

Effective Governance:

The Legal and Fiduciary Duties of Boards



Most individuals who are elected to serve on a school board consider it a privilege to contribute their time and expertise to their alma mater or their church. A position on the school board not only allows individuals the opportunity to give back, but for some, the position also allows them to keep an eye on and to advocate for their children or for their church. There are others who, because of prior unpleasant experiences on ill-managed boards, consider such service to be an imposition on their time and resources, and this is unfortunate.

With board membership comes legal, ethical, and fiduciary responsi-

bilities. The primary role of the school board and its members is to represent and act as the link between the constituency that elected them and the school administration, and to exercise legal and fiduciary duties in governing and carrying out the interests of the constituency in the operation of the school. An effective school board is one that understands its purpose as a governing body and its role as a partner in the school's success.

Governance experts warn that certain inherent problems make it difficult for boards to function and effectively carry out their responsibilities. Peter Drucker, the governance guru, stated more than 40 years ago that "there is one thing all boards have in common, regardless of their legal position. They do not function."¹ Drucker's assessment might seem unforgiving and negative, and indeed, there are times when boards do not function well. However, this article aims to help your board function more effectively.

How should a board function in order to effectively fulfill its legal and

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fiduciary obligations? This article examines these obligations and will suggest best practices that will empower boards to function effectively, and enable individual board members to fulfill their legal and fiduciary obligations.

Governance and Management

Board members must always bear in mind that they represent the interests of the constituency, whether that is the local sponsoring church(es), the conference, union, or division, rather than just representing their own individual interests. Effective governance starts with the actions of the school board. The board's role is to ensure that the school operates in such a way as to fulfill its mission.

The board should not involve itself in the day-to-day management of the institution. This is the function of the administration. The board's role is to monitor, guide, and enable good management, as well as to establish strategy and direction for the school in order to guide the administration and represent the interests of the sponsors. Effective school boards accomplish this by shaping the mission and strategic direction of the school, by ensuring that they have adequately allocated financial resources to effectively operate the school, and by committing themselves to maintaining the school's unique Seventh-day Adventist identity.

The Function of School Boards

Many school board members, once appointed, attempt to operate the school as if it were their own business or company, failing to recognize that they were elected by the constituency to represent its interests. They are merely representatives of the "owners."

For example, the North American Division *Working Policy* provides guidance regarding the role that K-12 school boards must play. It states: "In every school there shall be organized a school board elected by the school constituency. (For details of procedure, see the local

union education code.) The school board is responsible for the operation of the school within the guidelines and policies adopted by the conference board of education and the school constituency as stated in the school constitution. The employment, assignment, transfer, retirement, termination, or dismissal of school personnel is the function of the conference board of education."² The *Working Policy* then goes on to list the functions that these school

boards are expected to fulfill (see Table 1).³

At all levels, but specifically at the higher education level, school boards should also oversee matters critical to the health of the organization, including the viability of the school's business model, the integrity of internal systems and controls, and the accuracy of the financial statements. The school board should also help evaluate and manage risk (identify and control situations that could pose a

Table 1. Functions of K-12 School Boards

1. Ensure the implementation of policies and plans of the conference office of education.
2. Develop a clear, practical set of objectives in harmony with the Seventh-day Adventist philosophy of education.
3. Develop policies in areas of local concern such as:
 - a. Use of school property;
 - b. Bus schedules and routes;
 - c. Purchasing procedures;
 - d. Tuition and/or other methods of support;
 - e. Admission requirements (in accordance with state, provincial, or conference guidelines);
 - f. Equipment and maintenance of school plant;
 - g. Textbook purchases (pupil or school-owned);
 - h. Master planning;
 - i. Criteria for selection and use of films and media materials;
 - j. Dress and social behavior.
4. Support the principal (or head teacher) in the administration of the school program.
5. Recommend employment of personnel as needed to the conference board of education.
6. Support the Home and School Association.
7. Ensure that official minutes of each meeting of the school board and subcommittees are kept, and one copy is filed with the conference office of education. Academy boards are to file copies with the union and conference offices of education.
8. Consider appeals and answer questions regarding the operation of the school.
9. Participate in the process of school evaluation.
10. Cooperate with and support the conference office of education in-service education program.
11. If not already in place, adopt a plan of school organization that includes a constitution and bylaws.
12. Adopt the recommended conference-wide school calendar.
13. Authorize the preparation of a school bulletin.
14. Assume responsibility for the planning and funding of an annual operating budget.
15. Assume responsibility for planning and funding a capital-improvements budget.
16. Consult the conference guidelines for construction procedures when considering renovations and erecting new buildings.
17. Cooperate with the union and conference offices of education regarding matters of curriculum development.
18. Appoint subcommittees as needed, such as personnel, finance, etc.

problem for the institution), as well as oversee and protect the resources of the organization.

