



*This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

## **USE OF SPECIAL COMMITTEES BY BOARDS OF NONPROFIT TO FACILITATE FIDUCIARY DUTIES OF DIRECTORS**

By Phil Thompson, Partner, Moore Ingram Johnson & Steele, LLP

### **INTRODUCTION**

Directors of nonprofit corporations are generally subject to the fundamental obligations of (i) duty of care, (ii) duty of loyalty and (iii) duty of obedience. The duty of care requires that a director be informed and exercise independent judgement. “The duty of care requires that each director share equally in the responsibility of the board to act in the best interests of the corporation.” A director will generally be protected from liability to the corporation arising from unwise or unsuccessful actions or decisions if he or she acted in good faith and in a manner reasonably believed to be in the corporation’s best interest, and with independent and informed judgment (the so-called “Business Judgment Rule”). Under Georgia law, directors can delegate the management of the business of the corporation to a committee composed of one or more directors.

**The primary purpose of this paper is to provide an overview of the use of committees of the board of nonprofits composed wholly or in part by members of the board as a means by which directors can exercise their powers in good faith reliance on the informed advice of such committees.**

### **DISCUSSION**

The directors of a nonprofit corporation will frequently discharge their [duties](#) through use of committees composed in whole or in part by members of the board. Under the Business Judgment Rule, there is a deemed presumption that as long as directors act in good faith, with due care and in a manner they reasonably believe is in the corporation’s best interest, their decisions will be honored and will not be overturned. To be entitled to rely upon the protection of the Business Judgment Rule, directors must be disinterested and independent as to the issue at hand. To be deemed disinterested a director cannot derive any personal benefit from a proposal action. To be deemed independent a director’s decisions cannot be controlled or influenced by a person interested in the subject decision or transaction.

A director should be informed as to the committees authorized to act on behalf of the board and their delegated function. The reliance by a committee upon the financial and legal advice of qualified independent professionals bolsters the committee’s ability to be deemed fully informed. The purpose, powers and limitations of any committee should be clearly stated in the corporation’s bylaws and/or by resolution recorded in minutes of board.

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NOTE: In comparison to board committees, advisory boards or auxiliary committees are typically composed of non-directors and mostly work independent of the board.

For comparison purposes, there are two different categories of committees of a board: standing committees and special committees. Standing committees are permanent and need to be provided for in the corporation's bylaws or board resolutions. Typical standing committees are the executive committee, nominating committee, audit committee, and compensation committee.

**On the other hand, special committees are appointed by the board of directors to perform limited functions. Most special committees are created by board resolution and are often limited in their duration and scope of authority.**

Special committees can be either advisory – with no power to bind or act for the corporation – or can be delegated to act on behalf of the board in specialized situations. Committees empowered to exercise board authority must be formed consistent with applicable provisions of the corporation's bylaws and the governing state's nonprofit corporation law. Only directors (or, if allowed in the bylaws, former directors) may be members of any committee that has the power to bind or act for the corporation,

Finally, even committees generally empowered to act on behalf of the board may not (1) authorize distributions; (2) approve or recommend dissolution, merger, or the sale, pledge, or transfer of all or substantially all of the corporation's assets; (3) elect, appoint, or remove directors; or (4) adopt, amend, or repeal the articles or bylaws. It should be noted that the creation of or delegation of authority to a committee does not alone constitute compliance by a director with the standards of conduct prescribed in the Georgia Nonprofit Corporation Code. All standards regarding directors' duties of care, loyalty and obedience, and [conflicts of interest](#) apply equally to members of such board committees.

In addition, a board should review annually its directors and officers liability insurance (D&O insurance – to the extent it has such insurance) and indemnification rights under its governing documents, as to their application [to directors](#) acting individually and/or as a member of such committees.

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