

# *Fiduciary Responsibilities of Board Members*

US Youth Soccer  
Member-at-large  
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# Congratulations!

You have been elected to the Acme Youth Soccer Association's Board of Directors.

You get:

1. A really cool t-shirt
2. A really nifty soccer ball key chain
3. A very, very nice brief case with AYSA's logo on it, **AND**



You get to be

# A Fiduciary

A What? What was that last one?



# What is a fiduciary?

A person who has a duty to act *on behalf of and for the benefit of another* with the utmost in good faith, loyalty, candor, and care.

A fiduciary **MUST** give **PRIORITY** to the best interest of the beneficiary over all other interests, including the fiduciary's own interest.



You are at sea on a sinking ship with Joe. There is only one place left in the life boat. One of you, but only one of you, will be remembered fondly by friends and family. Which one?

The answer is YOU if you owe Joe a fiduciary duty because you then must place Joe's interest about your own. Result: You go down with the ship.



# Is there a cure?

Can you keep the t-shirt, the key chain, and the brief case, and, of course, your board position and give back or not accept the fiduciary part?

NO! The fiduciary duty is imposed by *operation of law* on officers and directors of a corporation.

*Imposed by law* means that as long as you are a board member, you have fiduciary duties and there is nothing you can do to get rid of them.



# Can you limit your fiduciary duty?

NO! A fiduciary duty cannot be waived

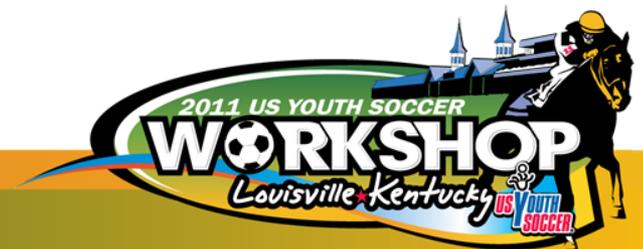
Cannot delegate the duty itself

Can “delegate” to the extent of getting advice or information, but the ultimate decision and responsibility remain with the fiduciary



Can you argue that the duty should not apply to you because Acme is a nonprofit corporation and you are a good person who is a volunteer?

**NO!** Fiduciary duties apply to nonprofit corporations as well as to for-profit corporations and to both compensated and uncompensated directors.



YOU CAN:

1. Give up your fiduciary position –  
resign from the board of directors

OR

2. Be a good fiduciary.



# Being a good fiduciary

First, as a fiduciary you owe to duty to act on behalf and for the benefit of another. Who is the “other”?

The “other” is:

The Corporation – Acme Youth Soccer Association

**ALL of it!!!**



Acme's bylaws provide that the clubs in each of its seven districts elect a director to the Acme Board of Directors. You are elected as the director from district 4. The Acme board is considering a proposal to set up a state-wide playing league. Part of the proposal is a provision that prohibits any team from playing a team from outside its own club unless it joins the playing league and plays "outside" teams in that league. The clubs in district 4 vote unanimously to instruct you to oppose the creation of the state-side playing league.

How do you vote if:

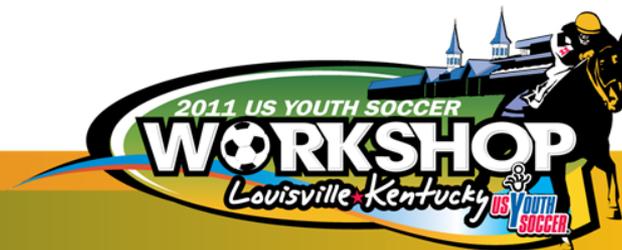


You reasonably believe in good faith that a state-wide playing league will seriously damage the clubs in district 4 but will be good for Acme as a whole?



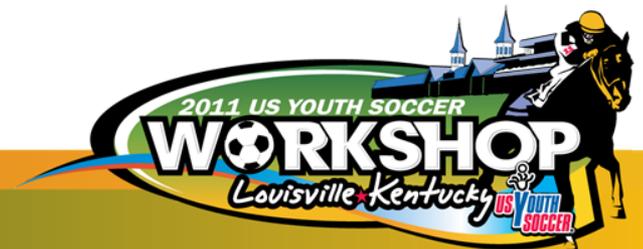
You reasonably believe in good faith that a state-wide playing league will be good for the clubs in district 4 but bad for Acme as a whole?