The functions of the school board must be carried out in the context of governance rather than management. The role of any board is to govern, not manage, the affairs of the organization. It is to provide strategic direction and oversight. Governance includes the establishment of policies and continuous monitoring of their implementation. Governance means requiring accountability from the school's administrators by setting goals, regularly evaluating their own performance as a board, and curtailing exertions of individual power that might surface, whether from the school's administrators, board members, church officials, or constituency. Good governance requires high levels of accountability, combined with the duty to improve the success and viability of the organization. Governance is about providing direction and a framework for the school's operations and ensuring that these functions are efficiently accomplished. In summary, *daily management and operations are not the responsibility of school boards, whereas governance is* (see Table 2).

Duties of Board Members

Board members, in every type of organization, have imposed on them numerous legal and fiduciary duties and obligations. Courts have delineated many of these duties, *such as the duty of knowledge, the duty of diligence, and the duty of skill and prudence.* The duty of knowledge requires that board members become familiar with the corporate cornerstones of the organization, such as the charter, constitution, or bylaws, and understand how to ensure that the mission, vision, and values of the organization are achieved. The duty of diligence requires active involvement on the board and necessitates members being prepared for

Table 2. Distinctions Between Governance and Administration*

| Governance refers to the power to: | Administration refers to the: |
|---|---|
| a. Create an institution. | a. Leadership of the institution |
| b. Provide resources, policy guidance, and leadership necessary for its and successful existence continued. | b. Management of the institution |
| c. Ensure that the institution remains true to its mission and stated purposes. | c. Day-to-day conduct of the functions of the institution |
| d. Ensure that the institution has systems and practices of accountability for compliance with applicable laws and regulations and operations in an ethical manner. | |

*Taken from Board Policy Manual Sample: <https://education.adventist.org/wp-content/uploads/2017/10/Board-Policy-Manual-Sample.pdf>, 2, 3.

meetings by reviewing the agenda, attending board meetings regularly, being prepared to discuss the business at hand, and participating in all votes. The duty of skill and prudence requires board members to use any specific expertise they might have to benefit the organization, and taking care to anticipate the potential consequences of board decisions.

But the three most critical standards or duties imposed on board members are the *duty of care*, the *duty of loyalty*, and the *duty of obedience*. These duties are so critical because they are all fiduciary duties that also have ethical and moral implications. In determining whether someone acted in an improper manner, courts use a legal standard based on the “reasonable” or “prudent” person. This standard basically means that as humans, we owe one another an average standard of care, skill, and judgment in how we conduct ourselves. In other words, this legal standard asks, What would a reasonable person do in those circumstances? However, all board members also act in a fiduciary role. A *fiduciary* is defined as someone who acts for and on behalf of another in a relationship of trust. In

this case, the board members are both fiduciaries of the school constituencies that appointed them, and of the owner (conference, union, division, or General Conference) as the ultimate trustor. As such, this fiduciary responsibility requires that every action or decision that a board member takes must be for the sole benefit and interest of the ones who have placed that trust in him or her.

The Duty of Care

The first major duty for board members is the duty of care. This duty deals with the manner in which a board makes decisions and carries out the governance of a school. Board members are expected, in all aspects of their work, at all times, to exercise a high level of skill, carefulness, and prudence. The legal requirement is that each board member act “(1) in good faith, and (2) in a manner the [board member] reasonably believes to be in the best interests of the [organization],” and shall act “with the care that a person in a like position would reasonably believe to be appropriate under similar circumstances.”⁴

The legal standard asks what a

reasonable person would do in the same or similar circumstances. In most instances, courts will not hold a board member liable for errors or mistakes in judgment, as long as his or her actions meet the legal standard and requirements. To meet this legal standard, the board member must have been disinterested and independent, made prudent decisions, have acted in good faith, attended scheduled meetings, and have been reasonably diligent in informing himself or herself of the facts and issues being dealt with by the board. At a minimum, to be protected under this rule, the board member must attend and actively be involved in board meetings, carefully select and diligently supervise administration, stay informed, and be financially accountable to the school board. Board members must remember that upon accepting the opportunity to serve on a board, they have accepted these responsibilities. Board meetings are not social gatherings; they are business meetings, which carry with them obligations and responsibilities for which board

members are fully accountable.

It is often this duty that makes individuals reluctant to serve on the boards of schools, local churches, or other non-profits. If board members cannot effectively serve and carry out their fiduciary responsibilities, they should decline the appointment, lest they bring unintended liability on themselves, the school, and the parent organization.

