



MICHIGAN ASSOCIATION OF  
**REALTORS®**

# 2009 Association Legal Issues

Association Governance & Leadership (1-5)

Govern – Do Not Operate (6-14)

All content in this publication is copyrighted property © 2009 by the Michigan Association of REALTORS® (MAR). MAR hereby authorizes you to view, copy, print and distribute the documents, related graphics and materials published by MAR in this publication subject to the following conditions: 1) all material must be accredited to MAR and the publication in which it appeared; 2) use is for informational purposes only; and 3) no documents or related graphics available from this publication are modified in any way; In consideration of this authorization, you agree that the above copyright notice and this permission notice shall appear in all copies of this document, related graphics and materials, or any portions thereof. Modification of the documents, related graphics and materials or use of the documents, related graphics or materials for any other purpose is a violation of MAR's copyright and other proprietary rights. The use of any documents, related graphics and materials from publication or MAR Web site or any networked computer environment is prohibited.

© 2009 by the Michigan Association of REALTORS®

## ASSOCIATION GOVERNANCE & LEADERSHIP

### I. Fiduciary Obligations to Membership

#### A. Duty to act in best interest of your Association.

1. Decisions to be based upon what is best for Association (e.g., the membership); not what is best for your company or local board.
2. We were unable to find any case or statute that addressed this issue. However, an analogous provision in corporations caselaw is the fiduciary duty of officers and directors of a corporation. *Wallad v Access BIDCO, Inc*, 600 NW2d 664 (1999) states that directors and officers of a corporation owe a strict fiduciary duty to the shareholders of the corporation and are bound to act in good faith for the benefit of the corporation. Essentially, this means that the officers and directors must subordinate their personal interests, and presumably the interests of their constituents, to the interests of the corporation.

#### B. Duty of full disclosure/confidentiality.

1. Disclose any conflict or appearance of conflict.
2. We were unable to find any case or statute that addressed this issue.

#### C. Duty of reasonable care -- business judgment rule.

1. Attend meetings.
2. Prepare for meetings -- read packet prior to meeting.
3. Avoid hastily made, uninformed decisions. Insist that leadership provide sufficient notice/information upon which to base your decision.
4. Delegate to professionals (e.g., accountants, attorneys) -- where you have concerns, ask for recommendations.
5. Exercise independent judgment -- don=t defer (or give Aprox@) to other directors -- doesn=t mean cannot compromise.

6. Put Ano@ votes/objections on record.
7. Rely on staff -- make policy, have staff implement the policy.
  - \$ Do not micro-manage (e.g., pick out Christmas cards)
8. Follow agenda, control subject mater of meetings, keep minutes.
  - \$ All items for discussion need to be on agenda.
    - If you receive a packet and an item is missing from agenda, contact staff prior to meeting.
    - Necessary for orderly and efficient meeting and for preparation by other members.

MCL ' 450.2541 provides that an officer or director of a non-profit corporation shall discharge his or her duties in good faith and with reasonable care, i.e. Athe degree of diligence, care, and skill which an ordinarily prudent person would exercise under similar circumstances in a like position.@

The Abusiness judgment rule@ essentially provides that the courts of this state will not undertake to manage the affairs of a corporation nor substitute their judgment for the officer or directors of the corporation; this rule applies in the absence of fraud, misconduct, or the abuse of discretionary powers. *Olsen v National Memorial Gardens*, 115 NW2d 312 (1962). We were unable to find any more recent cases on this issue. *Olsen*, however, was recently cited in a footnote in *Lytle v Malady*, 566 NW2d 582 n 25 (1997), opinion vacated in part on other grounds 579 NW2d 906 (1998).

In *Olsen, supra*, the business judgment rule *did not* apply where the principal shareholder of a non-profit corporation organized under the Rural Cemetery Act sold burial rights under false representations and siphoned corporate earnings for his own use.

In *Good v Modern Globe*, 78 NW2d 199 (1956), the business judgment rule *did* apply where the corporation entered into a contract with its former president to retain his services at greatly reduced compensation to (1) insure his availability for consultation, (2) take advantage of his influence in obtaining bank loans and government contracts, and (3) guarantee he would not engage in a competing enterprise for the life of the contract.

