



# **FIDUCIARY RESPONSIBILITIES**

*.... of the directors of a  
not-for-profit corporation*

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# DEFINITIONS

**fi-du-cia-ry**, *adj.*

[L. *fiduciaries*, confidence, trust]

1. of, relating to, or involving a confidence or trust as:
  - a. held or founded in trust or Confidence
  - b. holding in trust

**fi-du-cia-ry**, *noun*,

1. one that holds a fiduciary relation or acts in a fiduciary capacity

## DUTIES

### THREE MAIN FIDUCIARY DUTIES

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

### DEFINED BY:

1. ARTICLES OF INCORPORATION  
(Specific to each corporation)
2. BYLAWS  
(Specific to each corporation)
3. STATUTORY LAW  
(Common to all corporations)

4. CASE LAW  
(Common to all corporations)

## **DUTY OF CARE**

Directors must discharge their duties:

1. in “good faith”
2. in a manner believed to be in the best interests of the corporation
3. with the care of “an ordinarily prudent person” in similar circumstances

*Reference: Section 607.0830(1)(a-c), Florida Statutes*

### GENERAL STANDARD VS. BUSINESS JUDGMENT STANDARD

General Standard:

- For a Director’s non-decision making actions
- **“ordinarily prudent person”**

Business Judgment Standard:

- For a Director’s conscious decision making
- **“gross negligence”**
- Burden of proof on the complaining plaintiff.

### REQUIREMENTS FOR PROPER DUTY OF CARE

1. Active Participation
2. Keeping Informed
3. Administration of the Corporation

#### 4. Protect Corporate Property.

### 1. ACTIVE PARTICIPATION

To demonstrate compliance with the “duty of care”, the director must actively participate in the management of the organization by:

1. Attending meetings on a regular basis
2. Voting on corporate business
3. Evaluating corporate reports
4. Reading minutes
5. Reviewing the performance of corporate directors and employees
6. Otherwise becoming familiar with corporate activities, actions and issues.

- *Ignorance of corporate business is not an excuse to the duty of care.*
- *Directors who do not have the time to participate should not remain on the board.*

### 2. KEEPING INFORMED

To demonstrate compliance with the “duty of care”, the director must keep informed by:

1. Attending meetings on a regular basis
2. Routinely reading information disseminated by the corporation to directors
3. Having general knowledge of the corporation’s articles of incorporation, bylaws and other books and records.
4. Establishing committees to research issues in greater detail
5. Retaining professionals for consultation or advice

*A Director may rely on information, opinions or reports of officers (believed to be reliable), committees (if merits confidence) or professionals (if believed within the professional’s competence), but only in “good faith”, not blindly and without scrutiny. Reference: Section 607.0830(2)(a-c,) Florida Statutes.)*

*An “ultra vires” act will not be excused because the director was not informed on the scope of his/her authority.*

### 3. ADMINISTRATION OF THE CORPORATION

To demonstrate compliance with the “duty of care”, the director must be aware of the administration of the corporation by:

1. Monitor the performance of the corporate officers.
2. Assure that minutes of board meetings are taken every meeting and that they accurately reflect the actions taken
3. Scrutinize the actions and work of committees and professionals
4. Assure the accuracy of corporate records and books, through audits if necessary
5. Inquire into corporate improprieties (but the duty arises only upon “notice”, [i.e. a “warning”, “report” or “suspicion.”])

#### 4. PROTECT CORPORATE PROPERTY

To demonstrate compliance with the “duty of care”, the director must protect corporate property by:

1. Monitoring the actions of the corporation to assure that corporate assets are invested and managed consistent with the articles of incorporation, the bylaws, the purposes of the corporation and legal requirements.
2. Assure that there are adequate internal controls to detect and stop theft or mismanagement.
3. Not using any corporate assets for unauthorized personal use or for use outside the scope of the director’s authority

## **DUTY OF LOYALTY**

Directors have the absolute duty of complete, undivided loyalty to the corporation, including, but not limited to, putting the good of the corporation first and avoiding transactions from which the Director will directly or indirectly benefit.

General Standard: “*is it fair to the corporation*”

- Burden of proof on the interested directors.

