



AMC 2025

Session 1

Advising the Nonprofit Board – An Introduction

Presented by:

Moderator:

Michael J. Morse, Municipal Law & Litigation Group, S.C., Waukesha

Panelists:

John R. Decker, Dane County Historical Society, Madison

Dean R. Dietrich, Weld Riley, S.C., Wausau

About the Presenters...

John R. Decker, of Evansville, Wisconsin, now retired, received his B.A. in Economics from the University of Wisconsin-Madison in 1974 and his J.D. from the Marquette University Law School in 1977, where he was Executive Editor of the Marquette *Law Review*. He practiced law as an associate and partner with Michael, Best & Friedrich in Madison and Milwaukee from 1977 to 1991, when he established his own Milwaukee firm, which grew to five lawyers. He became general counsel for a health care institution in 2004, a position from which he retired in 2017. John has served on the Board of Curators of the Wisconsin Historical Society and as president of several nonprofit entities including the State Bar of Wisconsin, the Wisconsin Council for Local History, the Wisconsin Association of Historic Preservation Commissions, the Mid-Continent Railway Museum, the Department of Wisconsin of the Sons of Union Veterans of the Civil War, and Mt. Zion Lutheran Church of Wauwatosa. He is currently president of the Dane County Historical Society.

Dean R. Dietrich is a shareholder with the firm of Weld Riley, S.C. and is a Past-President of the State Bar of Wisconsin. His practice emphasizes municipal law, labor relations, and employment law, representing public and private sector clients in all aspects of municipal law and employment law. Dean has consulted with numerous law firms and lawyers regarding professional responsibility and compliance with the Rules of Professional Conduct, and has represented many attorneys in matters before the Supreme Court of Wisconsin and the Office of Lawyer Regulation. He is a member of the American Bar Association's Center for Professional Responsibility and of the Association of Professional Responsibility Lawyers. A graduate of the Marquette University Law School, Dean is the Chair of the State Bar Committee on Professional Ethics.

Michael J. Morse obtained a bachelor's degree in History and Economics from the University of Wisconsin-Madison, and his law degree from Marquette Law School. Mike was an associate and later a shareholder with the von Briesen law firm in Milwaukee. He was the Menomonee Falls Village Attorney from 1999 to 2020. From 2003 to 2023, he was also an Adjunct Professor of Law at Marquette Law School, where he taught Local Government Law. In 2008 Mike served as a public member of the Joint Legislative Council Special Committee on Differences in Laws Applicable to Cities and Villages. He has also served on the boards of several nonprofit organizations. He is currently a member of the Waukesha County Condemnation Commission. Mike has served on the Wisconsin State Bar Board of Governors and several State Bar committees. He is a past Chair of the State Bar Finance Committee, and of the Administrative & Local Government Law Section. He is currently the President of the Senior Lawyers Division.

State Bar of Wisconsin
Annual Meeting & Conference

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Advising the Nonprofit Board: An Introduction

Presenters:

Moderator:

Dean R. Dietrich
ddietrich@weldriley.com

John Decker
Febdg61@gmail.com

Michael J. Morse
mjmorse@mac.com

I. SCOPE OF PRESENTATION

- a. This course is intended to provide a foundational understanding of the legal, tax, and regulatory framework governing tax-exempt nonprofit organizations in Wisconsin. We will review board and board member responsibilities, achievement and maintenance of tax-exempt status, financial management, and key regulatory compliance issues. Operational “best practices” will be highlighted.
- b. Time constraints require us to limit our scope to those Wisconsin nonprofits which are exempt from income taxation under sec. 501(c)(3) of the Internal Revenue Code and are classified as “public charities” as opposed to “private foundations”. These are by far the most common nonprofits.
- c. We will devote brief attention to the deductibility of donations to tax-exempt organizations, both from the standpoint of the donor and of the donee.
- d. Key resource: State Bar of Wisconsin “A Guide for Wisconsin Nonprofit Organizations” (cited here as *Guide*).
- e. Other references: Internal Revenue Service, Wisconsin Department of Financial Institutions, and Wisconsin Department of Revenue web pages

