

**“To Protect and To Serve:”
The Duties and Responsibilities of Directors of Florida Not-For-Profit Corporations
By: Jeffrey A. Baskies and Cara Freedman¹**

As leaders in their communities and as advisors to their clients, many attorneys have had the privilege and opportunity to volunteer and/or work with Florida Not For Profit corporations (“NFP”). While every NFP is unique in its mission and organization, the duties and obligations of an individual serving as a director of a Florida NFP are not necessarily novel. The roles of NFP directors are defined by the Articles of Incorporation, Bylaws and other governing documents of the NFP, by common law, by Florida Statutes (“F.S.”) Chapter 617 (“Corporations Not For Profit”), and by applicable federal regulations. Briefly, directors of a Florida NFP owe a duty of care, a duty of loyalty and a duty of obedience.

A. In General: The Role of the Board of Directors

The role of the board of directors of a Florida NFP will in large part depend on the individual organization—its size, professional staff, mission statement, etc. In the most general terms, a board of directors is the group of people legally charged with the responsibility to govern a corporation whether for-profit or not. While in a for-profit corporation, the board is responsible to the corporation’s shareholders, in a not-for-profit corporation, the board may be responsible to various parties, including its donors, its members, its beneficiaries and the larger community which the NFP serves (ultimately represented by the Attorney General’s office).²

The function of the board of a Florida NFP is to ensure that the corporation is fulfilling its obligations. This is accomplished through overseeing and evaluating the operations of the organization, including monitoring the officers, executive directors and staff. In addition, the board’s function is to enable the NFP to successfully carry out its mission and achieve its purposes. In both of these primary functions, it is important to recognize that the role of the

board and its members is not to operate the organization. Instead, the day-to-day operations of the NFP typically will be the job of the executive director, the other officers, the staff, and/or volunteers.

While the specific responsibilities of the board of directors of a Florida NFP will depend on the particular organization, in fulfilling its primary functions, the work of the board is generally comprised of three activities:

1. Strategic planning;
2. Oversight of the organization's programs (including fiscal oversight); and
3. Fundraising.

To carry out these primary functions, the board will have certain specific duties which may vary depending on the organization. These responsibilities may include:

- Determine the organization's mission and purpose;
- Select the executive and professional team and review performance;
- Ensure effective organizational planning and financing;
- Enhance the organization's public image;
- Ensure adequate resources and effective use thereof by the organization.
- Determine and monitor the organization's programs and services.³

Of course, each NFP will have its own expectations and requirements for its board members. These requirements should be clearly set forth and presented to prospective directors and to the current members of the board. If there are fundraising expectations, these should be clearly communicated, as well. It is highly recommended that every NFP adopt a written Mission Statement and Code of Conduct which sets forth the responsibilities of board members, the goals of the organization and the means by which they will be achieved.

B. Duties of the Board of Directors and Florida Statutory Law

Members of a board of directors generally have three common law duties to the not-for-profit corporation:

1. Duty of Care;
2. Duty of Loyalty; and
3. Duty of Obedience.

1. Duty of Care. The duty of care requires board members of a Florida NFP to exercise reasonable care when they make decisions for the corporation. Florida law generally defines this duty as requiring directors to act in “good faith” and with the level of care expected of an “ordinarily prudent person” acting reasonably for the best interests of the NFP.⁴

In order to fulfill this duty, the directors are expected to perform certain responsibilities and engage in certain practices. Directors must actively participate in the management of the NFP. They must keep informed as to the operations of the NFP. They must be involved in (or at a minimum be aware of) the corporate administration and they must protect corporate property.

While the specific requirements for fulfilling these responsibilities will vary depending on the NFP and the individual board members, there are certain expectations that should be fulfilled by every member of a NFP board of directors.

(a) *Attend Meetings*. Directors must attend board and committee meetings on a regular basis. Boards of Directors function as a group and participation of all the board members is required in order for the board and its committees to function properly. Board meetings are generally the forum for disseminating information to the directors and for voting on corporate business. Failure to attend regular meetings will prevent directors from fulfilling their responsibilities to be informed and actively participate in the corporation’s management.

Moreover, failure to attend regular meetings will not protect directors from liability for improper action by the board. Directors may not use their absence from meetings as a means of absolving themselves of their responsibilities as members of the board.

(b) *Make Informed Decisions.* As active participants in the management of the corporation, directors are expected to vote on corporate business and evaluate corporate reports. In order to properly fulfill these responsibilities, directors must make informed decisions. In order to do so, directors should be familiar with the NFP's bylaws and corporate records, as well as any corporate reports presented to the board. Directors may rely on information and reports provided to the board by officers, directors, staff, consultants, or outside individuals if they reasonably believe that the information is reliable. If the directors have reason to believe that the information presented is not complete or accurate, then they cannot rely on it as such.⁵ For example, a director is not to be considered to be acting in good faith if his or her reliance on the information provided is unwarranted.⁶ In addition to reports and information distributed to the members of the board, directors are also responsible to ask for any additional information or records that are not otherwise provided but which they feel is necessary in order to make informed decisions.