D. Statutory protections in place for volunteer directors and officers of nonprofit corporations.

1. The duties of the officers shall be such as their titles, by general usage, would indicate and such as may be assigned to them by the Board of Directors or as provided by the corporation articles or bylaws.
2. From ARobert=s Rules of Order@: AThe treasurer of an organization is the officer entrusted with the custody of its funds. The treasurer, and any other officers who handle funds of the society, should be bonded for a sum sufficient to protect the society from loss.@
3. Michigan nonprofit act -- check bylaws for director/ officer liability provisions and indemnification provisions.
4. Nonprofit corporation act permits you to rely on advice of professionals such as counsel, accountants.
5. E & O coverage for directors; **limited to setting policy and giving directives.**
6. MCL ' 450.2209 provides that the Articles of Incorporation may contain the following:

(c) A provision that a volunteer director is not personally liable to the corporation or its shareholders or members for monetary damages for a breach of the director=s fiduciary duty. The provision shall not eliminate or limit the liability of a director for any of the following:

(i) A breach of the director=s duty of loyalty. . . .

(ii) Acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of the law.

(iv) A transaction from which the director derived an improper personal benefit.

(v) An act or omission occurring before January 1, 1988.

(vi) An act or omission that is grossly negligent.

MCL ' 450.2541 provides that an officer or director, in discharging its duty of good faith and reasonable care, may, when acting in good faith, rely upon (1) an opinion of counsel for the corporation, (2) the report of an independent appraiser selected with reasonable care by the board, (3) the financial statements of the corporation represented by that officer in charge of the books for the corporation as being correct, or as stated by an independent accountant or firm of accountants to fairly reflect the financial condition of the corporation.

## II. Antitrust

### A. Between Firms.

### B. Between Associations.

1. Board of choice -- local associations considered competitors -- antitrust implications of discussions between local association as to costs or services each provide.
2. Merger discussions -- should always involve attorneys, carefully followed agenda, confidentiality agreements, minutes.

### C. Within Association.

1. Red flag -- call from member complaining about another member=s way of doing business. Association cannot be used (or even appear to be used) to monitor other members= business practices.
2. Remember that committee meetings, board meetings by necessity are made up of competitors. Stick to Association business -- steer clear of conversations that begin Awe should all . . .@

## III. Employment/Personnel Issues

### A. Leave up to staff; supervise CEO only.

\$ Do delegate -- do not micro-manage.

- Leave request for accommodation and sexual harassment/gender discrimination claims to executive staff.

B. Sexual Harassment/Gender Discrimination

1. Per NAR, fastest growing area of litigation against real estate Associations.
2. Expressly prohibited via MAR written policy and bylaws; result in liability to Association and personally.
3. Association has employees; not independent contractors.
4. Most prone at social events involving alcohol.
5. General rule: If it is not appropriate for the elderly and young, do not do it. ANo hugging below the waist.@
6. Two U.S. Supreme Court cases in June 1998 increased liability for sexual harassment.
  - a. Both cases involved harassment of female employee by her employer.
    - \$ One, promises of advancement and threats of retaliation to extract sexual acts.
    - \$ One, uninvited and offensive touching and lewd remarks.

## **GOVERN—DO NOT OPERATE**

Based upon our research, all REALTOR® Associations in Michigan are incorporated and organized under the Michigan Nonprofit Corporation Act (the “Act”). When it comes to the governing of a nonprofit corporation, the Act is extremely clear as to who is in charge. Section 501(1) of the Act provides:

The business and affairs of a corporation shall be managed by its board, except as otherwise provided in this act . . . .

We have for many years advised officers and directors of REALTOR® associations that they should govern the association as required by Section 501(1) of the Act. We further advise that one of the primary acts of governing is to employ an association executive to be responsible for the operations of the association. The operations of the association reflect the policy and strategic planning and thinking provided by the officers and board of directors.

