

# **CORPORATE GOVERNANCE**

Board Rights and Responsibilities, Fiduciary  
Duties and Managing Conflict in ANCs

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Closely held organizations face unique challenges with corporate governance.

- Family and interpersonal relationships
- Conflicts of interest
- Trust issues
- Relationships between the Board of Directors and management
- Breaches of confidentiality
- Social media
- Ethics

# DIRECTOR DUTIES

- Fiduciary Duties
  - Duty of care
  - Duty of loyalty
  - Duty of confidentiality
- Protections against director liability
  - Business judgment rule
  - Acting within fiduciary duties
  - Indemnification and insurance

**SHAREHOLDERS**

ELECT

**BOARD OF  
DIRECTORS**

APPOINT

**OFFICERS**

# DIRECTORS

## RIGHTS UNDER STATE LAW

Absolute right to manage.

A.S. 10.06.450(a)

All corporate powers shall be exercised *by or under the authority of*, and the business and affairs of a corporation shall be managed *under the direction of*, a **board of directors** except as may be otherwise provided in this chapter.

# DIRECTORS

## RIGHTS UNDER STATE LAW

Absolute right to inspect books and records and facilities

### A.S. 10.06.450(d)

(d) A **director** has the absolute right at a reasonable time to inspect and copy all books, records, and documents of every kind and to inspect the physical properties of the corporation or a domestic or foreign subsidiary of the corporation. Inspection by a director may be made in person or by agent or attorney and the right of inspection includes the right to copy and make extracts. This section applies to a director of a foreign corporation having its principal executive office in this state or customarily holding meetings of its board in this state.

# DIRECTORS

## RIGHTS UNDER STATE LAW

Shareholder Inspection versus Director Inspection  
A.S. 10.06.430(b) versus A.S. 10.06.450(d)

	Shareholder	Director
All books and records	Yes*	Yes
Only at a reasonable time	Yes	No
Only at principal office	Yes	No
Requires written demand	Yes	No
Requires reasonable particularity	Yes	No
Requires proper purpose	Yes	No
Only records directly connected to purpose	Yes	No
Inspection by agent	Yes	Yes
Right to copy	Yes	Yes
Can be denied for prior misuse	Yes	No

# DIRECTORS

## RIGHTS UNDER STATE LAW

### Right to Dissent

A.S. 10.06.450(e) A **director** of a corporation who is present at a meeting of its board at which action on a corporate matter is taken is presumed to have assented to the action taken unless the director's dissent is entered in the minutes of the meeting or unless the director files a written dissent to the action with the secretary of the meeting before adjournment or forwards the dissent by certified mail to the secretary of the corporation immediately after adjournment. The right to dissent does not apply to a director who voted in favor of the action.



# DIRECTORS

## RIGHTS UNDER STATE LAW

### More on dissent...

How do you dissent?

“...*entered in the minutes ...*”

- Voice vote
  - “Let the record reflect...”
- Roll call vote
- Written dissent

“...*present at a meeting ...*”

- But not in the room for the vote

# DIRECTORS

## RIGHTS UNDER STATE LAW

More on dissent ...

The importance of minutes

- Most often inspected corporate records
- Prima facie evidence of what happened at meetings
- Always requested in litigation discovery
- Reviewed by independent and government auditors
- Best and often only opportunity to show due care
- What should (not) be in the minutes?
- Should board meetings be recorded?
- Records destruction

## The importance of minutes...

A corporation organized under this chapter shall keep correct and complete books and records of account, minutes of proceedings of its shareholders, board, and committees of the board, and a record of its shareholders, containing the names and addresses of all shareholders and the number and class of the shares held by each.

A.S. 10.06.430(a)

# DIRECTORS

## RIGHTS UNDER STATE LAW

More on dissent ...

In order for there to be minutes ...  
there has to be a meeting

### A.S. 10.06.473

(a) A majority of the number of directors fixed by the articles or bylaws of a corporation constitutes a quorum for the transaction of business unless a greater number is required by the articles or bylaws. ***The act of a majority of the directors present at a meeting at which a quorum is present is the act of the board, unless the act of a greater number is required by the articles or the bylaws.***

(b) The provisions of this section apply with equal force to committees of the board established under A.S. 10.06.468 and action by committees.  
Board only performs its role by having meetings.

# DIRECTORS

## RIGHTS UNDER STATE LAW

More on Dissent . . .

What about **“action without a meeting”**?

