

PROTECTING DIRECTORS, OFFICERS, MEMBERS AND VOLUNTEERS FROM
LIABILITY

by

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1. Immunity from liability
 1. History of charitable immunity
 1. Old days
 1. Complete immunity
 2. Wanted people to have an incentive to volunteer.
 2. Present day
 1. Complete immunity abolished
 1. Charities seen more as big business
 2. Substantial cash
 3. Economic power
 4. Influence
 2. Limitation of liability adopted
 1. South Carolina
 1. Fitzer case.
 2. General Assembly takes action.

2. Solicitation of Charitable Funds Act
 1. Limits liability of charitable organization
 1. 300,000 per person
 2. 600,000 aggregate
 3. 1,200,000 for physicians and dentists
 2. Coverage
 1. Organizations with 501(c)(3) or 501(d) tax exempt status.
 2. Employees of tax exempt organizations
 1. Agents
 2. Servants
 3. Employees
 4. Officers
 5. Likely covers officers and members
 3. Organization not employee is defendant
 1. Unless employee acted willfully or grossly negligent
 1. No limitation of liability for employee
 4. No punitive damages
 1. Only against employee who acts willfully or recklessly
3. Non Profit Corporations Act
 1. Provides immunity
 1. Directors
 2. Trustees
 3. Members
 4. Unless organization acted wilfully or recklessly
 2. Does not provide immunity to the organization
 3. Coverage
 1. Non profit corporations that properly file with the S.C. Secretary of State; and
 2. Tax exempt under 501(c)(3), 501(c)6) or 501(c)(12).

4. Directors, trustees, members not immune from suit for their own tortious acts.

2. INDEMNIFICATION

1. Permissive indemnification
 1. S.C. Code Ann Section 33-31-851
2. Mandatory indemnification
 1. S.C. Code Ann Section 33-31-851
3. Court ordered indemnification
 1. S.C. Code Ann Section 33-31-854
4. Indemnification expenses must be reasonable
 1. Public benefit nonprofit corporations may not be indemnified until 20 days after written notice is provided to the Attorney General of the proposed indemnification

3. THEORIES OF LIABILITY

1. Corporation v. Directors, Members and Volunteers
 1. Corporate waste.
 2. Mismanagement.
 3. Failure to pursue the goals and missions of the corporation.
 4. Failure to monitor or supervise.
 5. Failure to pursue information necessary to make an informed decision.
 6. Self dealing.
 7. Conflict of interest.
 8. Abdication of responsibility.
 9. Direct or derivative actions can seek damages or injunctive relief.

4. DUTY OF OBEDIENCE

1. Obey applicable laws and regulations.
2. Obey Articles of Incorporation and Bylaws.
3. Obey corporation's mission and policies.

5. DUTY OF LOYALTY

1. Do not compete with organization.
2. Maintain confidentiality of information.
3. Fiduciary Relationship.
 1. Occupying a position of trust and confidence to another person.

6. CONFLICTS OF INTEREST

1. When a director or officer participates on both sides of a transaction, whether directly or indirectly.
2. Directors and officers should be careful of personal benefit or gain in transactions with the charitable organization.
3. When can conflict of interest be waived or approved?
 1. Religious or public benefit corporation
 1. Vote of directors or Attorney General approval
 2. Mutual benefit corporation
 1. Vote of directors or members.
4. Not all dealings between directors and corporations constitute impermissible conflicts of interest.
5. To maintain a conflict of interest transaction, you must have the following:
 1. Full disclosure
 1. Written documentation
 2. Transaction must be fair to the corporation
 1. Obtain independent advice if necessary
 3. Directors/members should authorize, approve, or ratify transaction
 1. Document this action

7. DUTIES OF DIRECTORS

1. Should be reasonably informed.
2. Should participate in decisions.
3. Should do so in good faith and with best interest of the organization.

8. STANDARD OF CARE

1. With care of an ordinary and prudent person in similar circumstances.
2. In a manner believed to be in the best interest of the corporation and its members.

9. BUSINESS JUDGMENT RULE

1. S.C. Code Ann Section 33-31-830
 1. Protects directors
2. S.C. Code Ann 33-31-842
 1. Protects officers
3. S.C. Nonprofit Code envisions protection of directors due to their volunteer status.
4. Creates a presumption as to the validity of the acts of the officers and directors.
5. Officers and directors who act in good faith, on an informed basis, and in the honest belief that their actions are in the best interest of the corporation are entitled to the benefit of the business judgment rule

10. DELEGATION OF DUTIES BY DIRECTORS

1. Directors are charged with the management of the organization.
2. Can delegate “day to day” activities of organization.
3. Typical non-delegable duties:
 1. Major corporate actions (sale or merger, etc.)
 2. Adequate financial oversight.
 3. Hiring/firing of executive officers.
 4. Changes to mission of the organization.

11. STEPS TO MINIMIZE RISK

1. Organize as a nonprofit corporation.
2. Draft bylaws to provide for indemnification of director and officers. Draft indemnification policy.
3. Seek tax exempt status under 501(c)(3) or 501(d) of Internal Revenue Code.
4. Observe necessary corporate formalities. Memorialize meetings and decisions with corporate minutes and resolutions.
5. Avoid wrongful delegation of duties.
6. Adopt conflict of interest policy, have it signed by directors and officers.
7. Maintain comprehensive general liability insurance for operations. Consider additional insurance coverage for directors and officers.