We have constantly urged officers and members of boards of directors of REALTOR® associations to stay away from the day-to-day operations of the association. This is not an easy thing to do for many officers and directors. Typically, people in these positions are used to running their own businesses and solving problems on the fly! Officers and directors of associations should keep in mind that if they do involve themselves in the day-to-day operations, then they potentially expose themselves to individual, personal liability for any number of types of claims.

A decision reached by the Michigan Court of Appeals on December 30, 2008, demonstrates how a volunteer, unpaid officer or member of the board of directors of a nonprofit corporation can get into hot water while trying to advance the interest of the corporation. In this case, defendant Janice Tipton was the president of the Board of

Directors of the Pontiac Housing Commission (the “PHC”). In February 2004, Plaintiffs Belinda Glover and Angela L. Speaks were hired as Section 8 Administrator and Human Services Administrator, respectively. These two new positions had been created in 2003 by PHC Executive Director Bernadette Ellsworth and had been approved by the PHC Board of Directors.

Apparently, Ms. Tipton, the President of the Board, had been friends with Ms. Glover and Ms. Speaks before they were hired by the PHC. In fact, Ms. Tipton had called and encouraged Ms. Glover and Ms. Speaks to apply for the jobs. In addition, she had helped them get ready for their interviews by providing them with “job related documents,” arranging their interviews, and actually sitting in when they appeared before the interview panels. The Court’s decision indicates that President Tipton told other persons that she was attempting to recruit a “dream team” of employees at PHC who were her friends or relatives. In fact, several of President Tipton’s family members and friends were employed at PHC.

At the time the Section 8 Administrator and Human Services Administrator positions were created, the PHC was suffering budget problems. However, Executive Director Ellsworth hoped that Ms. Glover’s and Mr. Speaks’ jobs would eventually pay for themselves through grants and through the generation of additional revenue. In 2004, the Section 8 Administrator and Human Services Administrator positions did not generate enough income to cover Ms. Glover’s and Ms. Speaks’ salaries.

It appears that around this time, the relationship between President Tipton and now PHC employees Glover and Speaks began to deteriorate. It is indicated in the Court’s decision that President Tipton began to act like she was Ms. Glover’s and Ms.

Speaks' supervisor, although she had been directed as a member of the Board of Directors of PHC and as President, not to interfere with PHC's day-to-day operations.

In August of 2004, President Tipton became angry with Ms. Glover when Ms. Glover failed to contact a service provider for PHC whom Tipton preferred she use. It was reported that President Tipton barged into Ms. Glover's office, "closed the door and pointed her finger in Glover's face while loudly cursing at her." In response to President Tipton's actions, Ms. Glover felt threatened and left the room for the hallway. As a result of these actions by President Tipton, Ms. Glover called the Pontiac police, filed a complaint with the City of Pontiac and contacted the City of Pontiac's director of human resources. She also reported President Tipton to HUD, which provided funding for PHC.

Unfortunately, the difficulties between President Tipton and PHC's employees, Glover and Speaks, did not end with the August 2004 confrontation between President Tipton and Ms. Glover. In October 2004, Ms. Speaks believed that President Tipton was improperly using the PHC credit card, cell phone and vehicle. Ms. Speaks reported her belief to a HUD auditor. Somehow, President Tipton found out and became very unhappy with Ms. Speaks. President Tipton called Ms. Speaks to complain about her report to the HUD auditor. Thereafter, on October 28, 2004, "unsigned, typewritten letters that included highly personal and embarrassing information about both [Ms. Glover and Ms. Speaks] began arriving in the mailboxes of PHC employees, the local school board and at Pontiac Central High School." Ms. Glover and Ms. Speaks hired a linguistics expert to determine, in her expert opinion, that President Tipton was the author of the derogatory letters. Ms. Speaks then reported President Tipton to the Pontiac police and the City of Pontiac for harassment, intimidation, defamation and interfering with Ms. Speaks' job.

