-third of the number of directors in office. [G.S. § 55A-8-24(a)].

The NCAE Constitution provides that “[a] majority of the voting members of the Board shall constitute a quorum.”

- C. **Voting.** Unless the statutes, Articles of Incorporation, or Bylaws require a greater vote, if there is a quorum present and the vote is an affirmative vote of the majority of directors present, then it is a valid act of the Board of Directors. [G.S. § 55A-8-24(b)]. In practice, votes are taken on either a voice vote or roll call basis. Unless there is a motion, the decision to take the vote or roll call is usually that of the President as the Presiding Officer.

D. Objections to Meetings.

A director that is present at a meeting of the Board of Directors and who does not object, abstain, or file written notice of dissent or abstention, is presumed to have assented to the action taken. [G.S. § 55A-8-24(c)].

If a director attends a meeting and participates, then any objection to notice is waived.

If a director has not received notice and they wish to object, then they must ask that their objection be noted in the minutes before participating.

VII. DIRECTORS & OFFICERS INSURANCE

A. Indemnification & Immunity.

G.S. § 55A-8-50 *et.seq.* provide for indemnification of directors, officers & employees. Generally, a corporation may indemnify an individual who has been made a party to a proceeding, if the individual meets 3 statutory requirements. If a director defends the lawsuit is successful, then indemnification is mandatory.

If a corporation indemnifies or advances expenses to a director under G.S. 55A-8-51, G.S. 55A-8-52, G.S. 55A-8-53, G.S. 55A-8-54, or G.S. 55A-8-57 in connection with a proceeding by or in the right of the corporation, the corporation shall give notice of the indemnification or advance in writing to the members with or before the notice of the next meeting of members. [See G.S. § 55A-16-21].

A person serving as a director or officer of a nonprofit corporation shall be immune from individual liability for monetary damages, except for 7 specified instances. See G.S. § 55A-8-60. In addition, volunteers are immune from civil liability. See G.S. § 1-539.10.

B. Insurance.

The statute also authorizes the purchase of insurance to fund the indemnification.