

brenda l. speer llc
 ATTORNEY AT LAW

Legal Issues for Non-Profit Boards

© 2007 Brenda L. Speer


brenda l. speer, llc | 719.381.1708 | fax: 719.466.8098
 brenda@blspeer.com | www.blspeer.com
 2 NORTH CASCADE AVENUE, SUITE 1100, COLORADO SPRINGS, CO 80903


brenda l. speer llc
 ATTORNEY AT LAW

protecting the technological and creative arts

DISCLAIMER!

- This may be boring
- You may not learn anything
- If you learn something, it'll probably be enough to make you dangerous
- This is **NOT** legal advice


brenda l. speer llc
 ATTORNEY AT LAW

The Burning Question

Q: Can I Get Sued?


A: Yes, But Don't Panic


brenda l. speer llc
 ATTORNEY AT LAW

protecting the technological and creative arts

Corporate Structure


FOR PROFIT	NONPROFIT
• Shareholders	• Members
• Directors	• Directors
• Officers	• Officers
• Staff	• Staff
• Committees	• Committees
	• Volunteers


brenda l. speer llc
 ATTORNEY AT LAW

protecting the technological and creative arts

Corporate Structure...

FOR PROFIT	NONPROFIT
• Shareholder purchases stock	• May or may not have members
• Shareholders elect Directors	• Members may or may not join organization
• Directors appoint Officers	• Members may or may not elect Directors
• Officers hire staff	• Directors appoint Officers
	• Officers hire staff
	• Staff selects volunteers


brenda l. speer llc
 ATTORNEY AT LAW

protecting the technological and creative arts

Corporate Structure...

NONPROFIT

- **Articles** establish membership
- **Bylaws** establish membership criteria
- May or may not have members
- Members may or may not have voting rights

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Corporate Management

FOR PROFIT	NONPROFIT
<ul style="list-style-type: none"> • Directors determine strategy • Officers execute strategy 	<ul style="list-style-type: none"> • Directors determine strategy • Officers execute strategy

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Corporate Objectives

FOR PROFIT	NONPROFIT
<ul style="list-style-type: none"> • Make a profit • Serve shareholders in terms of dividends • <i>Wealth distribution</i> 	<ul style="list-style-type: none"> • Make a profit • Serve members in terms of goods and services • <i>No wealth distribution</i>

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Corporate Documentation

FOR PROFIT	NONPROFIT
<ul style="list-style-type: none"> • Articles of Incorporation • Bylaws • Minutes • Resolutions • Policies • Statutes 	<ul style="list-style-type: none"> • Articles of Incorporation • Bylaws • Minutes • Resolutions • Policies • Statutes

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Definitions

- **Articles of Incorporation**
 - Establish authority to operate
 - Public record
 - Filed with Secretary of State
 - Open for inspection

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW


Definitions...

- **Bylaws**
 - Internal rules of governance
 - Not public record
 - Not filed anywhere
 - Open for inspection


protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Definitions...


- **Statutes**
 - Laws of the state governing the corporation
 - Control anything not addressed in the Bylaws


 protecting the technological and creative arts
Definitions...


- **Minutes**
 - Record of proceedings
 - Meetings of Members
 - Meetings of Directors
 - Meetings of Officers (Executive Committee)
 - Meetings of Committees
 - Not public record
 - Not filed anywhere
 - Open for inspection


 protecting the technological and creative arts
Definitions...


- **Resolutions**
 - Adopt motions
 - May be included in or separate from the Minutes
 - For action undertaken by the Board


 protecting the technological and creative arts
Definitions...


- **Policies**
 - Internal rules of operation
 - Company
 - Members
 - Directors
 - Officers
 - Activities
 - Hiring
 - Etc.


 protecting the technological and creative arts
Definitions...


- **Mission Statement**
 - Purpose of organization
 - Also policy


 protecting the technological and creative arts
Director's Responsibilities
Congratulations! You're a director.
Now what?

- Familiarize yourself with your organization's documentation.
- Understand your responsibilities as a director.
- Roll up your sleeves and get to work.



 protecting the technological and creative arts
Director's Responsibilities...

- **Duty of Care**
- **Duty of Loyalty**
- **Duty of Confidentiality**


 protecting the technological and creative arts
 brenda l. spear & associates, p.c.
 ATTORNEYS AT LAW


Director's Responsibilities...

- **Duty of Care - Definition**
 - A director must act in a reasonable and informed manner when participating in the board's decisions and its oversight to the corporation's management.


 protecting the technological and creative arts
 brenda l. spear & associates, p.c.
 ATTORNEYS AT LAW


Director's Responsibilities...

- **Duty of Care - Elements**
 - Be informed and exercise independent judgment
 - *Attend meetings regularly*
 - *Vote/Participate*
 - *Act in the best interests of the corporation*


 protecting the technological and creative arts
 brenda l. spear & associates, p.c.
 ATTORNEYS AT LAW


Director's Responsibilities...

