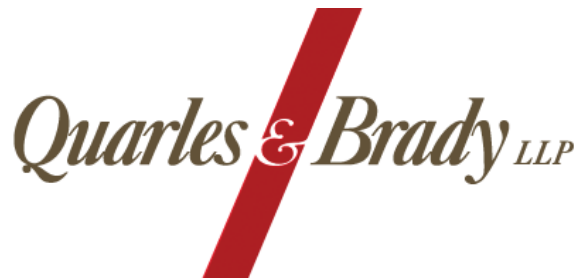


## The Legal Role

Marian Lalonde

Quarles & Brady LLP

[Marian.LaLonde@quarles.com](mailto:Marian.LaLonde@quarles.com)



## *Board Governance*

- Fiduciary Duties-Good Faith, Due Care, Loyalty
- The board is responsible for the performance of the organization
- Road Hazards
  - Conflicts of interest
  - Failure to exercise
    - Due care in decision making
    - Effective oversight
  - Excessive deference
  - Micromanagement
- Road Blocks
  - Private Inurement and Excess Benefits
  - Campaigning and Excessive Lobbying
  - Failure to file and properly report on the 990

## *What Should You Know?*

- Look at 990, financials, board composition
- Do they get audited financials?
- Are corporate filings current?
- Google your organization

## *What Should You Ask?*

- What is the mission?
- What is the financial commitment
- What kind of support does the Board have?
  - Directors and Officers insurance?
- What is the plan for the organization
- What is the plan for you in the organization

## *Road Rules*

- Directors owe fiduciary duties to the organization
- Take seriously that the Board is ultimately responsible for the organization
- Be independent in your decision making

# A Legal Road Map:

By Marian C. LaLonde, Quarles & Brady LLP

## Understanding Your Legal Role on a Nonprofit Board

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### Road Rules

Directors owe fiduciary duties (good faith, due care, and loyalty) to the organization. Always act in good faith and in the best interest of the organization. No self-dealing or self-interest. Avoid any disclosure of any conflicts of interest and respect confidentiality. The organization is responsible for the care and use of funds. Take seriously that the Board is ultimately responsible for the organization. Be **DISPENSIBLE** in your decision making.

### Director Fiduciary Duties

As a director, it is your duty to:

- The best interests be paramount and to act accordingly.
- Follow your fiduciary and your Board's duty.
- The organization to protect your fiduciary duties to officers, agents, and volunteers.
- The best interests to protect aspects of your personal life.

As a director, it is also your duty to:

- The organization to act in good faith in the best interests of the organization.
- The organization to protect its assets.
- The organization to protect its reputation.

You have been asked to serve on the Board of Directors for a nonprofit...NOW WHAT?

**Benefits of service –**  
Warm and Fuzzy feelings  
Passion for the cause  
Giving back to your community  
Networking  
Building your resume



**First ask...**  
What do they want from me?  
What will be my role?  
What are the legal and ethical implications?



# *You have been asked to serve on the Board of Directors for a nonprofit...NOW WHAT?*

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## First ask...

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What will be my role?

What are the legal and ethical implications?



# ***Board Governance***

Pursuant to A.R.S Section 10-3830 (A), Directors and Officers have fiduciary duties to the organization...

## **1. Good Faith**

Duty to perform duties honestly and in a manner reasonably believed to be in the best interest of the organization.

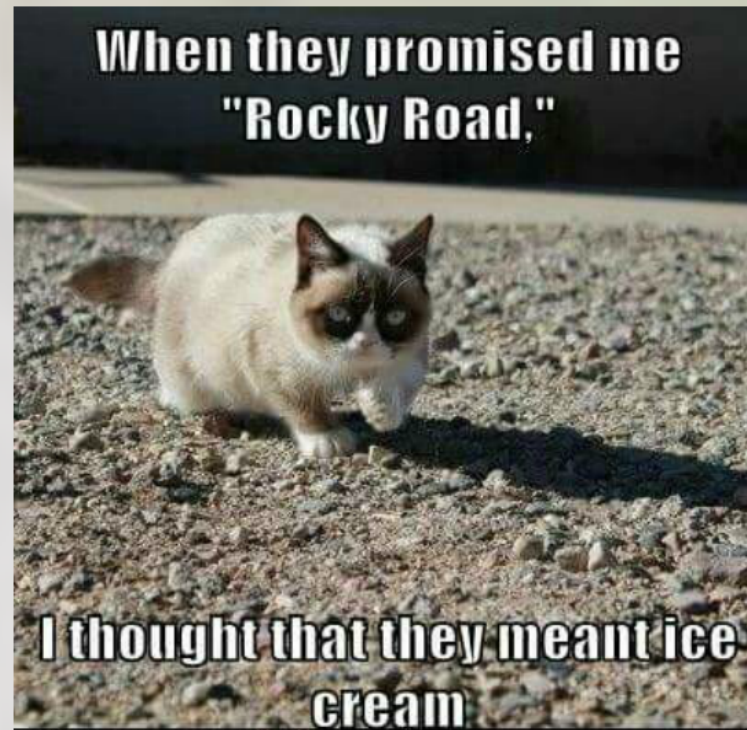
## **2. Due Care**

Duty to use diligence and with such care as an ordinary and prudent person in a like position would use under similar circumstances.