II. WHAT DO WE MEAN BY “NONPROFIT”?

- a. Note that business corporations organized under Wis. Stat. ch. 180 are empowered to “make donations and otherwise devote its resources to the public welfare or for charitable, scientific, educational, humanitarian, philanthropic or religious purposes”. Wis. Stat. sec. 180.0302 (13). Likewise, directors of business corporations “may consider effects on employees, suppliers and customers” under Wis. Stat. subs. 180.0827 (1) and on “communities in which the corporation operates”. Wis. Stat. subs. 180.0827 (2).
- b. Beginning in 2017 Wisconsin business corporations have had the option to organize or to revise their articles of incorporation as a public benefits corporation (“PBC”) under Wis. Stat. ch. 204. 2017 Wis. Act. 77.
 - i. A PBC is required to have as one of its purposes the creation of “a general public benefit”. Wis. Stat. subs. 204.201(1). In addition, it may create one or more “specific public benefits”. Wis. Stat. subs. 204.201(2).

- ii. A PBC is further required to have a designated “public benefit director” and a “public benefit officer”, as well as an “annual benefit statement”. Wis. Stat. secs. 204.302, 204.304, 204.305.
 - iii. If its article of incorporation permits, a PBC may operate under standards of a third-party organization or seek periodic certification by such a third-party organization as a benefits corporation. Wis. Stat. subs. 204.401(2)(b). “B-Corporation” certification is an example. See <https://blocalwisconsin.org>.
- c. Unincorporated associations may be established as nonprofits and may be eligible for tax-exempt treatment.
 - 1. Uniform Unincorporated Nonprofit Association Act, Wis. Stat. ch. 184, effective 1998. 1997 Wis. Act 140.
 - 2. Statutory definition: “an unincorporated organization consisting of 3 or more members joined by mutual consent for a common, nonprofit purpose.” Wis. Stat. subs. 184.01.(2).
 - 3. Entity with an identity separate from its sponsors, a significant departure from common law rules.
 - 4. No filing requirement with DFI. See *Guide* sec. 1.33.
 - 5. Inappropriate if tax deductible contributions are to be solicited or if annual receipts of \$5,000 or more are expected. See *Guide* sec. 1.12.
 - 6. May be viewed unfavorably by financial institutions due to lack of familiarity.
- d. By far the most common Wisconsin nonprofits are non-stock corporations organized under Wis. Stat. ch. 181.
 - 1. Here, “nonprofit corporation” means “a corporation that does not make distributions, except as authorized under s.
 - 2. 181.1302(1), (2) and (3).” Wis. Stat. subs. 181.0103(17).

3. "Distribution" means "the payment of a dividend or any part of the assets, income or profit of a corporation to any members, officers or directors, but does not prevent the payment of reasonable compensation, benefits, pensions, incentive compensation or the reimbursement of expenses." Wis. Stat. subs. 181.0103(10).
4. The authorized distributions are
 - a. Purchase of its memberships, so long as it does not cause insolvency;
 - b. Distributions on dissolution; and
 - c. Distributions or payments to another tax-exempt nonprofit corporation, in accordance with the stated purposes of the corporation, so long as they do not result in insolvency. Wis. Stat. subs. 181.1302(1), (2) and (3).
5. Catch-all distributions: Others permitted by the articles of incorporation, in accordance with the stated purposes of the corporation, and not resulting in insolvency> Wis. Stat. subs. 181.1302(4).

III. THE TAX-EXEMPT ORGANIZATION.

- a. With formal recognition by the Internal Revenue Service.
- b. Use of earnings: dedicated to purposes consistent with the organization's foundational documents, which in turn must conform to the charitable, scientific, or educational, etc. aims to be met for obtaining and maintaining tax exempt status under sec. 501(c)(3).
- c. Distribution of earnings
 - ii. Ongoing distributions (as above)
 - iii. Distributions on dissolution: limited to expenditures in furtherance of the organization's exempt purposes or to other exempt organizations having similar purposes. Note that the organization's

articles of incorporation and related statutes must be consulted closely in the event of distributions on dissolution. See Wis. Stat. sec. 181.1302(3) and (4).)

e. Purposes of the organization: Internal Revenue Code definitions

i. 501(c) 3 organizations: “organized exclusively for religious, charitable, scientific, literary, or educational purposes, or to provide testing for public safety, or to foster national or international amateur sports, or for the prevention of cruelty to children or animals.”

ii. Other, specially recognized organizations

1. Business leagues

2. Veterans

3. Labor organizations

4. Other

ii. State statute definitions

i. Wis. Stat. ch. 181 Non-stock Corporations and ch. 184 Nonprofit Associations. See discussion above.

ii. Ch. 202 Charities and solicitations.

