

SERVING THE ARIZONA ASSOCIATION OF REALTORS® AS AN OFFICER OR DIRECTOR

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The Arizona Association of REALTORS® (“AAR”) was incorporated in 1953 as a 501(c)(6) non-profit corporation. As a non-profit corporation, AAR is governed by its Articles of Incorporation, Bylaws, Policies and Official Statements and the Arizona Non-profit Corporation Act (“NCA”), A.R.S. §10-3101 *et. seq.* These governing documents and Arizona law define the scope of the duties and liabilities associated with serving as an AAR officer or director.

AAR Governing Documents

The AAR Articles of Incorporation provide that:

- Management and control of AAR is vested in the Board of Directors.
- The directors and any person that serves on a board or council in an advisory capacity shall not be subject to suit for acts or omissions made in good faith within the scope of their official capacity.
- The directors and any person that serves on a board or council in an advisory capacity **shall not be subject to personal liability for breach of fiduciary duty** to the maximum extent provided by law.
- AAR shall indemnify any person who incurs expenses by reason of the fact that the person is or was acting in their capacity as an AAR officer, director, employee or agent to the maximum extent provided by law.

The AAR Bylaws provide that:

- AAR shall be managed by the Board of Directors and the Executive Committee. (*The AAR Executive Committee officers are President, President-elect, First Vice President, Treasurer and five Regional Vice Presidents.*)
- Every officer shall be indemnified against all expenses and liabilities reasonably incurred in conjunction with any proceeding in which that officer is involved by reason of being or having been an AAR officer, except in such cases wherein the officer is adjudged guilty of willful misfeasance or malfeasance in the performance of such officer’s duties or shall have acted in such a manner as has exceeded such officer’s authority so to act.

The AAR Policy Statements and Official Statements:

- Contain guidelines for internal AAR operations.
- Require the Executive Committee to ensure that AAR is strategically focused, monitor but avoid conducting day-to-day AAR operations, conduct business in a timely and honest fashion, and observe the internal and external chain-of-command.

The Arizona Non-profit Corporation Act (“NCA”)

The NCA sets forth the standards of conduct for officers and directors of a non-profit corporation. The NCA provides that an officer or director’s duties must be discharged:

- In good faith.
- With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
- In a manner the director reasonably believes to be in the best interests of the corporation.

See, A.R.S. §10-3830 (directors); A.R.S. §10-3842 (officers).

In discharging these duties, an officer or director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

- Officers or employees of AAR whom the officer or director reasonably believes are reliable and competent in the matters presented.
- Legal counsel, public accountants or other persons as to matters the officer or director reasonably believes are within the person's professional or expert competence.
- A committee of, or appointed by, the Board of Directors of which the director is not a member if the director reasonably believes the committee merits confidence.

The NCA also provides that a director is presumed in all cases to have acted, failed to act or otherwise discharged such director’s duties in good faith, with prudent care and in the corporation’s best interests. A person challenging a director’s action, failure to act or other discharge of duties has the burden to establish by clear and convincing evidence facts rebutting this presumption. *See*, A.R.S. §10-3830(D) (directors); A.R.S. §10-3842(D) (officers).

FREQUENTLY ASKED QUESTIONS

Q: Can I be held personally liable for actions taken as an AAR officer or director?

A: AAR officers and directors are largely shielded from personal civil liability for actions taken as AAR officers or directors provided that they act in good faith and within the scope of their official duties. However, an officer or director can be held personally liable in certain circumstances. For example, an officer or director may be held personally liable for directly injuring someone or intentionally taking a fraudulent or illegal action.

Q: If I am named in a lawsuit, will AAR reimburse me for my expenses?

A: As an officer or director, you have a right to be reimbursed for reasonable expenses arising because of a lawsuit. This obligation to reimburse you is referred to as “indemnification.” This indemnification is provided for through both the NCA and the AAR governing documents. *See*, A.R.S. §10-3851 - A.R.S. §10-3852.

The NCA provides that a corporation may indemnify an individual made a party to a proceeding because the individual is or was an officer or director if:

- The individual’s conduct was in good faith.
- The individual reasonably believed:
 - In the case of conduct in an official capacity with the corporation, that the conduct was in its best interests.
 - In all other cases, that the conduct was at least not opposed to its best interests.
 - In the case of any criminal proceedings, the individual had no reasonable cause to believe the conduct was unlawful.

Q: Are there any limits to the duty to reimburse me for expenses incurred in a lawsuit?

A: Yes. For example, AAR may not indemnify an officer or director:

- In connection with a proceeding in which the officer or director was adjudged liable to the corporation.
- In connection with any other proceeding in which the officer or director was adjudged liable on the basis that the officer or director improperly received personal benefit.
- In a case in which the officer or director is adjudged guilty of willful misfeasance or malfeasance.
- In a case in which the officer or director exceeded their authority to act.