The Duty of Loyalty

The second major duty for board members is the duty of loyalty. This duty requires board members to exercise their powers in the best interests of the organization, and to be faithful to the organization and its mission. The interests of anyone other than the organization are to be set aside.

Board members should not be motivated by personal, business, or private interests, but by what is in the best interests of the school. Positions on the board should not be used for personal benefit or to secure advantages for family or friends. Breaches

of this duty usually arise in the form of unreported or undocumented conflicts of interest that occur when board members have “such a substantial personal interest in a transaction that it reasonably might affect their judgment.”⁵ When serving on multiple boards, board members need to remember that they *must* act in the best interests of the organization for which they are *presently* making decisions. For example, if a church official serves on a school board, when participating in decisionmaking, he or she needs to vote in such a way that the best interests of the school are put first, rather than putting his or her organizational administrative responsibilities first.

Conflicts of interest breach the duty of loyalty because it is unethical for a board member to profit from his or her position at the expense of the organization, or for the member to enable friends and family to benefit from his or her membership on the board. For board members, examples of this would include engaging in activities that compromise or undermine the needs of the school, using school assets to develop personal business opportunities, or using their position to obtain personal benefit by selling, endorsing, or promoting a product, contact, or transaction. For example, imagine that a school is in the process of remodeling or building an addition. One of the board members, a general contractor, submits a proposal for the work to the principal after having found out about the school’s project because of his service on the board. No other proposals are obtained. The board discusses the proposal in the board member’s presence, and he participates in the discussion and does not excuse himself or declare that he has a conflict of interest. No provision is made to ensure that the price quoted is a reasonable estimate for the project.

Since the board member will personally benefit from the granting of the contract and the discussion on whether to grant the contract occurred in his presence, the rest of the

Box 1. Sample School Board Code of Ethics*

1. Uphold and enforce all laws and regulations;
2. Make decisions based on the educational welfare of children;
3. Confine board actions to policy making, planning, finances, and appraisal;
4. Carry out designated responsibilities—not administering the school but seeing that it is well run;
5. Recognize that authority is vested in the board, and make no personal promises or take any private action that might compromise the board;
6. Refuse to surrender independent judgment to special or partisan interests, and do not use one’s position to secure personal gain or gain for friends or family;
7. Ensure confidentiality regarding all matters that would injure individuals or the school if disseminated. For all other matters, provide accurate information;
8. Vote to appoint the best-qualified personnel (e.g., teachers or principal/president);
9. Support and protect school personnel in proper performance of their duties;
10. Refer all complaints to the principal/president, and bring matters to the attention of the board only after administrative actions have failed to achieve resolution.

* Modified from the *New Jersey Department of Education Code of Ethics for School Board Members* (1996-2017): <https://www.state.nj.us/education/ethics/coe.htm>.

board placed themselves in a compromised situation.

When conflicts of interest arise, certain steps must be taken to protect the board ethically and legally. School board members who have either an actual or a potential conflict of interest should disclose this in writing (see Box 2), remove themselves from the boardroom during the discussion, avoid any involvement in the discussion, and refrain from voting on the matter in question.

Board members should acquaint themselves with their division's *Working Policy* requirements relating to conflict of Interest and abide by those requirements. Board members must always be mindful that even though they are not prohibited from engaging in all economic or commercial activities with the school, such transactions will be considered to be self-dealing (in other words, the use of one's position on the board for personal benefit, to act in one's own interest rather than in the

best interests of the constituency or organization) unless the proper conflict-of-interest protocols have been followed. In addition, there are some prohibited activities such as engaging in a business activity that would be in direct competition with the activities carried out by the organization, using one's position on a board to further outside personal business interests, making use of or disseminating confidential information acquired through a board position in such a way as to obtain personal benefit, or using one's position on the board to secure employment or favors for one's relatives or friends. These are all prohibited activities, and a board member who engages in such behaviors must be held accountable. The school bylaws should outline the expected conduct required of board members and carefully delineate what happens if a board member fails to uphold his or her duties. If no such guidelines are in place, then boards should seek

legal counsel to help them develop such policies.⁶

One of the other essential characteristics of the duty of loyalty is the responsibility for maintaining the privacy and confidentiality of communications that occur at board meetings. During school board meetings, disciplinary issues relating to students or employees, personnel issues, or other legally protected conversations will occur. Each board member has a legal obligation and a duty to maintain confidentiality and not disclose or discuss these matters outside of the board meeting setting. While our human tendency is to share that "juicy gossip" or just seek advice from friends and relatives, the disclosure of such information exposes the board member, the school, and the church to potential legal liability for breach of this duty.

