

Charity & Nonprofit **BOARD SERVICE**

IN WASHINGTON STATE

A QUICK GUIDE

Presented by:



Washington
Secretary of State



Washington State Office of the
ATTORNEY GENERAL

Revised February 2012

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 that each member 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 and may rely on information, opinions or reports of these committees. Committees operate subject to the direction and control of the board. 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. Normally, the minutes will record such objections to create a record of the dissent.
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 and membership 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. The board is ultimately responsible to ensure that internal controls are adequate to safeguard the organization's assets and help prevent fraud. This also means the board might take steps to require regular financial audits by an independent certified public accountant. At the very least, the board should be aware of what the financial records disclose.

Many boards determine that an effective way to achieve adequate financial oversight is to appoint a Finance Committee that includes at least one member with a background in finance to focus on the financial details and report to the full board. Often, the treasurer of the board chairs this committee and the appointed members can include people who are not on the board.

7. **Assets.** The board of directors has the duty to protect, preserve, invest and manage the corporation's assets and to do so in a manner consistent with the organization's mission, donor restrictions, and legal requirements. Oversight of appropriate 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 that 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. The board should adopt procedures to handle reports of inappropriate uses of resources or inaccurate reporting of financial affairs. These procedures should include protections for anyone reporting the possibility of such damaging activities. 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. The board as a whole may also seek such advice when needed to assist the members in dealing with a difficult situation.

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 settlor 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 and other resources to fulfill the organization's mission.

1. **Federal, State and Local Statutes.** Board members should be familiar with federal, state and local laws relating to nonprofit corporations, charitable solicitations, sales and uses taxes, FICA (Social Security) and income tax withholding, and unemployment and worker's compensation obligations. They should also be familiar with the requirements of the Internal Revenue Service (See Attachment A). Directors should see to it that their organization's status with federal, state and local agencies is protected and current.

Board members should assure themselves that the provisions of the Internal Revenue Code applying to 501(c)(3) organizations have been met before advising donors that their contributions may be tax deductible.

2. **Filing Requirements.** Board members must comply or assure compliance 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,

its directors have a duty to maintain its corporate status by submitting or assuring submission of timely filings to the Office of the Secretary of State.

If the organization conducts fund raising activities, a separate annual Charitable Solicitation Report may be required. See [RCW 19.09.065](#) and the information about the Charitable Solicitations Act on the Secretary of State's website at <http://sos.wa.gov/charities> for details.

3. **Governing Documents.** Board members should ensure that the organization's mission is being accomplished in accordance with the stated purpose in the organization's [articles of incorporation](#). They should be familiar with their organization's governing documents and should follow the provisions of those documents. Board members should be sure that proper notice is given for meetings, that regular meetings are held, and that members are properly appointed or elected.

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 several 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](#) and [RCW 4.24.264](#)) 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.

Federal Guidelines for Governance, Management and Disclosure

The federal government has prescribed that certain governance practices are desirable for non-profit entities that have federal tax-exempt status. While they are not required by law, the federal Return of Organization Exempt from Income Tax (Form 990) does require disclosure as to whether or not these practices are in place. Potential donors may consider the absence of these features as indications that the organization is not well run. Please refer to the applicable questions that are included in **Attachment A**.

Attachment A

Part VI Governance, Management, and Disclosure For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.

Check if Schedule O contains a response to any question in this Part VI

Section A. Governing Body and Management

		Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year		
1b	Enter the number of voting members included in line 1a, above, who are independent		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?		
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person?		
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?		
5	Did the organization become aware during the year of a significant diversion of the organization's assets?		
6	Does the organization have members or stockholders?		
7a	Does the organization have members, stockholders, or other persons who may elect one or more members of the governing body?		
7b	Are any decisions of the governing body subject to approval by members, stockholders, or other persons?		
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:		
a	The governing body?		
b	Each committee with authority to act on behalf of the governing body?		
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? If "Yes," provide the names and addresses in Schedule O		

Section B. Policies (This Section B requests information about policies not required by the Internal Revenue Code.)

		Yes	No
10a	Does the organization have local chapters, branches, or affiliates?		
10b	If "Yes," does the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with those of the organization?		
11a	Has the organization provided a copy of this Form 990 to all members of its governing body before filing the form?		
11b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.		
12a	Does the organization have a written conflict of interest policy? If "No," go to line 13		
12b	Are officers, directors or trustees, and key employees required to disclose annually interests that could give rise to conflicts?		
12c	Does the organization regularly and consistently monitor and enforce compliance with the policy? If "Yes," describe in Schedule O how this is done		
13	Does the organization have a written whistleblower policy?		
14	Does the organization have a written document retention and destruction policy?		
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?		
15a	The organization's CEO, Executive Director, or top management official		
15b	Other officers or key employees of the organization		
	If "Yes" to line 15a or 15b, describe the process in Schedule O. (See instructions.)		
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?		
16b	If "Yes," has the organization adopted a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and taken steps to safeguard the organization's exempt status with respect to such arrangements?		

Section C. Disclosure

- 17** List the states with which a copy of this Form 990 is required to be filed ► _____
- 18** Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (501(c)(3)s only) available for public inspection. Indicate how you make these available. Check all that apply.
 Own website Another's website Upon request
- 19** Describe in Schedule O whether (and if so, how), the organization makes its governing documents, conflict of interest policy, and financial statements available to the public.
- 20** State the name, physical address, and telephone number of the person who possesses the books and records of the organization: ► _____

Attachment B

Twelve Principles of Governance That Power Exceptional Boards

Excerpted with permission from Boardsource

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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Attachment C

HELPFUL COMPLIANCE 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/
Business Licensing Services	Master Licensing Service Business License	Telephone: (800) 451-7985 www.bls.dor.wa.gov
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 (WAACO is a Washington state nonprofit corporation.)	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 http://034b8b8.netsolhost.com/WordPress/wp-content/uploads/2011/10/Washington-Nonprofit-Handbook_2009.pdf