

# Oversight over Public Charities: Fiduciary Duties of Trustees & Officers



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# Preliminary Matters

Disclaimer: Views and tips are my own and not those of the AGO, do not constitute official AGO guidance, and are not intended to serve as a statement of the law or as an official AGO opinion. Rather this presentation serves as advice based on experience and is offered to help board members and potential board members. Official guidance documents are available on the AG's Website:

[www.mass.gov/ago/charities](http://www.mass.gov/ago/charities)

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# Outline

- AGO Jurisdiction:
  - “Public Charities” & Professional Fundraisers
- AGO Role:
  - Due Application, Proper Administration of Funds
- Fiduciary Duties
  - Duty of Care
  - Duty of Loyalty



# Attorney General's Jurisdiction: Public Charities

“Public Charity”: 3-prong test:

- Not-for-profit
- Charitable purpose
- Indefinite class of beneficiaries

Excluded non-profits:

- Non-charitable entities
  - country clubs, unions, trade associations
- Public or quasi-public entities that report to the state



# Attorney General's Role

## AG role takes many shapes

- Support, education, guidance for charitable sector
- Support transparency, accountability
- Publicize financial filings

Remedy wrongdoing, deter bad practices, support good practices, provide guidance



# Attorney General's Role

- Law enforcement
  - Inquiry
  - Civil Investigative Demand → Formal Investigation
  - File Lawsuits
  - Governance Agreements, Public Reports, Private Letters
  - Monitoring
  - Monetary Judgment



# Trustee Duties

## Trustees are Fiduciaries:

- Duty of Care:
  - Be careful, diligent, and thoughtful
- Duty of Loyalty:
  - The organization's interests come first
  - Avoid conflicts of interest



# Duty of Care

Perform duties as a trustee or officer:

- (a) in good faith, in a manner you reasonably believe is
- (b) in the best interests of the corporation, and
- (c) with such care as an ordinarily prudent person in a like position in a similar corporation would act under similar circumstances.

(MGL ch. 180, § 6C)





# Duty of Care: Examples

Standard: complete good faith + exercise of reasonable intelligence

## Oversight of Management

- Assess senior staff, ask questions, and avoid micromanaging

## Fiscal Soundness

- Be familiar with financial statements and what they represent

## Legal, Regulatory Compliance

- Bring your professional mind, background, life experience; be curious
- Make sure regulatory filings are up-to-date



# Duty of Care: Examples

## Board Self-Assessment

- Performance, engagement, areas needing improvement

## Policies and Procedures

- Periodic review, revision
- Document board processes and decisions via agendas, minutes, reports, etc.



# Duty of Care: Examples



By Sander van der Wel from Netherlands (Bury your head in the sand...) [CC BY-SA 2.0], via Wikimedia Commons

Willful Blindness -- avoidance of information -- is bad



# Duty of Loyalty

Act in good faith in a manner you reasonably believe to be in the organization's best interests.

- The organization's interests come first, even ahead of your own
- Avoid conflicts of interest
- Follow State Ethics Law



# Duty of Loyalty: Examples

- Conflicts of Interest
  - State Ethics Law
  - Personal financial gain from corporate decisions
  - Steering business to your firm, a friend, family
  - Failing to disclose information about your interest in a corporate action
  - Loans, compensation, self-dealing
  - Non-financial conflicts



# Conflicts

## Handling Conflicts of Interest

- Disclose, discuss, and manage
- Documentation of discussion, recusal, and decisions by disinterested trustees
  - Who voted which way

If have questions, ask!



# Resources

- AGO Website: [www.mass.gov/ago/charities](http://www.mass.gov/ago/charities)
- Public Charities Annual Filings
- “Findings and Recommendations”
  - Governance Agreements
  - AG’s Guide for Board Members



# Resources

- IRS Form 990: Governance Questions
- IRS Exempt Organizations Website
  - model policies and procedures, governance practices
- Community Foundations
- Mass Nonprofit Network