1. Regulatory scheme based on issuance of credentials state-by-state.

2. Credentials for charities.

3. Credentials for professional fundraisers.

4. Various disclosures are required at the time of application for credential and at annual renewals. The extent of financial disclosures depends upon the sum of donations received.

f. Application for Recognition as an Exempt Organization. See *Guide* secs. 2.21-2.33.

- i. Incorporation. See sample articles at *Guide* sec. 1.19, *et sec*, and Appendix 1C.
- ii. Application for FEIN. IRS Form W-9. Submit after organization is established. IRS Publication 557.
- iii. Exemption application documents and attachments are submitted electronically through pay.gov using Form 1023 or Form 1023-EZ. See the following at IRS.gov using “charities” as the search term on the landing page:
 - i. “Apply for tax-exempt status”
 - ii. “Annual filing and forms”
 - iii. “The Life Cycle of an Exempt Organization”
 - iv. “Reinstate tax-exempt status” [as applicable]
- iv. Fees. Found at Internal Revenue Bulletin 2022-01
 - i. Form 1023-EZ applications \$275.00
 - ii. Form 1023 applications \$600.00
- v. IRS action. See *Guide* sec. 2.44.
- vi. Corrections by applicant and appeals. *Id.*
- vii. Determination Letter See *Guide* secs. 2.38-2.43.
- g. Ongoing reporting requirements
 - i. Federal
 - i. Form 990 Information Returns See *Guide* secs. 2.50-2.55.
 - ii. 990N ePostcard and acknowledgement. This form may be used when annual gross receipts ordinarily are \$50,000.00 or less. *Id.* sec. 2-53.

- iii. Form 990-EZ may be filed when gross annual receipts are less than \$200,000.00 and total assets at year-end are less than \$500,000.00.
 - iv. A form 1023-T is required to be filed, and tax paid, where annual Unrelated Business Income exceeds \$1,000.00.
 - v. AUTOMATIC revocation of exempt status for failure to file for 3 consecutive years. *Id* and I.R.C. sec. 6033(j).
 - vi. Reinstatement is possible. See the IRS web site and IRS Publication
- ii. State
 - i. Filing of Articles of Incorporation. DFI Form 102. \$35.00 filing fee.
 - ii. Annual Report. DFI Form 5. \$40.00/\$25.00 (hard copy/on line) filing fee.
 - iii. Reinstatement process and fees. By submission of a current Annual Report and payment of fees in arrears.
 - iv. Renewal of charitable credential (see below).
 - v. Exempt organizations need not file a Wisconsin Income Tax form unless they have Unrelated Business Income, in which case a WDOR Form 4T is to be filed. See *Guide* sec. 2-54.
- h. Disclosure requirements.
 - i. Federal. See *Guide* secs. 2-55-2.60.
 - i. Form 990 tax returns for the last 3 years but does not include Schedule B (containing the names and addresses of contributors).
 - ii. Form 1023 or Form 1023-EZ application for recognition of exempt status, including attachments and supporting materials.
 - iii. IRS determination letter or any other letters or documents issued by the IRS with respect to the application.

- iv. Penalties apply for nondisclosure: \$20.00 per day for tax returns; an additional \$20.00 per day for exemption application materials, with a maximum of \$10,000.00.
 - v. Copies of lost or misplaced documents can be obtained from the IRS without charge by submission of IRS Form 4506-B Request for a Copy of Exempt Organization IRS Application or Letter.
- ii. State. Disclosures to members of the Corporation, subject to limitations and conditions, including reasonable charges for copies.
 - i. Key documents required to be kept at the principal office (articles, bylaws, minutes, etc.) Wis. Stat. sec. 181.1601 (1), 181.1602.
 - ii. Accounting records and the membership list. Wis. Stat. sec. 181.1602 (2) and 181.1603.
 - iii. CPA-reviewed financial statements. Wis. Stat. sec. 181.1620.
- i. Duties and responsibilities of the board
 - i. In common with profit-distributing entities
 - i. Policy setting. See *Guide* secs. 3.15-3.22.
 - ii. Financial oversight. *Id.* sec. 3.24.
 - iii. Compliance with laws and regulations. *Id.* secs. 3.29-3.33.
 - iv. Conflicts of interest. *Id.* sec.
 - v. Appointment and supervision of officers
 - vi. Delegation
 - 1. Of board powers to an executive committee. Special issues with respect to disclosure. *Id.* secs. 3.55-3.56.
 - 2. Of powers respecting financial transactions and formalities required of financial institutions
 - vii. Reports to electing or appointing authority

ii. Unique to nonprofits

i. Federal regulation

1. Excess benefit transactions and disqualified persons. See *Guide* sec. 2.47.
2. Tax on excess benefits. *Id.* sec. 2-48.