In January 2005 President Tipton told a friend that she was going to fire Ms. Glover and Ms. Speaks by “writing them out of the budget” of PHC. In March 2005, PHC’s new Executive Director, Franklin Hatchett, and Budget Director, Steve Hammersly, recommended to the PHC Board of Directors that Ms. Glover’s and Ms. Speaks’ positions be eliminated in order to deal with the budget deficit at PHC. The five-member Board of Directors, including President Tipton, voted to approve the budget prepared by Mr. Hatchett and Mr. Hammersly and to eliminate Ms. Glover’s and Ms. Speaks’ jobs.

Ms. Glover and Ms. Speaks believed that the claimed budgetary reason for the elimination of their jobs (*i.e.* their firings) was a phony reason and, instead, that they had been terminated because they had reported President Tipton’s conduct to various authorities.

Ms. Glover and Ms. Speaks became Plaintiffs, suing both PHC and President Tipton for alleged violations of the Whistleblowers’ Protection Act (the “WPA”), defamation, invasion of privacy and other claims. However, Ms. Glover’s and Ms. Speaks’ claims did not last long before the trial court. The trial court found that they had failed to establish a causal connection between their firings and their protected activity (*i.e.* the reports they had made to the authorities). Obviously, the trial court was convinced that the Plaintiffs had been terminated due to PHC’s budget problems. Further, the trial court found that President Tipton could not be individually liable under the WPA. Then, Ms. Glover and Ms. Speaks went to the Court of Appeals.

In the Court of Appeals, Ms. Glover and Ms. Speaks argued that the trial court should not have summarily dismissed their claims. The Court of Appeals agreed. It found that the trial court had made a mistake in concluding that the breakdown in the

relationship between President Tipton and Ms. Glover and Ms. Speaks was not based upon their protected activity, *i.e.* making reports to HUD, the Pontiac police, Pontiac City Council and other entities. The Court of Appeals found that there was evidence that the personal conflicts between President Tipton and Ms. Glover and Ms. Speaks existed before Ms. Glover and Ms. Speaks engaged in protected activity. The Court of Appeals further found that there was evidence that President Tipton's anger rose to a new level when she found out that Ms. Glover had reported her to police and human resources in August of 2004 and again, when Ms. Speaks reported her allegations to the HUD auditor in October 2004. Further, the Court found there was evidence that President Tipton retaliated by sending out defamatory letters. The defamatory letters resulted in a second round of protected activity by Ms. Glover and Ms. Speaks responding to the defamatory letters.

President Tipton admitted that Ms. Glover's and Ms. Speaks' actions upset her. She further admitted that she had sent a letter to Ms. Speaks' husband describing her complaints about how Ms. Speaks performed her job. She sent this letter to Ms. Speaks' husband because she was angry about Ms. Speaks' accusations. President Tipton also admitted that in March 2005, the time at which the PHC Board decided to eliminate the Plaintiffs' jobs, she was still angry at Ms. Speaks for going to the police.

The Court of Appeals also found that Ms. Glover and Ms. Speaks provided evidence that President Tipton "wielded a great deal of power within PHC." This evidence included the number of her family members and friends that were employed by PHC. Further, evidence was presented that President Tipton influenced Executive Director Hatchett's decision making, including the fact that Hatchett's father was her attorney, the fact that Hatchett stated that his predecessor would not have been fired if she had just done

what President Tipton told her to do and President Tipton's admission that Hatchett never refused to do something that she asked him to do. Further, President Tipton had testified that the Board of Directors never really discussed the elimination of Ms. Glover's and Ms. Speaks' jobs because "that's up to the [executive] director." The Court of Appeals found that this evidence suggests that once President Tipton convinced Executive Director Hatchett to eliminate Ms. Glover and Ms. Speaks, the other members of the Board of Directors of PHC did not give the matter any further consideration.

In sum, the Court of Appeals concluded that the evidence submitted with respect to the extent of President Tipton's anger, when coupled with the evidence of her significant power and influence over Executive Director Hatchett within the PHC, led to the conclusion that summary disposition was inappropriate and that it should be up to a jury should decide whether Ms. Glover and Ms. Speaks were fired due to their protected activities under the WPA.

The PHC and President Tipton argued before the Court of Appeals, that even if there was some connection between President Tipton's anger, her power and the termination of Ms. Glover and Ms. Speaks, nonetheless, the evidence that the terminations were for budgetary reasons was overwhelming. In other words, regardless of what President Tipton had done in the case, the budget deficit dictated termination of these two positions.