## **3. Loyalty**

Duty to act in the best interest of the organization and not your own personal best interest or best interest of a third party. Also includes the duty of confidentiality.

# *Where the Rubber Hits the Road...*



# ***Board Governance***

**The Board is responsible for the performance of the organization.**

**Failure to fulfill duties may result in personal liability.**

**Liability or Damages may result from intentional or reckless failure to act or knowingly acting when it was not in the organization's best interest.**

- **Pursuant to A.R.S Section 10-3830 (D), no liability for any action or failure to take action if the director is acting in compliance with his or her fiduciary duties.**
- **Additionally, 42 USCA Section 14501 et seq., protects volunteer directors if action was not tied to willful or criminal conduct, gross negligence, reckless misconduct or flagrant disregard.**

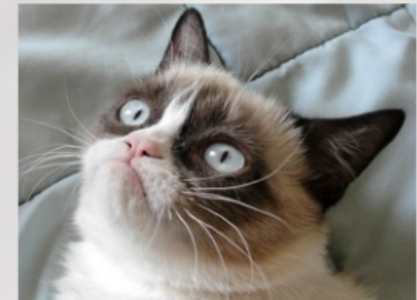


# What does governance look like?

The Board is responsible for making sure the organization has a sustainable future by adopting sound, ethical, and legal governance and financial management policies, as well as by making sure the organization has adequate resources to advance its mission.

*This means the Board must have effective oversight, including, but not limited to:*

- *Creation and maintenance of governing documents (Articles, Bylaws, Policies and Procedures*
- *Reviewing financial statements and approving budgets*
- *Delegating tasks to qualified individuals, committees, holding staff accountable, evaluations*
- *Code of Ethics, Confidentiality and privacy systems*
- *Setting goals and measurement of progress*



# Road Hazards

## Conflicts of Interest -

*A person (Director, staff, donor, etc.) with significant influence on the organization and competing interests must disclose the conflict.*

## Failure to exercise due care in decision making-

*Boards must understand the business of the organization and demonstrate sound business judgment.*

## Failure to exercise effective oversight-

*Boards may not delegate its responsibility for oversight.*

## Excessive Deference-

*It is not acceptable to be passive and allow a Founder, Executive Director, Board Chair etc. to control the organization.*

## Micro-management-

*The Board provides leadership, sets policy and strategy, oversees resources, does not run day to day operations.*

# Road Blocks

An Organization is subject to sanctions or the loss of its tax-exempt status if the following actions occur or are not managed in accordance with the law:

## Private Inurement and Excess Benefits -

*Assets of the organization may not inure to the benefit of any private shareholder or individual and no organization insider can receive an excessive economic benefit.*

## Campaigning and Excessive Lobbying -

*Any political campaign activity could result in the loss of tax-exempt status. Public charities are prohibited from lobbying to a substantial degree, but no clear guidance exists.*

## Failure to file and properly report on the 990-

*After three years, status will be revoked.*



# What Should You Know?

Do some homework... some of this you might find on your own...

Look at the organization's **Form 990** (usually available at [www.guidestar.org](http://www.guidestar.org) or the organization's website)

Look at **financials** – *don't get involved in an organization that is on the way down*. Financials are often available on the organization's website

Do they get **audited** financials? If not, why not?

Look at **board composition** and length of service. Is there not a lot of turnover? Too much turnover?

**Corporate filings** – are they current? If not, why not?

**Google it** – look for bad news, warning signs, etc.

# *What should you ask?*

**What is the Mission of the organization? Obtain copies bylaws, board books, etc.**

It is your job to understand the purpose of the organization and whether it is currently fulfilling such purpose in a sustainable manner.

**What is the financial commitment?**

Many organizations have a minimum required financial contribution plus membership fees.

Is there a “get” requirement? – getting grants from others, table sponsorships, donations for auctions, etc.

**What kind of support does the Board have?**

Staff to do the books, agendas, minutes?

Staff to help with events and projects?

Budgets and expense reimbursements?

Do they offer Board training?

Evaluations and/or Self-Assessment?