ii. State regulation

1. Composition: a board of at least 3 members. Wis. Stat. sec. 181.0803 (1).
2. Reports to the membership: required as to the general and financial condition of the corporation at the annual meeting of members. Wis. Stat. sec. 181.0701 (4).

j. Duties and responsibilities of directors.

i. Common law. See *Guide* sec. 4.12.

- i. Loyalty.
- ii. Diligence
- iii. Participation
- iv. Competence
- v. Best judgment

ii. Federal regulation

- i. Taxation (including prohibited or penalized transactions – see below)
- ii. Labor & employment law. See *Guide* chapters 5-6.

iii. State regulation

- i. Conflict of interest. Wis. Stat. sec. 181.0831.

- ii. Loans to directors. Wis. Stat. sec. 181.0832.
 - iii. Director's liability for unlawful distributions. Wis. Stat. sec. 181.0833.
 - iv. Limited liability provisions. Wis. Stat. sec. 181.0855.
- k. Best recommended practices
 - i. Goal setting
 - i. Relationships to exempt purposes
 - ii. Relationship with recognized business practice
 - ii. Measurement of progress
 - iii. Course corrections
 - iv. Rewards and disincentives
 - v. Communications and public relations
 - i. With the membership
 - ii. Existing and potential donors and grantors
 - iii. Allied entities
 - iv. Beneficiaries and constituents
 - vi. Director and officer recruitment and retention
 - vii. Attention to financials
 - i. System of internal controls
 - ii. Review of financial reports
 - 1. Placing monthly or other interim reports on file rather than approving. RONR (12th ed.) sec. 8.20.

2. Model form of annual treasurer's report. RONR (12th ed.) sec. 48.22 p. 455.
3. Annual report should be made after audit. RONR (12th ed.) sec. 48.21.

iii. Required reviews and reports based on regulation of solicitations

viii. Risk management

- i. Insurance
- ii. Contractual relations

ix. Board meetings

- i. Frequency and scheduling
- ii. Annual meeting requirement
- iii. Notice and agendas
- iv. Formality/informality
- v. Requirement of deliberative action Wis. Stat. secs. 181.0820(3).
- vi. Minutes and documentation. Wis. Stat. 181.1601(1) and (5)(d).
- vii. Committees of the board

1. Executive committee
2. Nominating committee
3. Other

x. Meetings of the membership

- i. Annual and special meetings. Wis. Stat. sec. 181.0701.
- ii. Required reports (see above)


I. Prohibited and penalized transactions

- i. In general, See *Guide*
- ii. Conflicts of interest
- iii. “Excess benefits transactions”
- iv. Unrelated business income taxation. See *Guide* sec. 2-111-112.
- v. Violations of regulations pertaining to solicitation. Wis. Stat. sec. 202.16.


IV. DEDUCTIBILITY OF CONTRIBUTIONS. SEE IRS PUBLICATION 526.

- a. Requirement of itemization. IRS Form 1040 Schedule A.
- b. Annual limit as a percentage of Adjusted Gross Income (60% or less). Pub. 526.
- c. Documentation requirements:
 - i. Depending on amount and nature of contribution (cash, non-cash, combination thereof, or out-of-pocket expenses when donating services).
 - ii. Cash of \$250.00 or more. A contemporaneous written acknowledgement from the donee with its identification, the amount and date of the contribution, and a statement that no goods or services were provided to the donor as a result of the contribution [ignoring certain token items and membership benefits]. Contemporaneous here meaning made by January 31 of the year following the donation, or by the date the donor’s tax return for the year of donation is due.
 - iii. Cash of less than \$250. Donor’s documentary record (e.g., cancelled check, etc.) showing the date of the donation, unless date stated by donee’s acknowledgement.
 - iv. Non-cash donations are subject to numerous conditions and limitations beyond the scope of this presentation.
- d. Qualified Charitable Donations from IRAs. See Pub. 526.


- i. Convenient vehicle for donations by those age 70-1/2 and older with IRAs.
- ii. Can be treated as part of a Required Minimum Distribution.
- iii. It is not taxed (but may not also be counted as a deduction).
- iv. Must be made directly from the donor's fund administrator to the donee.