Q: Does AAR purchase E&O insurance?

A: Yes. AAR and its officers and directors are insured by the National Association of REALTORS® Association Professional Liability Insurance Policy. This policy generally covers claims relating to negligent acts, errors, omissions, misstatements, misleading statements or breaches of fiduciary duty, as described in the policy. The policy also includes a number of exceptions. You may want to explore whether an individual personal umbrella policy may provide additional protection.

Q: Does the National Association of REALTORS® Association Professional Liability Insurance Policy expressly cover breach of fiduciary duty claims asserted against officers and directors?

A: Yes. The Policy specifies that the insurance carrier will pay on behalf of the **Insured** all Loss on account of any covered **Claim** for a **Wrongful Act**.

- **Wrongful Act** is defined in part as “any negligent act, error, omission, misstatement, misleading statement or breach of fiduciary duty by the Association or **Insured Persons** in the discharge of their duties.”
- **Insured Person** is defined in part as “Any persons who were, now are, or shall be Directors or Officers of the Association.”
- **Claim** is defined in part as: (i) “a written demand against any Insured for monetary damage or non-monetary or injunctive relief”; and (ii) “a written demand served upon the board of directors or the management of the Association to bring a civil proceeding against any of the directors and officers on behalf of the Association.”

Q. In the unlikely event that, in my capacity as an officer or director, I am threatened with litigation, or made aware of a problem which may escalate into a claim or lawsuit?

A. As soon as you become aware of a problem which may escalate into a claim or lawsuit, or are sued, immediately send written notice to the AAR Chief Executive Officer, such as an email or letter sent by an overnight delivery service.

Q: Should I be concerned about conflicts of interest?

A: Conflicts of interest are addressed in the NCA (A.R.S. §10-3860) and in the AAR Policy Statements and Official Statements. AAR Policy A.8 provides that AAR's decision-making bodies, including officers and directors, should not use their position with the association to further their private interests and should avoid placing themselves in situations where their personal interests may conflict with the interests of the association.

Officers and directors have a conflict of interest on an issue when:

- The issue involves a business providing products or services to AAR in which the officer or director or a member of an officer or director's immediate family is a principal, partner or corporate officer.
- The issue is one in which that officer or director or a member of an officer or director's immediate family has a financial interest involving money, employment, investments, credit or contractual rights.

Officers and directors have a conflict of interest in a transaction if they know at the time of commitment that they or a related person:

- Is a party to the transaction.
- Has a beneficial interest in, or is so closely linked to, the transaction and of such financial significance to the director, officer or related person that the interest would reasonably be expected to exert an influence on the judgment of the director or officer if called to vote on the transaction.

Q: What should I do if I have a conflict of interest?

A: AAR Policy requires that you immediately disclose the interest at the outset of any discussions and not participate in the discussion relating to that issue other than to respond to questions. Further, you may not vote on the issue and should not be present when the vote on the issue is taken.

TIPS FOR THOSE SERVING AS AN AAR OFFICER OR DIRECTOR

- Act in good faith and in AAR's best interests.
- Be prepared for meetings.
- Review advance materials.
- Ask questions and participate in discussions.
- Do not use your position to further private interests.
- Avoid conflicts of interest.

This article provides only an initial overview of a very complex subject. The information contained herein is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel.

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ⁱ The legal principles discussed herein are generally applicable to serving as an officer or director of a local association formed as a non-profit corporation.

AAR DIRECTOR OATH OF OFFICE

AS DIRECTORS OF THE ARIZONA ASSOCIATION OF REALTORS® YOU SHARE A SENSE OF COMMON PURPOSE AND MUTUAL VISION. YOUR PRIMARY CONSIDERATIONS, WHEN MAKING DECISIONS, SHOULD BE:

- 1) THE MEMBERS WHO HAVE ENTRUSTED YOU TO LEAD THIS ORGANIZATION,
AND;
- 2) THE BEST INTERESTS OF THE ARIZONA REAL ESTATE INDUSTRY WHICH IS STATED IN THE ASSOCIATION’S VISION- REALTOR®...THE BEST PREPARED REAL ESTATE PRACTITIONER WITH THE HIGHEST STANDARDS.

DO EACH OF YOU SOLEMNLY PROMISE AND SWEAR THAT YOU WILL UPHOLD THE HIGHEST STANDARDS POSSIBLE BY:

- 1) SUPPORT OF THE REAL ESTATE COMMISSIONER’S RULES
- 2) ENFORCEMENT OF THE REALTOR® CODE OF ETHICS
- 3) ENFORCEMENT OF THE GOVERNING DOCUMENTS OF THE ARIZONA ASSOCIATION OF REALTORS®,
AND;
- 4) IN ALL YOUR ACTS, BE GOVERNED BY THE PRINCIPLES OF HONESTY AND JUSTICE?

IF YOU SO PLEDGE, PLEASE INDICATE BY SAYING I DO.