(c) *Exercise Independent Judgment.* In addition to attending the scheduled meetings of the board of directors and evaluating the corporate reports presented to the board, each director is also expected to exercise his or her own judgment in making corporate decisions. When necessary, a director should independently research issues and/or make inquiries in order to be properly informed regarding board matters.

(d) *Monitor Performance.* It is the responsibility of the board to monitor the performance of the corporation's officers and employees. In order to fulfill these duties,

directors should monitor the corporate records and books and perform audits when or if necessary. If there is concern of corporate impropriety, a director has a duty to inquire further regarding these matters. For most NFPs, an audit committee which is responsible for tracking performance and reviewing records is generally recommended.

(e) *Act in Good Faith.* The decisions made by directors must be made in good faith and in the best interests of the NFP. Directors fail to act in good faith when they act for improper personal benefit or when they act with willful misconduct or conscious disregard for the best interests of the NFP.⁷

(f) *Maintain Records.* Minutes should be maintained for all board meetings and subcommittees. The minutes should be reviewed for accuracy and kept in the corporate records so that they may be later referenced if necessary.

2. Duty of Loyalty. In addition to the duty of care which directors are expected to fulfill, directors of a Florida NFP are also required to exercise a duty of loyalty. While these two responsibilities in many ways overlap and intertwine, the duty of loyalty may be explained as the responsibility of the director to act with undivided loyalty to the corporation, without conflicts of interest or self-dealing. Board members should not use information gathered through their position for personal gain, and they must always act in the best interests of the corporation.

A primary concern for any director regarding the duty of loyalty is the possibility of a conflict of interest. A conflict of interest may arise whenever the corporation enters into a contract or transaction with one or more directors or with another corporation where a director may directly or indirectly benefit either financially or otherwise. In order to avoid a conflict of interest, transactions with interested parties should be avoided. Alternatively, there must be full

disclosure of any relationship between a director and any corporate transaction. The conflicted director should excuse himself or herself from the decision-making process.

Full disclosure of a conflict requires that the relationship or interest between the parties be made entirely known to the members of the board of directors prior to any vote. Moreover, the transaction or agreement must be approved without the vote of the interested director(s). In addition, the contract or transaction must be fair and reasonable to the corporation.⁸ Any individual who makes a decision or votes on an issue having a conflict, opens up the possibility of being held liable if the decision later proves wrong, even if his or her motives and intent were in the best interests of the NFP. In general, it is always best, if possible, for the NFP to avoid any such conflicts entirely.

In order to set forth the director's responsibilities with regard to the Duty of Loyalty, NFPs should adopt written Conflict of Interest policies. Such policies should be developed by every Florida NFP and such policies should be reviewed and signed by every director prior to serving on the board. In addition to executing such policies, it is also essential that the requirements be monitored and enforced. Each member of the board should regularly review and certify adherence to the policy. In conjunction with this, each director should make certain to disclose any actual *or potential* conflicts that may exist.

3. Duty of Obedience. The Duty of Obedience requires board members to be faithful to the corporation's mission. They cannot act in a way that is inconsistent with the organization's goals. The members of the board are trusted by the public to manage donated funds to fulfill the NFP's mission.

In order to fulfill these responsibilities, directors need to make certain they comply with the governing documents of the corporation. They must understand the mission statement of the

NFP and be adequately familiar with the corporation's articles of incorporation, bylaws, and other governing documents (i.e., Code of Conduct, Conflict of Interest Policy, etc.). In addition to complying with the corporate documents of the organization, the directors are responsible for making sure that the corporation complies with other pertinent federal, state and/or local regulations.

To fulfill the duty of obedience, Florida NFPs must be sure to adhere to all appropriate filing requirements. For example, all federally tax-exempt organizations are now required to file an annual IRS Form 990 with the IRS or risk losing their tax-exempt status.⁹ In addition, organizations in the State of Florida who conduct business or fundraising must register with the Secretary of State. Florida NFPs that intend to solicit funds must also register with the Department of Agriculture and Consumer Affairs.¹⁰ There may be other filing or registration requirements depending on the nature of the corporation and its activities. It is the board's duty to make certain that the corporation is in compliance with these requirements. It is important to recognize that the board of directors' duties are to the NFP itself, and not to the beneficiaries (or donors) which the not-for-profit may serve.¹¹

Florida statutes set forth the means of ensuring the common law duties of care, loyalty and obedience are met by directors of NFPs organized in this state. F.S. §617.0830 provides the general standards for directors of NFPs, and it is worth presenting in full for review:

- (1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
 - (a) In good faith;
 - (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
 - (c) In a manner he or she reasonably believes to be in the best interest of the corporation.
- (2) In discharging his or her duties, a director may rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

- (a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matter presented;
 - (b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence; or
 - (c) A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.
- (3) A director is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.
- (4) A director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.¹²

The standard of conduct thus established by Florida Statutes for the directors of a Florida NFP is that of an ordinarily prudent person in a similar position. While there is no precise rule to define exactly what this standard of conduct would be, a general standard to consider would be what the majority of "reasonably prudent" directors would do in the specific situation. It is worth noting, this is the same language and standard of conduct set forth in F.S. Chapter 607 regarding the duties of directors of for-profit corporations, and the same standard has been applied to both positions.¹³

In order to fulfill the standard of conduct set forth in the Florida Statutes, directors must have adequate information to make their decisions, and directors must reasonably believe that the information upon which they are making decisions is reliable, because those providing such information are competent to do so. In determining whether directors have met the standard of conduct set forth under Florida law, the standard adopted for directors' decision-making is the "Business Judgment Rule".¹⁴

The Business Judgment Rule is a case-law derived concept in corporate law whereby the directors, officers, managers and agents of a corporation (both for-profit and not-for-profit) are

immune from liability to the corporation for losses incurred in corporate transactions if the directors acted within their authority and power and the transactions were made in good faith.

¹⁵ [CITE] The Business Judgment Rule requires that directors must (i) be informed; (ii) act in good faith; and (iii) have the best interest of the corporation in mind. As the Fifth District Court of Appeal explained in *Sonny Boy, LLC v. Asanani*, “the ‘rule’ suggests that the decisions of directors will not be questioned unless there is a showing of fraud, self-dealing, dishonesty or incompetency.”¹⁶

Both the statute and case law focus on the process by which directors made their decisions, rather than whether or not the decisions ultimately proved to be best for the NFP. If directors act in a manner that is not indicative of fraud, self-dealing dishonesty, or incompetency and comply with the Business Judgment Rule, then they will be considered to have properly discharged their duties in good faith with the care of an ordinarily prudent person. And, if this standard of care is met, then in general the directors will not be held liable for the decisions they have made, even if the decisions prove ultimately in hindsight to be wrong. The Business Judgment Rule creates a strong presumption in favor of the board of directors and the burden is on the party challenging the decision of the board to establish that in fact the board violated their duties of care, loyalty and obedience.¹⁷

Florida law also provides *limited* immunity from civil liability for individuals who serve as volunteer board members and officers of NFPs. F.S. §617.0834 sets forth the limits of this immunity. Protection is limited to officers and directors who serve as director, trustee or member of the governing board of a NFP and who do not receive compensation for such position.¹⁸ The immunity, therefore, does not apply to employees and other agents of the NFP, or to paid directors. In addition, the protections against liability do not apply if (1) the directors

breached or failed to perform their duties and that breach constituted a violation of criminal law; or (2) if there was improper personal benefit (i.e., a breach of the duty of loyalty); or (3) if “recklessness or an act of omission was committed in bad faith with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.”¹⁹ To summarize, there is no immunity for directors if their actions constitute bad faith, recklessness or willful violations of the basic common law duties of care, loyalty and obedience.

C. Federal Rules and Regulations

In addition to the common law duties and the statutes regarding Florida NFPs, certain federal rules and regulations may also apply to Florida NFPs and the members of their boards of directors.

If the NFP qualifies as a federally tax-exempt organization [such as IRC §501(c)(3)], then it is required to report annually to the IRS.²⁰ Most organizations are required to annually file a Form 990 which provides information to the IRS regarding an organization’s funding and expenses. Regulations provide that if a NFP fails to file the Form 990 for three years, its tax-exempt status may automatically be revoked.²¹

The Form 990 was revised significantly in prior years. It now includes a new governance section and expands the reporting requirements of the corporation’s compensation of officers, directors, key employees, and highest compensated employees. The Form 990 also seeks to ensure that there is proper director oversight of the organization and requires documentation of the board’s review of the form. All of this is a means of trying to ensure that the directors of a NFP remain involved and maintain proper oversight of the organization. Some of the information required to be provided on the Form 990:

1. Fundraising activities, revenues and expenses;

2. Policies for documenting meetings and written actions taken by the Board;
3. Policies for maintaining public transparency, including making information included in the Form 990 and the Form 1023 available to the public;
4. Review process for accounting statements and financial oversight of the organization;
5. Process used to determine compensation for key employees, officers and management; and
6. Whether the organization maintains written Conflict of Interest, Whistleblower, and/or Code of Conduct policies.