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1

Scope of Presentation



2

- This course provides a foundational understanding of the legal, tax, and regulatory framework governing tax-exempt nonprofits organizations in Wisconsin.
- We will review Board member responsibilities, achievement and maintenance of tax-exempt status, financial management, and key regulatory compliance issues.
- Operational “best practices” will be highlighted.

3

**What do we
mean by
“Nonprofit”?**



4

- The most common Wisconsin nonprofits are non-stock corporations organized under Wis Stat. Chapter 181.

5



6



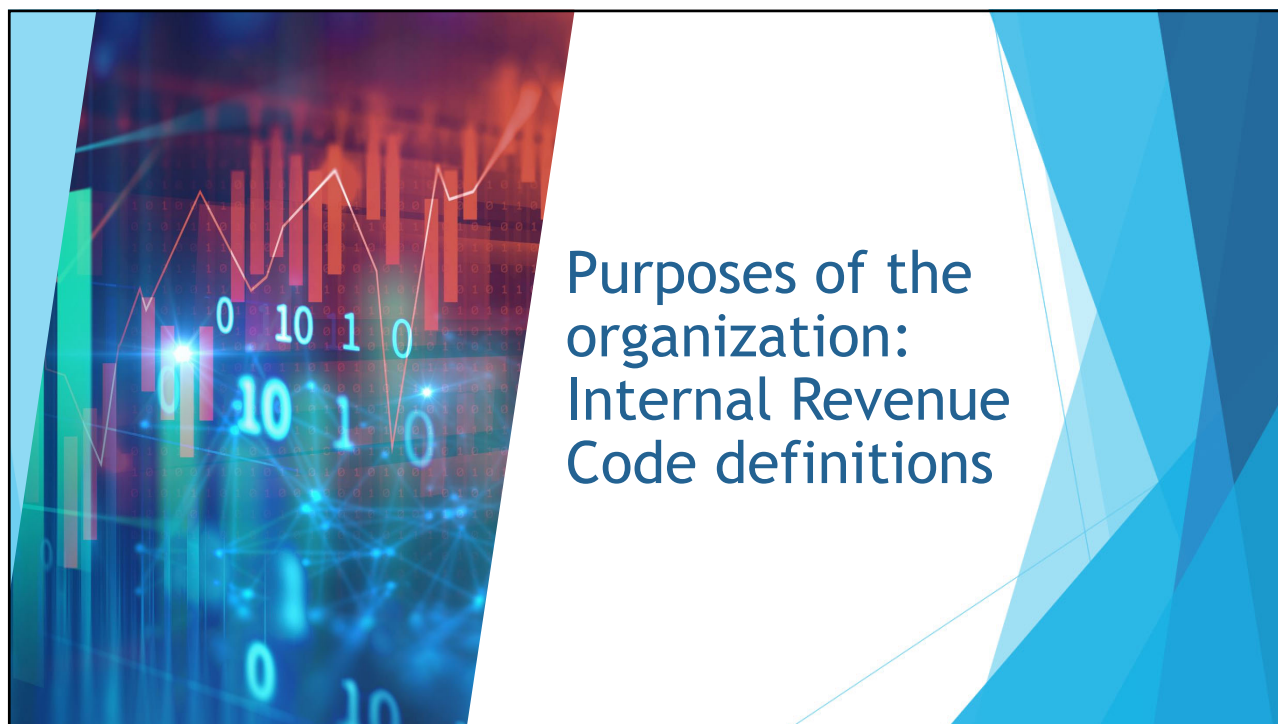
With formal
recognition of
the Internal
Revenue Service

7



Distribution
of earnings

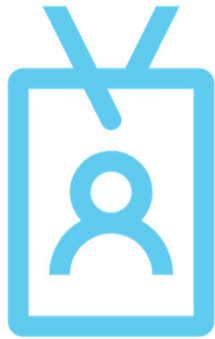
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10



Application for
recognition as
an expert
organization

11



Ongoing
reporting
requirements

12

Disclosure requirements

13

Duties and responsibilities of the board

14



Duties and responsibilities of the directors

15



Best recommended practices

16



Deductibility of Contributions

17

- Requirement of itemization
- Annual limit as a percentage of adjusted gross income (60 percent or less)
- Documentation requirements
- Qualified charitable donations from IRAs

18

Ethics of Serving on Boards



19

Are you a Board
member or an
attorney for the
entity?