What if all of the other directors completely disagree with you, snarl at you, and make you eat lunch alone?



The law does NOT recognize or make allowances for the “constituent director”

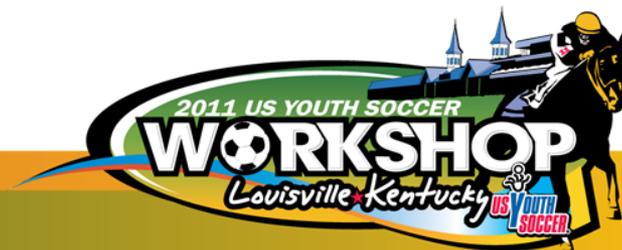
A “constituent director” is a director elected by a subset or subgroup of the whole



You are elected by all the referees in Acme as the “referee representative” board member. The fees charged by the referees for doing games have become such a large part of operating club expenses that clubs may have to limit the number of players and teams if referee costs go up any higher.

A motion is made and seconded at the Acme board of directors to increase the amount of the fees paid referees by 20 percent.

How do you vote?



# Specific Duties of a Fiduciary

A fiduciary owes a duty of *UNDIVIDED* loyalty to the corporation. The duty of loyalty is multifaceted – it can arise in a large number of situations, such as:



# Conflicts of Interest

A conflict of interest exists *whenever* the interest of the director is inconsistent with the interest of the corporation.

Does NOT have to be financial

Arranging state cup games to be played close to your house so you do not have to travel

CAN be indirect as well as direct

Arranging for your spouse's company to be the supplier of Acme's t-shirts



# Conflicts include, but are not limited to:

1. Financial – easiest to identify
2. Misuse of corporation's property or information
3. Materially benefiting from position
4. Acting for an adverse party
5. Competing with the corporation



Many possible approaches to definitions and conflict of interest rules. One good definition is:

A “conflict of interest” means:

Any relationship, transaction or arrangement that could influence, or reasonably be perceived as influencing, a person’s objectivity as a member of the board of directors or as an officer in regards to matters involving the corporation that could result in any personal benefit, either directly or indirectly, financially or otherwise, to that person, a member of that person’s family, a business partner or business associate of that person, or a close personal associate of that person; and



Includes actual conflicts of interest, potential conflicts of interest, and a perceived conflict of interest.

A perceived conflict of interest exists if a person not associated with the corporation and aware of the facts might reasonably entertain a doubt that the person would be impartial.



Conflicts permitted in very limited situations under “interested director statutes”

Only apply to individual transactions.

Conflict permitted if, but only if:

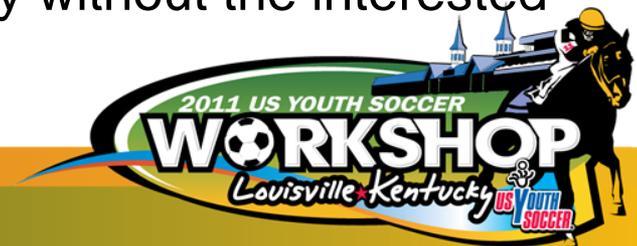
Fair and reasonable to the corporation and for the corporation’s benefit

Before transaction:

Board has knowledge of material facts and director’s interest

Board conducted a reasonable investigation and could not make more advantageous arrangement

Board in good faith approved by majority without the interested director



Corporate Opportunities – cannot “usurp”

Cannot be involved in a transaction known which may be of interest to the corporation

Interest to corporation very broadly interpreted – anything of legitimate interest to corporation

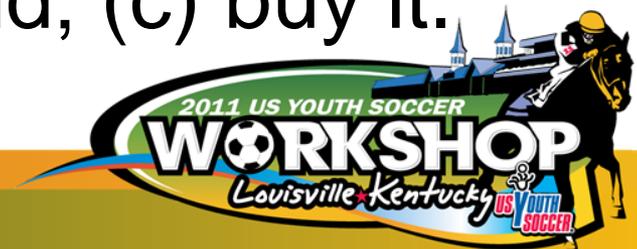
Director must fully disclose the opportunity in sufficient time for corporation to act or decline to act



Using your own knowledge and entirely through your own efforts you figure out that there is 40 acres of land available, that the land can be acquired inexpensively, that the city will only approve it to be developed for a youth recreational facility, and that once developed it will be very lucrative for the owners.