Ordinarily, a so-called "economic force reduction" will eliminate any claims that an employee was terminated in violation of the law. If the company had no money to employ them, then it follows that they were going to lose their job in any case. In this case, the PHC offered a great deal of evidence that Ms. Glover and Ms. Speaks were discharged

for reasons related to the budget. Unfortunately, there was other evidence presented, in addition to the evidence described above, which caused the Court of Appeals to reject what is ordinarily an acceptable defense.

Ms. Glover and Ms. Speaks claimed that the budgetary justification for the elimination of their jobs was simply a pretext. They argued that they were the only employees who lost their jobs in March of 2005. There were a variety of different ways that the PHC could have balanced its budget. Further, they argued that many of the employees who were retained had less seniority, but were personally connected through family or friendship to President Tipton. The Court of Appeals, in reliance on these arguments, determined that it was improper for the trial judge to dismiss Ms. Glover's and Ms. Speaks' claims solely based on PHC's and President Tipton's claims that they were required to do so in order to address the budget deficit. Instead, a jury would decide the real reason why Ms. Glover and Ms. Speaks lost their jobs.

Finally, the Court of Appeals had to consider whether President Tipton could be personally liable for the claims asserted by Ms. Glover and Ms. Speaks under the WPA. The Court of Appeals determined that the test for determining whether there is personal liability should be the same as it is for violations of the Elliott-Larsen Civil Rights Act (the "ELCRA"). Thus, the question was whether President Tipton could be deemed "an employer" and thus liable under the WPA, just as "an employer" would be under the ELCRA.

It had previously been decided by the Michigan Supreme Court that under the ELCRA, agents (as opposed to employees) of an employer can be liable as individuals.

The Court of Appeals had previously held that one becomes an "agent" of the employer

through the “delegation of general supervisory power and authority.” The Court of Appeals had previously found that persons who are delegated the authority by an employer to supervise and act on behalf of the employer, are agents, as distinguished from co-employees, subordinates or co-workers.

Obviously, President Tipton, as an officer and member of the Board of Directors of PHC, would not normally be deemed an “employer” as she would not involve herself in the day-to-day operations of the PHC, which would include hirings and firings. However, the Court of Appeals reviewed the facts alleged by Ms. Glover and Ms. Speaks to determine whether it could be successfully asserted that President Tipton was acting as an “employer” for purposes of liability.

The Court again noted that the sheer number of staff members at PHC who were President Tipton’s friends or family members indicated that she had a great deal of influence over both the hiring process for PHC. Further, the Court noted that President Tipton was present at the interviews of both Ms. Glover and Ms. Speaks. In addition, Ms. Glover and Ms. Speaks provided several examples of occasions where President Tipton engaged in behavior of a “supervisory nature.” The Court indicated that this type of supervisory behavior included:

Tipton’s attempt to ban plaintiffs from attending PHC board meetings; Tipton’s removal of Speaks from a business meeting and requirement that she immediately assist a program participant; Tipton’s telephone call to Speaks and warning not to give direction to employees outside her division; and repeated phone calls to Glover to inquire about one of Glover’s subordinates of whom Tipton did not approve.

The Court of Appeals concluded that while President Tipton may have had no formal responsibility over the day-to-day operations of PHC, there were sufficient facts for

a jury to conclude that she had in fact acted as an “employer,” in which case she would have personal liability for alleged violations of the WPA.

This has been a rather windy dissertation on this case. However, over the years, I have had occasion to observe a number of officers and directors at various local associations engage in some of the conduct that got President Tipton into trouble and may result in substantial personal liability against her. Fortunately, the path to avoiding President Tipton’s dilemma is an easy one to follow. If there is an operational problem, it must be handled by the association executive. If there is a complaint by or about an association employee, it should be directed to the association executive. Officers and members of the Board of Directors must suppress their admirable desire to pitch in and try to help solve the day-to-day problems in the operation of a REALTOR® association. They are simply not paid enough to take this kind of risk.