- **Duty of Care - Elements...**
 - Discharge duties in good faith
 - *Ordinarily prudent person in a like position would reasonably believe to be appropriate under the circumstances.*


 protecting the technological and creative arts
 brenda l. spear & associates, p.c.
 ATTORNEYS AT LAW


Director's Responsibilities...

- **Duty of Loyalty - Definition**
 - Directors must exercise their powers in good faith and in the best interests of the corporation
 - Directors shall not use a corporate position for individual, personal advantage


 protecting the technological and creative arts
 brenda l. spear & associates, p.c.
 ATTORNEYS AT LAW


Director's Responsibilities...

- **Duty of Loyalty - Elements**
 - Avoid:
 - *Conflicts of interest*
 - *Corporate opportunity*
 - *Confidentiality*


 protecting the technological and creative arts
 brenda l. spear & associates, p.c.
 ATTORNEYS AT LAW


Director's Responsibilities...

- **Duty of Confidentiality - Definition & Elements**
 - A director must not, in the regular course of business, disclose information about the corporation's legitimate activities unless they are already known by the public


 protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW


Director's Rights

- Management access
- Books and records
- Notice of meetings
- Right to dissent
- Minutes


 protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW


Liability to Third Parties

- **Directors, Officers, Employees, and Members** of a nonprofit corporation **are not, as such, personally liable** for the acts, debts, liabilities, or obligations of a nonprofit corporation
 - CRS § 7-126-103


 protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW


Liability Coverage

- Statute: *Mandatory Indemnification*
 - CRS § 7-129-103
- Bylaws: *May limit, but not eliminate*
- Insurance: *Errors and Omissions*


 protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Director's Liabilities

- In Colorado, bylaws **CAN eliminate or limit** personal liability for:
 - *Breach of Fiduciary Duty*
 - *Injury to Person or Property Committed by an Employee*


 protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW


Director's Liabilities...

- In Colorado, bylaws **CANNOT eliminate or limit** personal liability for:
 - *Breach of Duty of Loyalty*
 - *Acts or Omissions...*


 protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW


Director's Liabilities...

- **Acts or Omissions...**
 - *Not in Good Faith*
 - *Intentional Misconduct*
 - *Knowing Violation of Law*


protecting the technological and creative arts


Director's Liabilities...

- **Acts or Omissions...**
 - *Transaction with Improper Personal Benefit*
 - *Unlawful Distribution*
 - *Loan to a Director or Officer*


protecting the technological and creative arts


Officers

- **Required Per Statute:**
 - *President*
 - *Secretary*
 - *Treasurer*
 - *Other*
- **May Be Otherwise In Bylaws**


protecting the technological and creative arts


Officers...

- **Per Statute:**
 - *Need not be director or member*
 - *Person may hold more than one office*
- **May Be Otherwise In Bylaws**


protecting the technological and creative arts


Officers - Duties

- **President**
 - *Chief executive officer*
 - *Preside at meetings*
- **Secretary**
 - *Maintain corporate records*
- **Treasurer**
 - *Care and custody of funds*
- **Other**
 - *As set forth in Bylaws*


protecting the technological and creative arts

Don't Worry

- **Sarbanes Oxley**
 - *Applies to publicly traded companies*


brenda l. speer llc
 ATTORNEY AT LAW

A Non-Profit Board Director's Perspective

© 2007 Brenda L. Speer

brenda l. speer, llc | 719.381.1708 | fax: 719.466.8098
 brenda@blspeer.com | www.blspeer.com
 2 NORTH CASCADE AVENUE, SUITE 1100, COLORADO SPRINGS, CO 80903

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Qualities of a Good Director

- Advocate of the nonprofit's mission
- Active participant
 - Is Educated about the corporation
 - Stays Informed
 - Is Prepared
 - Attends Meetings
 - Attends Events
 - Supports Financially
 - Volunteers

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Director Don'ts

- Fail to participate
- Micromanage
- Complain and not correct
- Fail to recognize when it's time to bow out

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Resources

- **Guidebook for Directors of Nonprofit Corporations:** American Bar Association, www.abanet.org
- **The Colorado Revised Nonprofit Corporation Act:** Colorado Bar Association, www.cobar.org
- **Robert's Rules of Order:** www.robertsrules.com

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Resources...

- **Statutes:**
East Library, Penrose Main Library www.cobar.org
- **Colorado Secretary of State:**
www.sos.state.co.us; email notice sign-up
- **Attorney Nonprofit Connection:**
www.elpasocountybar.org/lawyer_referral.cfm
719.473.9700
- **Center for Nonprofit Excellence:**
www.cnecoloradosprings.org

protecting the technological and creative arts
 brenda l. spear llc
 ATTORNEY AT LAW

Questions

- **Answers**
 - The Answer to Life, the Universe and Everything is "42"
 - Douglas Adams, *Life, the Universe and Everything* (*Hitchhiker's Guide to the Galaxy* Trilogy)
 - "It Depends"
 - Universal legal answer