### **REQUIREMENTS FOR THE PROPER DUTY OF LOYALTY**

1. Avoiding Conflict of Interests
2. Protecting Corporate Opportunity

### **CONFLICT OF INTEREST**

A “conflict of interest” may arise when:

1. the corporation enters into a contract or other transactions;
2. with:
  - a. one or more of its own directors, or;
  - b. another corporation in which one or more of its directors are directors in both corporations, and;
3. who are directly or indirectly financially interested or benefited.

### **1. “AVOID” CONFLICT OF INTEREST**

The “conflict of interest” may be avoided by:

1. Not contracting or doing transactions with other parties so interested, or;
2. Full Disclosure:
  - a. the fact of such relationships or interest is disclosed or is previously known to the Board prior to the vote of the Board, and;
  - b. the contract or transaction is fair and reasonable to the corporation at the time of the vote, and;
  - c. the contract or transaction is ratified by a “sufficient” vote without counting the interested directors’ vote.

- i). if the RWB enters into a contract with an organization/individual represented on the Board, the contract must be approved by a 2/3 vote of the entire Board. *Reference Section 445.007(1), Florida Statutes*
- ii). otherwise, the action must be approved by a majority of the entire Board. *Reference Section 607.0832(1-3), Florida Statutes*

**\*\*Note:** despite “full disclosure,” doing business with Workforce Florida, Inc., while a Board member, may conflict with Florida’s “Code of Ethics” (Chapter 112.313(3)) and should be avoided.

## 2. PROTECT CORPORATE OPPORTUNITY

1. Fiduciary obligation not to divert a corporate opportunity to the director’s direct or indirect gain.
2. A director may not engage in or benefit from a business opportunity that is available to and suitable for the corporation unless:
  - a. conflicts of interest procedures are followed, and;
  - b. the corporation decides to not engage in the disclosed business opportunity
3. A director is obligated to assist the corporation in obtaining adequate resources.

# **DUTY OF OBEDIENCE**

## REQUIREMENTS FOR DUTY OF OBEDIENCE

1. Comply With Governing Documents.  
Directors need to be **familiar with corporate documents** to assure that corporate procedures are met (i.e. proper notice for meetings, regular meetings held, proper minutes, corporate mission followed, etc.)
2. Filing Requirements  
Directors need to assure that **filing requirements and filing deadlines are met** (i.e. registering with Sec. of State, filing returns with IRS, withholding and payment of SS and income tax, etc.)
3. State and Federal Statutes  
Directors need to be familiar enough with state and federal statutes pertaining to corporations and the corporate mission to assure that **legal requirements are met** and that **corporate status** with state and federal agencies **is protected**.
4. Committees and Professional Help  
Directors **may rely** upon committees, professionals (accountants, attorneys, etc.) and officers (if within their competency) **for information**.

# **LITIGATION**

## **personal liability**

1. If a Director or Officer acts “outside” the scope of the corporate powers, then he/she may be “personally liable” for harm caused by such action.

### **corporate shield**

2. If a Director or Officer acts “within” the parameters of the corporate powers, then he/she is “protected” from personal responsibility by the doctrine of the “corporate shield.”

### **in-dem-ni-fi-ca-tion, noun**

[L. *indemnis*, unharmed]

“to secure against hurt, loss or damages”

A corporation may indemnify any person against liability who, while conducting corporate business:

1. was a director, officer, etc. of the corporation
2. acted in good faith
3. acted in the best interests of the corporation
4. (if criminal charges) had no reason to believe the act was unlawful

*Reference: Section 607.0850(1), Florida Statutes*

### **CONSEQUENCES TO THE CORPORATION AFTER LITIGATION**

1. If the director **successfully defends** the lawsuit, he/she shall (must) be indemnified for reasonable expenses incurred. (legal costs, lost salary, etc.)
2. If he/she **settles, pleas, receives adverse judgment or is convicted**, indemnification is still permissible and/or mandatory (settlement/judgment plus legal costs) under statutory conditions unless prohibited by law.
3. Directors may breach duty of care if E&O (errors and omissions) insurance **not considered**.