The Duty of Obedience

The third major duty is the duty of obedience. In carrying out its governance functions, the school board must ensure that it remains faithful to and abides by the purpose and mission of the school. This means that boards should function in accordance with their constitution and bylaws; the educational policies of the conference, union, and division; as well as local, state/provincial, and federal laws and regulations. Boards must ensure that any action taken by the board falls within the power and authority granted to it by the constituency, ensuring that the school is fulfilling its responsibilities that relate to the constituency, the parents, the community, the government, and most importantly, its commitment to function as a Seventh-day Adventist institution of learning. Boards must also ensure that their actions do not venture beyond their given authority. Failing to adhere to the governing documents, exceeding their authority, not abiding by the requirements, or exercising decision making in areas over which the board has no

Box 2. Sample Statements Relating to Conflict of Interest and Ethical Foundations

Sample Conflict of Interest Statements

The Accrediting Association of Seventh-day Adventist Schools, Colleges, and Universities (AAA): https://adventistaccreditingassociation.org/wp-content/uploads/2017/12/aaa_conflict_of_interest_form.pdf

Pacific Union Conference: https://www.puc.edu/__data/assets/pdf_file/0020/56009/Conflict-Interest.pdf

The Center for Nonprofit Management: http://www.resourcesharingproject.org/sites/resourcesharingproject.org/files/Sample_Conflict_of_Interest_Policy_2.pdf

Statement of Ethical Foundations

The General Conference of Seventh-day Adventists: <https://www.adventist.org/en/information/official-statements/documents/article/go/-/ethical-foundations-for-the-general-conference-and-its-employees/>

The North American Division: https://www.rmcsda.org/uploaded_assets/298188

Upper Columbia Conference: <https://www.uccsda.org/English/HR/Documents/Conflict%20of%20Interest%20for%20Exempt%20Employees%20Only.pdf>

Box 3. Key Questions for Each Board

1. Have the constitution and bylaws been reviewed by the board within the past five years?
2. Has the board engaged in a medium- to long-term strategic-planning process? Does the board outline specific goals and objectives for each school year?
3. Is the board actively involved in the process of developing the annual budget? Are comparisons of financial performance to budgeted figures consistently made and reported throughout the year?
4. Has the board developed and instituted financial controls that meet generally accepted practices?
5. Are board members required to make financial contributions to the organization or to student aid, or to solicit funds for these purposes?
6. How active is the board in raising money for school needs or student aid?
7. Is a process in place to conduct regularly scheduled performance review of the board officers and the board as a whole?
8. Does the board play a leading role in promoting the organization to internal and external stakeholders (church)?
9. Do board members actively support the school's renewal and revitalization (physical plant and Spiritual Master Plan)?
10. Is there a school board manual? (If not, create one.) Do members reference it to facilitate better understanding of their roles and responsibilities?
11. Have a sufficient number of subcommittees been developed to accomplish the work of the board effectively?
12. Does the board solicit the views, interests, concerns, etc. of others? (Conference, local church, advisors, friends, parents, constituents, etc.)
13. Is there a process that ensures that appropriately qualified people become members of the board?
14. Does the board actively seek to establish sound and amicable relationships with other organizational entities (local church, conference, union, division, etc.)?
15. Does the board strive to maintain its appropriate role in the overall scheme of organizational function (i.e., Does it avoid micro-managing)?

authority will result in legal challenges that could find them in court and on the wrong side of the law. School boards must consult with legal counsel when dealing with these issues.

Conclusion

Constituencies count on an effective and functioning board to govern the operations of local elementary and secondary schools, as well as institutions of higher education. The success of the school, while measured by how effectively it serves the educational needs of the students

and meeting the needs of the sponsoring organizations, also depends on the ability of the board to function in an orderly and efficient manner in performing its governance functions. Board members must always remember that the legal and fiduciary responsibilities imposed on them require that, at a minimum, they make prudent decisions, be fully informed, fully involved, and fully compliant. The risk of the school not achieving its stated mis-

sion lies in the way that it is governed, and at the very top of an educational institution is the school board. ✍

This article has been peer reviewed.



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NOTES AND REFERENCES

1. Peter Drucker, *Management* (New Delhi, India: Allied Publishers, 1973), 628.
2. "K-12 Education Policies," in *North American Division (NAD) of the General Conference Working Policy* (2017-2018), Section FEA 30 20; *The NAD Union Education Code*: <https://adventisteducation.org/superintendents-handbook/4code.html>.
3. *Ibid.*, FEA 30 35.
4. Model Business Corporation Act § 8.30 (2016).
5. *NAD Working Policy* (2017-2018), Section E 85 05.
6. Hamlet Canosa, "Governing Boards: A Practical Guide to Best Practices and Policies" (2008), 31: http://www.columbiaunion.org/sites/default/files/pictures/new_board_manual_07-08l.pdf.