20



Confidentiality and
privilege concerns

21



Declare your
role in
responding

22



Competence

23



Why do you
need a Board?

24

State laws are explicit to indicate that nonprofit corporations need a board to assume the fiduciary role for the organization's well-being

25

Duties & Responsibilities of Board of Directors:

Common law duties - include:



26

Duty of Care

Exercise care in the performance of duties for the corporation as a reasonable person would in a like position and under similar circumstances

27

Duty of Loyalty

Avoid or fairly resolve conflicts of interest between directors and the corporation; allow the corporation to take full advantage of business opportunities rather than exploiting them personally; maintain confidentiality and discretion regarding the affairs of the corporation

28

Duty of Obedience

Carry out the purposes of the corporation as expressed in organizational documents

29

Governance

The Board acts as a body

- ▶ **Big Decisions:** Determine mission and purpose. Decisions such as whether to close down or merge, to move to another state, and so forth
- ▶ **Legal:** Ensure compliance with federal, state, and local regulations and fulfillment of contractual obligations
- ▶ **Financial oversight:** Safeguard assets from misuse, waste, and embezzlement. See that money is used as directed
- ▶ **CEO:** Select the chief executive officer (usually called the executive director); assess performance
- ▶ **Planning:** Scrutinize and approve plans, including a plan for how the organization will obtain funds
- ▶ **Efficiency and impact:** Monitor and revise budgets and plans to maximize use of resources

30

Support

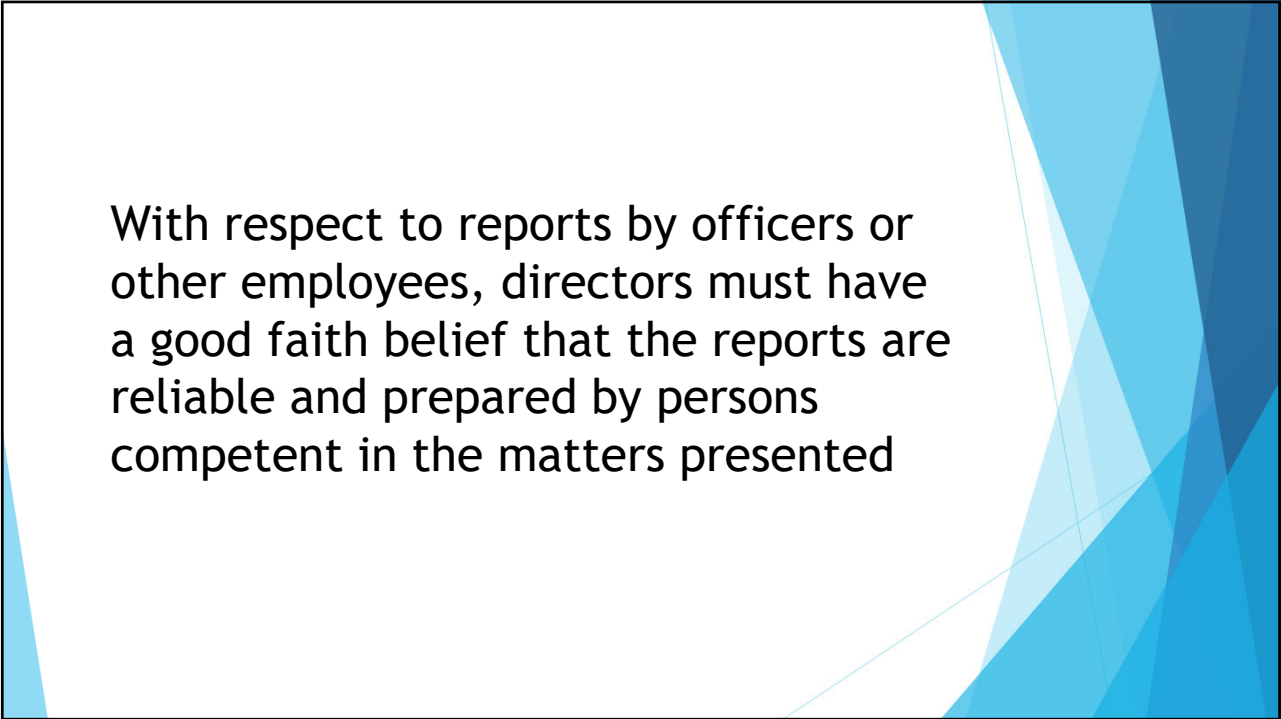
Board members act as individuals

- ▶ Advice
- ▶ **Supporting the revenue strategy**, perhaps by fundraising , perhaps by assisting with earned income, perhaps by working with funders, and so forth
- ▶ **Ambassadors**: representing the organization to the community
- ▶ **Volunteering**: helping with senior clients, accounting, painting the building, and so forth