# *What else should you ask?*

**Do they have Directors & Officers insurance?**

**If not...BEWARE!!**

**What is the plan for the organization?**

**Get a copy of the strategic plan, if there is one.**

**Major events – growing, consolidations, capital campaigns, big projects, etc.**

**What is the plan for you in the organization?**

**How do I get involved – committees, etc?**

**What would you like to do on the board – specific projects or leadership**



# ***Road Rules***

**Directors owe fiduciary duties (good faith, due care, and loyalty) to the organization.**

**Always act in good faith and in the best interest of the organization.**

**Be informed and participate.**

**Avoid and disclose any conflicts of interests and respect confidentiality.**

**Be cognizant of mission drift and use of funds.**

**Take seriously that the Board is ultimately responsible for the organization.**

**Be INDEPENDENT in your decision making.**

# Questions?

Thank you for your attention.

Marian C. LaLonde  
Quarles & Brady LLP  
520-770-8717  
[marian.lalonde@quarles.com](mailto:marian.lalonde@quarles.com)







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## Director Fiduciary Duties

A director has a duty of:

- *care* that you be fully informed and involved in all decisions
- *loyalty* that you place your company's interests first
- *obedience* that you follow the law and the company's constitution

A director also has a duty of:

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A popular internet meme featuring Grumpy Cat. The cat has a grumpy expression. The text "CUDDLES?" is written in white capital letters at the top, and "DONT TOUCH ME" is written in white capital letters at the bottom, both within a black rectangular border.


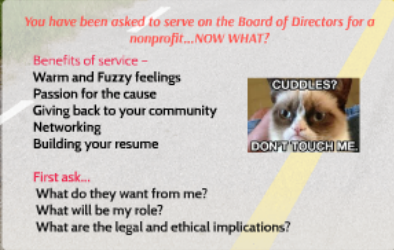
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## **10 Questions To Ask Before Joining A Board**

1. Are you passionate about the organization's mission and vision?
2. Will you be able to serve for the expected term and attend the majority of meetings?
3. What are the expectations of board members?
4. What contribution is expected from you as a board member beyond board service (Time, Talent, Treasure)?
5. Does the nonprofit have D&O insurance?
6. How committed is the nonprofit to compliance? (Ask to see its audited financial statements and Form 990)
7. How receptive is the nonprofit's leader to recommendations made by the board?
8. Has the nonprofit ever been sued? If so, for what?
9. What is the nonprofit's financial health? Does it have cash reserves or does it struggle to pay overhead expenses?
10. Are you passionate enough about this nonprofit to donate your money to it and ask your friends and family to donate?

## **CHARITY X**

### **Board Action Calendar Fiscal Year Ends December 31**

<b><u>Board Action</u></b>	<b><u>Date</u></b>
Filing Requirements: IRS Form 990 Completed or Filed Extension	May 15 <sup>th</sup> after close of fiscal year (5 ½ months after close of fiscal year)
Disclose Conflicts of Interest	Annual Meeting and as they arise
Annual Meeting <ul style="list-style-type: none"><li>▪ Fill officer vacancies</li><li>▪ Fill director vacancies</li><li>▪ Approve budget</li></ul>	Determined by the Board
Annual Report due each year with the ACC	On or before _____
Evaluate and Review Compensation for Chief Executive	Annually
Review Bylaws	Every two years
Review Strategic Plan	Every three years

\* The actions listed above are representative of common board actions. Other actions may include actions related to fundraising events, audits, board orientation and training and the like.





## **Due Diligence for New Directors**

Some Boards will provide a Board book or even board member orientation to educate new director while others do not offer any additional information and only respond to requests. Those that do provide board books and/or orientation are often fail to include important information. Ideally, new directors should ask for and review the following materials:

- The organization's budget.
- The organization's strategic plan.
- If the organization is a corporation, the Articles of Incorporation, including all amendments. If it's incorporated outside of Arizona, is it authorized to do business in Arizona? You can find out by checking the Arizona Corporation Commission's website.
- If the organization is a Trust, it's Trust Agreement.
- Current Bylaws. Do the bylaws specify how is the Board elected or appointed (e.g., by voting members, by the current Board, or by some third party)? How long are the board terms? Is there a term limit? Are board members automatically removed for missing a certain number of meetings?
- Do the bylaws provide indemnification for board members?
- A list of current directors and officers, indicating when their terms expire.
- A list of Board committees. Note whether committees have delegated authority to act or whether they merely advise the Board. If there is an Executive Committee, consider whether it is acting only in emergencies or undermining the authority of the Board.
- An organizational chart of staff positions and duties. What is the employment arrangement of the two or three highest level employees? Do they have contracts or are they employees at will? Normally salary information is on the tax return which can be viewed at [www.guidestar.org](http://www.guidestar.org).
- Form 990 for the past two years (can be obtained from [www.guidestar.org](http://www.guidestar.org))
- Two years' worth of audited (if any) or unaudited financial statements
- The organization's website and printed promotional literature.
- Key governance policies such as a conflict of interest policy, a signature authority policy, whistleblower policy, document retention policy, gift acceptance policy, confidentiality policy, and endowment policies if any. Consider whether you have any conflicts of interest.
- Any director and officer liability insurance policy and a summary of other insurance coverages for the organization.