You:

(a) Tell Acme; (b) tell a friend; (c) buy it.



# Duty of Candor

Duty to disclose to the corporation material facts relating to anything of significance to the corporation.

Duty is *affirmative* – no one has to ask

Disclosure must be full and fair



You know that a team from Acme's District 4, the district that elected you to the Acme board, won the state cup by playing four ineligible players in the final state cup match and is going to advance to Regionals. No one else on the board knows this and it is certain that it will never be discovered.

What do you do?



# Duty of Confidentiality

Duty to maintain confidences of the corporation

Confidences are anything not known to the public, a matter of public record, or something that is common knowledge

NOT limited to secrets or information from closed sessions

INCLUDES details of board deliberations, opinions and votes of board members, and information from management, advisers, and retained experts



# Duty of Care

A director as a fiduciary must do *all* of the following:

1. Act in good faith

“Good faith” means honesty of intention and prohibits not just dishonest conduct or conduct motivated by actual intent to harm but also conscious disregard of the corporation’s best interest

2. Act in manner believed to be in corporation’s best interest

3. Act with care a prudent person would use in the same circumstances



You believe in good faith that it would be in Acme's best interest to not have or maintain any financial reserves.

Do you have a problem?



Duty of care requires director to be informed, *including* obligation to make reasonable inquiries

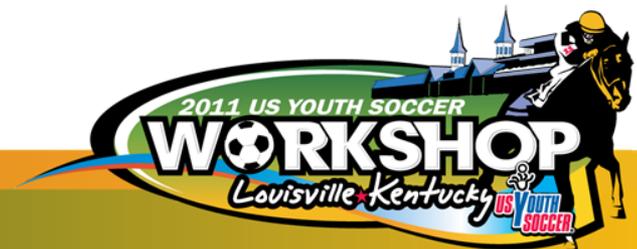
Can rely on:

Officers and employees reasonably believes to be reliable and competent

Experts, such as attorneys and accountants, retained by corporation as to matters within their expertise

A committee of the board if director reasonably believes committee merits confidence

May rely ONLY IF director neither knew nor should have known of anything making reliance unwarranted. No RED FLAGS!!!



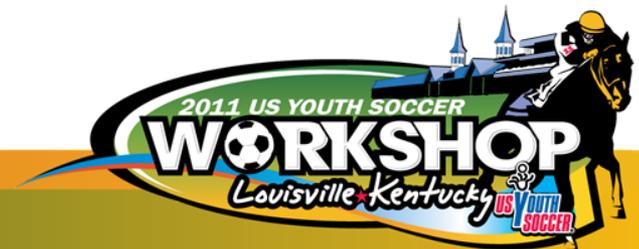
Acme's Finklebury Field Complex for years had an annual operating loss of between \$3000 and \$5000. Acme's Executive Director, who has been with Acme for years and has always been reliable, reports on February 24<sup>th</sup> that for the last year the complex lost \$48,000. When asked why the change, the Executive Director informs the board that it is too complicated to explain, the loss will not happen again, and that the board should take his word for it that all will be well. Without further discussion the board unanimously accepts the Executive Director's statements. Any problems?



On June 24<sup>th</sup> Acme's independent auditor gives the board the audit. The audit reports that between February 24<sup>th</sup> and June 1<sup>st</sup> \$45,000 is missing from the field complex account. No one has seen or heard of the Executive Director since May 31<sup>st</sup>.

Got a problem?

Are you OK because every single member of the board acted the same way in accepting the Executive Director's statements?



Acme's accountant sends every board member a copy of its 990 tax return to look over. You don't bother. The report shows Acme paying taxes of \$100,000 on unrelated business income. The IRS is now asking questions about what Acme is really doing and threatening to revoke its charitable organization status.

Do you have a problem?