31

A director must have a good faith belief that the externally-prepared information, opinions, reports, or statements have been prepared by persons acting within their professional or expert competence

32

An abstract graphic on the right side of the slide, composed of overlapping triangles and polygons in various shades of blue, ranging from light sky blue to deep navy blue.

With respect to reports by officers or other employees, directors must have a good faith belief that the reports are reliable and prepared by persons competent in the matters presented

33

Business Judgement Rule

The business judgment rule in Wisconsin protects directors from liability for actions taken as a director, if the director acts:

34

The Reasonably Prudent Person and the Principle of Good Faith

The reasonably prudent person avoids:

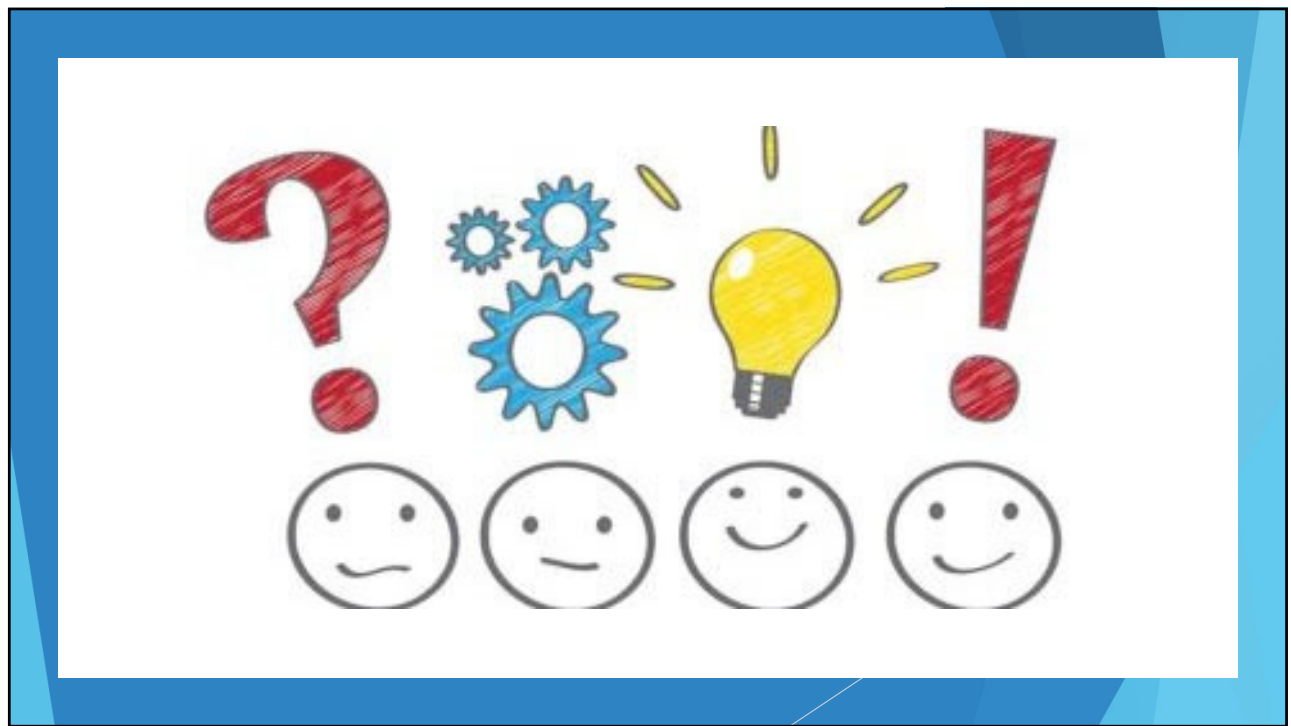
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Mismanagement - Failure to follow fundamental management principles, e.g. failure to ensure that planning occurs; failure to review reports for problems;

Non-management - Failure to use existing opportunities for good management, e.g. failure to use available control systems;

Self-Dealing - Concerns board members voting on decisions in which they face possible personal gain

36



37