A.S. 10.06.475(b) Unless prohibited by the articles or bylaws of the corporation, action required or permitted to be taken by the board or a committee designated by the board may be taken without a meeting on written consents, identical in content, setting out the action taken and signed by all the members of the board or the committee. The written consents shall be filed with the minutes. The consents have the same effect as a unanimous vote.

# DIRECTORS

## RIGHTS UNDER STATE LAW

More on Dissent . . .

What about “action without a meeting”?

**Legal, but...**

- No minutes
- No discussion
- No debate
- No exchange
- No questions and answers
- Must be 100% unanimous

**When to use?**

Simple, ministerial actions

Actions previously debated at meetings

Actions covered by extensive prior written reports or presentations

# DIRECTORS

## RIGHTS UNDER STATE LAW

More on dissent ...

What about “Board polls”?

- No legal basis
- All action must later be ratified

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

A.S. 10.06.450(b)

A director shall perform the duties of a director, including duties as a member of a committee of the board on which the director may serve, in *good faith*, in a manner the director *reasonably believes to be in the best interests of the corporation*, and with the *care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances.*



# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### What is “good faith”?

- Honesty in fact
- Freedom from knowledge of circumstances which right to put the holder on notice.
- Absent of design to take advantage

*Acting in good faith* – acting honestly and dealing fairly; in contrast, a lack of good faith would be evidenced by acting, or causing the corporation to act, for the director’s personal benefit, or acting intentionally with a purpose other than that of advancing the best interest of the corporation, or acting with the intent to violate applicable law, or failing to act in the face of a known duty to act, in a manner that demonstrates an intentional disregard of, or extreme inattention to, the director’s duties

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care

“... the care, including reasonable inquiry, that an ordinary prudent person in a like position would use under similar circumstances...”

*Care* – expressing the need to pay attention, to ask questions, to act diligently in order to become and remain generally informed and, when appropriate, to bring relevant information to the attention of the other directors; in particular, these activities include reading materials and engaging in other preparation in advance of meetings, asking questions of management or advisors, requesting legal or other expert advice when desirable for a board decision until satisfied that all information significant to a decision is available to the board and has been considered, and when relevant, bringing the director’s own knowledge and experience to bear

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care (con't)

*Person in a like position* – avoiding the implication of special qualifications and incorporating the basic attributes of common sense, practical wisdom, and informed judgment generally associated with the position of corporate director; and

*Under similar circumstances* – recognizing that the nature and extent of the preparation for and deliberations leading up to decision making and that the level of oversight will vary, depending on the corporation's circumstances and the nature of the decision to be made.

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care ...

#### **Before a meeting:**

- Read material distributed in advance of board meetings
- Contact key managers for clarification or to request additional information
  - What about chain of command?
- Attend or request workshops for major actions or initiatives
- Always stay current on review of financial statements
- Attend committee meetings if matter will be referred to full board
  - What is policy on notice, attendance, board fees, etc.

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care ...

#### **At a meeting:**

- Attend and actively participate
- Ask questions and express genuine concerns
- Inquire as to the involvement of outside experts or consultants
- Do you want executive session or certain people to leave?
  - Who should participate?
  - Standing agenda item?
  - Make motions
- Disclose what you know about the issues
- Vote

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care ...

Should attendance at board and committee meetings be mandatory?

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care ...

#### Relying on others

##### A.S. 10.06.450(b) & (c)

(b) Except as provided in (c) of this section, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by

- (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
  - (2) counsel, public accountants, or other persons as to matters that the director reasonably believes to be within the person's professional or expert competence; or
  - (3) a committee of the board upon which the director does not serve, designated in accordance with a provision of the articles or the bylaws, as to matters within the authority of the committee if the director reasonably believes the committee to merit confidence.
- (c) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by (b) of this section unwarranted.



# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care ...

#### Relying on others

A.S. 10.06.468 (a) If authorized by the articles or the bylaws of the corporation, the board, by resolution adopted by a majority of the entire board, may designate from among its members an executive committee and other committees of the board. Each committee shall have at least two members, who serve at the pleasure of the board of directors. Each committee, to the extent provided in the resolution or the articles or bylaws of the corporation, has the authority of the board...

(b) The designation of a committee, the delegation to the committee of authority, or action by the committee under that authority ***does not alone*** constitute compliance by a member of the board or the committee in question with the responsibility to act in good faith, in a manner the member reasonably believes to be in the best interests of the corporation, and with the care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.



# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care ...

### Relying on others

A note about specialized knowledge

### A.S. 10.06.450(c)

A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by (b) of this section unwarranted.

- A director with special skills or expertise
- A management or “inside” director

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Care ...

Some red flags:

- Infrequent or irregular meetings
- Incomplete information or reports
- Need for immediate board action
- No written information before meeting
- Excessive teleconference meetings
- Board polls
- Consultants not at meetings
- Departures from prior practices
- Late financial information
- Efforts to limit access to information or key personnel
- Requests for board ratification

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

“...reasonably believes to be in the best interests of the corporation...”

*Reasonably believes* – although a director’s personal belief is subjective, the qualification that it must be reasonable – that is, based upon a rational analysis of the situation understandable to others – makes the standard of required conduct also objective, not just subjective

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

### Conflicts of Interest.

If –

- a director has a –
  - material financial or
  - personal interest in
  - any corporate transaction,

then –

- the interest and transaction must be fully disclosed to the board and
- the transaction must be fair to the corporation and
- the transaction must be approved by the board without counting the vote of the interested director.

See A.S. 10.06.478

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

### Conflicts of Interest

What is a “material financial interest”

- Common directorships
  - Competitors
  - Village corporations, Tribal Councils and Non-profits
  - City Councils/Borough Assemblies
- Board fees and compensation of directors (A.S. 10.06.450)
- Family or household members

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

### Conflicts of Interest

What is a “personal interest”

- Not covered by statute
- Social or political interests
- Family or household members
- Any non-corporate interest
- What about competing against corporation?

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

### Conflicts of Interest

What is a “corporate transaction”?

Not limited to action before board

Director contracts

Distributions

Appointments

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

### Conflicts of Interest

How to make disclosure?

Early – before transaction is entered into

In writing and at a board meeting

Put in minutes

What about conflicting obligations to another entity?



# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

### Conflicts of Interest

### What is fairness?

- whether the terms of the proposed transaction are at least as favorable to the corporation and its shareholders as might be available from unrelated persons or entities.
- whether the proposed transaction is reasonably likely to further the corporation's business activities; and
- whether the process by which the decision is approved or ratified is fair.

Should the board obtain a “fairness” opinion or other independent advice?

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

### Conflicts of Interest

### Board approval

A.S. 10.06.478(a)(2) authorizes, approves, or ratifies the contract or transaction in good faith by a sufficient vote without counting the vote of the interested director or directors,

A.S. 10.06.478(d) Interested or common directors may be counted in determining the presence of a quorum at a meeting of the board that authorizes, approves, or ratifies a contract or transaction.

Do interested directors have to leave the room during board discussion and consideration? What should the minutes say?

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Loyalty

### Corporate Opportunities

Business opportunities within the corporation's current or planned lines of business belong to the corporation

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Duty of Confidentiality

Everything is confidential

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Business Judgment rule

If directors adhere to their standard of care in performing their duties they will not be liable for harm to the corporation resulting from their actions.

# DIRECTORS

## RESPONSIBILITIES UNDER STATE LAW

### Remedies for Breach of Fiduciary Duty

Code of Conduct remedies

No indemnification

No insurance

Personal liability

Removal by shareholders of Superior Court

(A.S 10.06.463)

# CONFLICT AT MEETINGS

## Derailers

Walk away

Repeating & going back to the same topic

Negativity

Disrespectful, rude, swearing, raising voice

Ignoring

Changing the topic

Side talking or talking over someone

Non-Verbal body language

Silent, use of electronics, not participating

Interrupt with something irrelevant or off-topic

Ask lots and LOTS of questions

# CONFLICT AT MEETINGS

## Enhancers

State an idea, ask for input

Sender feedback

Point of order; let's get back to the point

The topic we are discussing ...

Tell me more

Eye contact; audible

I understand that you feel ...

I would like to remind you that ...



# DIRECTORS & MANAGEMENT

## Micromanagement versus Oversight

The importance of policies, procedures and charters

Personnel matters and chain of command

Financial matters

Strategic planning

# BUILDING TRUST

## The ABC's of Trust\*

**ABLE:** Demonstrate competence and skills, solve problems

**BELIEVABLE:** act with integrity, keep confidences, admit errors, respect

**CONNECTED:** listens, shows interest, asks for input

**DEPENDABLE:** timely, responsive, organized, accountable

(courtesy of Cynthia Olmstead)