

## **LEGAL AND ETHICAL CONSIDERATIONS**

As a director of the board of a Camp Fire council, you have an exciting opportunity to contribute to youth and to your community. You also have a very serious responsibility.

Members of the council and the community trust that you will see that the Camp Fire purpose is fulfilled, protect the assets of the corporation, ensure the future viability of the council, and provide safe and healthy programs for children. In the past, members of not-for-profit boards were protected as “good Samaritans” while pursuing such worthy goals. That is no longer true. In today’s legal climate it is absolutely essential that you understand and exercise your legal and ethical responsibilities as a board member.

This fact sheet is not meant to create undue fear over liability for every corporate loss or mishap that may occur. It is designed to help you understand how you can reduce risks. Some of the advice may seem simplistic. That is because it is a very complex area of board work, and no one can give definitive answers to all the possible situations that may arise. It involves an area of law which is in flux. Your chances of avoiding risks are improved if you follow the advice in this fact sheet. Having qualified legal council is also essential.

## **LEGAL LIABILITIES OF THE TRUSTEES/DIRECTORS**

A board of directors and/or individual directors can have legal action taken against them. Generally, legal action is taken on the basis that the board or an individual failed to take action or that the action taken was inadequate or irresponsible.

In recent years, legal action has been taken against boards and board members for the following types of actions. This is not an exclusive list.

- Actions of employed persons
- Violations of civil rights acts
- Conflict of interest
- Mismanagement or nonmanagement
- Improper expenditures
- Waste of assets
- Poor investments
- Failure to exercise due care

## **REASONABLY PRUDENT PERSON**

Directors are expected to function as “reasonably prudent persons” as they carry out their fiduciary responsibility to act for the council’s benefit. There are three major categories of violations of fiduciary responsibility: mismanagement, non-management and self-dealing.

### **Mismanagement**

Mismanagement is failure to follow fundamental management principles. A board or board member may be accused of mismanagement when:

- No provisions are made to protect assets or to protect the health and safety of program participants.
- Reports are not reviewed for problems, but are just accepted at face value; conclusions and decisions are made when other available information clearly suggests a different direction.
- There are inadequate controls and reporting systems.

## **Non-management**

The differences between mismanagement and non-management are not distinct. But it is less important to understand the differences than it is to know the consequences. Non-management is failure to use existing opportunities for good management. Some examples of non-management are:

- Failing to attend board and committee meetings;
- Having data relevant to a decision and not using it; and
- Having control systems and not using them.

A little-known responsibility and liability of a board member is that members are responsible for decisions made in their absence. That is why attendance at board meetings is essential. When you do miss a meeting, find out what decisions were made as soon as you can. Call the president or another board member. Carefully read the minutes of any meeting you miss. If you find that action was taken with which you disagree, inform the president by letter. Send a copy of the letter to the board secretary. At the next meeting, be sure that your dissent is duly entered in the record.

## **Self-Dealing**

Serving on a not-for-profit board may offer opportunities for a board member to benefit from decisions of the board. You may own a company that sells office supplies. You may be an insurance broker. Or a member of your family or a business associate may benefit from a decision of the board. Self-dealing is a serious breach of a board member's responsibilities. All efforts must be made to disclose any potential conflict of interest in keeping with board policy and procedures. It is not always in the best interest of the council for you to avoid all conflict of interest; but it is essential that the board be knowledgeable and accept any potential conflict.

Your council should have a policy on how to handle potential conflicts of interest for both board members and staff. Utilizing that policy and the following recommendations will reduce accusations of self-dealing:

- Disclose, as soon as possible, any potential conflict of interest that you may have with a pending board decision. It is wise to disclose even any appearance of a conflict.
- Be sure the board follows established policies on voting to proceed after disclosure of a conflict. You must abstain from such voting. Be sure your abstention is recorded in the minutes. Be sure the board gets competitive bids on any products or services. If your bid is accepted with justification, you are not self-dealing.
- Do not attempt to influence the vote on a decision that would benefit you.

In summary, a board member must not realize possible personal benefit or gain from a decision of the board *unless* the board is fully aware of the potential benefit, the action is authorized by a vote of the board, and the individual receiving the potential benefit does not participate in the vote.

## **THE PRINCIPLE OF GOOD FAITH**

A director who exercises care and diligence and acts in the best interest of the organization meets the principle of good faith and is less likely to be liable for human judgment errors. The principle of good faith is subjective, but following are some specific things you can do to show your good faith efforts as a board member:

- Attend all board and assigned committee meetings. If you are not able to attend, be able to show a valid reason for absence.
- Be aware of the general operations and programs of the council. Have a general knowledge of the purpose and philosophy of the council.
- Be familiar with the council's bylaws, articles of incorporation, charter obligations and policies, as well as federal, state and local laws affecting the operations of the council.
- Ensure that the council meets its minimum statutory requirements, such as filing reports and withholding employee taxes. Be sure that an annual audit is conducted by an independent auditor.
- Disclose and properly deal with any potential conflict of interest.
- Record your dissent from actions taken. If a motion is passed over your strong dissent, insist that your dissent be entered into the minutes.
- Insist on having information from which you can make informed decisions. Insist that differences of opinions be sought and considered.
- Be sure the council seeks professional advice on legal, auditing, insurance and employee relations issues.

## **INDEMNIFICATION AND INSURANCE**

Indemnification is a means by which a corporation may provide for the related expenses incurred by a director accused of misconduct. Your council bylaws may include a provision for indemnification which, in essence, says that a director may obtain indemnification for litigation costs, attorney fees and other reasonable costs, *unless* the director is found guilty of actual misconduct or bad faith.

Purchasing insurance is one way to provide indemnification. Your council can purchase directors and officers liability insurance (D&O) through a group plan with Camp Fire. The council should also have comprehensive insurance coverage, including general liability insurance.

## **THE BOARD IS RESPONSIBLE**

The fact that the affairs of the council are managed by the board has two important implications for each individual director. First, it means that officers or staff should not assume this responsibility by default. This may happen when board members perceive they have an excellent executive director/CEO. It is tempting to relax as a director, knowing that everything is being handled competently. But it is still your responsibility to thoroughly monitor what is happening in the council, be knowledgeable of the fiscal affairs of the council, and ensure regular evaluation of the executive director/CEO.