

Legal Responsibilities of the Board

Purpose *To clarify the legal responsibilities and liabilities of the Board.*

Policy Statement *The Board of Directors exists legally, only when it meets as a Board. The Members of the Board cannot speak for the Board outside Board meetings, unless the Board has entrusted them to do so.*

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Legal Responsibilities of the Board

1. The Board cannot confer on a committee of Members, or on an Executive any higher power than it has itself.
2. Any Member who is present at a meeting of Board Members, or committee of Members, is deemed to have consented to the resolutions passed, or actions taken, unless the Member dissents and requests the dissent to be entered into the minutes, or sends a written dissent to the Secretary immediately after the meeting. Any Board Member absent from the meeting must follow the same procedures within seven days after becoming aware of the resolution; otherwise, the Board Member is deemed to have consented. Expressing dissent does not absolve a Member from any liability for Board action if the Member chooses to remain on the Board after dissenting.
3. Board Members have the responsibility to clearly state their position, including that of dissent, at Board meetings. Members also have the right to dissent by way of vote. This dissent, by way of Board minutes, is a matter of public record. However, it is not considered part of accepted practice to disagree with Board decisions in public, and to do so, would be perceived as an act of bad faith by the Board Member.
4. Any Board Member, who fails to make it clear to a third party, that the Board Member is acting on the Board Member's own behalf, becomes liable in principle. A Board Member must act strictly within the actual authority identified by the Board. Board Members, who participate in transactions or decisions that are not authorized by an incorporating statute article or By-law of ASC, are liable.
5. Board Members may not exercise individual authority over the Association, except as set forth in Board Policies. In this matter, Board Members must recognize that they cannot speak for the Board when dealing with the public, press or other entities, unless they are specifically authorized to do so by the Board.
6. If a case is established that ASC has the intent to commit illegal acts, the Members of the Board may also be charged with the offense.
7. ASC provides Board Members and Officers with liability insurance.
8. It is the duty of all Members of the Board to know and understand their legal responsibilities. It is particularly important that they know and understand the legal terms and the implications, of those legal terms as set out in the Glossary of this Board Policy Manual and as set out below.
 - a) The standard test of care - The standard test of care is to consider what a "reasonably prudent person" would undertake in the same circumstances. The Board Member must act honestly, exercise some degree of skill and diligence, and ensure that he or she has the authority to act, in compliance with the provision of the Association's Objectives and Bylaws.

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A professional, as Board Member, faces a greater risk of liability than the other Board Members who lack specific expertise. A lawyer, for example, is required to provide competent legal advice to the Board. In other matters, over which the Board Member has no special expertise, however, the professional is not required to attain a higher level of performance.

A Board Member who acts honestly and who has met the standards of conduct required by the fiduciary duty and standard of care, is not responsible for errors of judgment that occur while performing his or her duties.

- b) Duty of Diligence - The duty of diligence means that a Board Member must become acquainted with all aspects of the Association including the transaction of business, Association policies, and the delegation of task.

It is prudent for a Board Member to attend whatever Board meetings possible. Non-attendance may be interpreted as a failure to exercise the proper degree of diligence.

While Board members are responsible for the effective management of the Association, it is within their rights to delegate some of that responsibility; however, they cannot delegate aspects of management. The extent and nature of delegation rests on the test of what a "prudent person" would do in similar circumstances. Personal liability may result if delegated activities are inadequately supervised.

When Board members do not have the expertise for certain aspects of management, they often rely on the services of experts (for example, accountants and lawyers) who are not officers or members of the Association. In this case, it is the duty of the Board Members to ensure that the qualifications of the experts are appropriate.

- c) Duty of Attendance (also a part of Duty of Diligence - see above). While a Board member is not legally bound to attend Board meetings, he or she does have the duty to stay informed of all events that transpire at meetings. If a Board Member attends a meeting where an illegal act is planned, that Board Member is liable, unless he, or she, immediately registers dissent. Liability can also occur if the Board Member does not properly notify the members and other interested parties about the illegal act. On the other hand, a Board Member may not be liable for an illegal act if he or she has no knowledge about it and has fulfilled the other duties required. Illegal acts committed by the Board, prior to a Board Member's election, are not sources of liability.

If a Board Member does not attend meetings because of long-term illness, he or she should consider relinquishing office if unable to fulfill his or her necessary duties. This will ensure that the Board Member is not held liable for not attending. Because all Board Members are obliged to ensure the effective management of the Association, a Board Member who is not adequately fulfilling his or her role may be removed from office, in accordance with the Bylaws of the Association.

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d) Investment Powers A Board Member of an incorporated not for profit organization faces great potential liability for the investment of corporate funds. All not for profit organizations maintain the power of investment (except Ontario). The Board Member must consider whether the other Board Members possess sufficient expertise to invest funds without outside consultation. However, certain investment responsibilities should never be delegated. These include establishing corporate policy, appointing financial officers, enacting bylaws concerning corporate affairs, reviewing financial reports at frequent intervals, and establishing the details of employment for employees.

e) Duty of Skill - In most jurisdictions, the law does not specify what level of skill is required of a Board Member of an incorporated not for profit organization. A Board Member is under no obligation to exercise skills that are beyond his or her level of competence and Board Members are not liable for errors of business judgment.

The level of skill required of each Board Member will vary, according to individual qualification and experience, as well as the range of organizational demands placed upon that Board Member. However, if a Board Member does possess specific expertise, he or she is required to use it in the interest of the organization's affairs.

f) Duty of Prudence - A prudent person exercises sound and practical judgment and is cautious and discreet in conduct. Therefore, a Board Member must act in a manner that is both practical and cautious, with a view to anticipating the probable consequences of any course of action that the organization might take. The level of knowledge a Board Member has is not relevant to his or her duty of prudence. Prudence must be exercised with practicality in mind, not expertise.

g) Continuing Duty - A Board Member cannot necessarily avoid liability through resigning his or her office. A Board Member is responsible for acts already done, or neglected, while he or she was in office. Further, the Board Member may remain bound by a continuing duty to the corporation, which will vary in length of time according to the circumstances. In some situations, resignation by a Board Member with the intent to avoid liability could be a breach of duty itself. Resignation, in such circumstances, may violate the duties of care, diligence, prudence, loyalty and the best interests of the Association. Even if the Association dissolves, liability continues during the winding-up process.

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