In addition to the requirements and oversight guidelines set forth in the Form 990, private foundations must be certain to not violate the restrictions placed upon private foundation activities by the Internal Revenue Code. While the specific requirements for private foundations are beyond the scope of this article, to briefly summarize some of the restrictions imposed on private foundations:

1. Minimum Distribution Requirements: Private foundations must generally distribute a minimum of 5% of the fair market value of their assets every year. These distributions must be made to public charities.²²
2. No Taxable Expenditures: Private foundations are not permitted to use their funds for non-charitable purposes, to carry on certain lobbying activities, or to finance travel or study unless such programs are financed through a proper grant-making procedure.²³
3. Prohibited Acts of “Self Dealing”: Private foundations are prohibited from engaging in certain financial transactions with “disqualified persons”, which include members of the foundation board, family members of the board members, substantial

contributors, and corporations or other entities which are more than 35% owned by a disqualified individual.²⁴

4. Prohibition Against “Jeopardy Investments”: Private foundations may not make investments that would jeopardize the organization’s ability to carry out its charitable purposes. Jeopardy Investments may include certain exotic investments (such as hedge funds, etc.) and investments in closely held businesses (particularly those that may also constitute acts of self-dealing).²⁵
5. Prohibition Against “Excess Business Holdings”: In conjunction with the regulations against acts of self-dealing, private foundations in conjunction with all disqualified persons are prohibited from holding more than 20% ownership in any business enterprise.²⁶

If serving as a director on the board of a private foundation, it is very important to make certain that these restrictions are not violated. The federal regulations impose a tax on the foundation for violating any of these requirements, and in addition impose substantial penalties upon the disqualified person, the officers and/or the directors.²⁷

D. Summary

The duties of a director of a Florida NFP include: Duty of Care, Duty of Loyalty and Duty of Obedience. In fulfilling these duties, directors of Florida NFP corporations must be certain that the organization is in compliance with all relevant federal, state, and local rules and regulations. In addition, it is important for all members of the board to understand the mission statement of the corporation and to work to fulfill its goals, including maintaining operational and fiscal oversight of the corporation. If these duties are faithfully adhered to by the members of the board, and there is no indication of fraud, self-dealing, dishonesty or incompetency, then

there is a strong presumption in favor of the decisions and actions of the board of directors. As a result of this presumption, the members of the board will not be held liable for monetary damages for actions or decisions made in the discharge of its duties.

¹ Jeffrey A. Baskies, a Florida Bar Board Certified Expert in Wills, Trust and Estates Law, is a partner in the Boca Raton boutique Trust & Estates, Tax & Business law firm, Katz Baskies LLC. Cara Freedman is an associate practicing at Katz Baskies LLC.

² Under Fla. Stat. §617.0304(2) the actions of the board may only be legally challenged by a) a member against the corporation; b) the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, or through members in a representative suit, against an incumbent or former officer, employee, or agent of the corporation; or c) by the attorney general, to dissolve the corporation or to enjoin the corporation from the transaction of unauthorized business.

³ BoardSource is a company that provides tools, research, and information to NFP organizations to help build better NFP organizations and board leaders. BoardSource regularly produces publications, offers seminars and provides consultations to board members and NFP leaders. More information regarding Boardsource may be found at www.boardsource.org

⁴ Fla. Stat. §617.0830(1).

⁵ Fla. Stat. §617.0830(2).

⁶ Fla. Stat. §617.0830 (3).

⁷ Fla. Stat. §607.0831.

⁸ Fla. Stat. §617.0832.

⁹ IRC §6033(j)(i)

¹⁰ Fla. Stat.. Chapter 496.

¹¹ Fla Stat. §617.0830.

¹² Fla. Stat. §617.0830.

¹³ Fla. Stat. §607.0830.

¹⁴ Fla Stat. §617.0830.

¹⁵ Fla Stat. §617.0834 and Fla Stat. §617.0831. See *Fox v. Professional Wrecker Directors of Florida, Inc.* 801 So.2d175 (Fla. 5th DCA 2001).

¹⁶ *Sonny Boy, L.L.C. v. Asnani* , 879 S0.2d 25 (Fla. 5th DCA 2004) at 28.

¹⁷ *Nero v. Continental Country Club R.O., Inc.*, 979 So.2d 263 (Fla. 5th DCA 2008).

¹⁸ Fla. Stat. §617.0834.

¹⁹ Fla. Stat. §617.0834(1)(b)(3).

²⁰ IRC §6033.

²¹ The Internal Revenue Service website provides information and resources for tax exempt organizations. For a complete list of the IRS publications regarding tax exempt organization see:

www.irs.gov/charities/article/0,,id=159929,00.html.

²² IRC §4942.

²³ IRC §4945.

²⁴ IRC §4941.

²⁵ IRC §4944.

²⁶ IRC §4943.

²⁷ IRC §4941.