

Alert for elders, trustees, directors, pastors, and deacons

by John W. Mauck

Please be reminded: When you serve on a governing board of a church or not-for-profit organization, even when you serve as a volunteer, you still have potential legal liability for your actions or non-actions. A recent U.S. Federal Court of Appeals decision in a case arising out of Pittsburgh, Pennsylvania, illustrates this risk. In January the court upheld a \$2.25 million jury verdict holding the directors of the Lemington Home for the Aged personally liable for breach of their duty of care. The jury found that the directors had failed to remove the nursing home's administrator and chief financial officer after the results of their mismanagement had become apparent.

The directors had been warned by a consultant that the home was being mismanaged. Two patients had died under suspicious circumstances. Also, the local Department of Health had found that the administrator lacked the qualifications and ability to perform her job. Even though the home eventually filed for bankruptcy, the court ruled that the directors had "deepened" the nursing home's insolvency and upheld the jury verdict that they needed to repay \$2.25 million to the bankruptcy estate.

While this case is unusual, both in the finding of director liability and in the amount of the damage award, it is not outside of well-established law. Directors, deacons, elders, trustees, pastors who are board members, all have a "fiduciary duty" to act in the best interests of the not-for-profit or church they are serving. Even if serving as a volunteer, they still have the obligation to be loyal and diligent in the exercise of their fiduciary duties. When serving as a paid director, board members are protected by a legal doctrine known as the "good business judgment rule" which means the court will evaluate their decisions based on the reasonable judgment of a business person at the time a decision was made --- and will not judge their actions by an adverse outcome which later came about possibly due to circumstances that were difficult to foresee. Board members of not-

for-profit and religious organizations serving as volunteers are also protected by the "good business judgment rule" that shelters directors of for-profit corporations. In the eyes of courts and juries an even higher level of protection is generally afforded unpaid board members because they are usually given the "benefit of the doubt" in close cases. Nevertheless, not-for-profit board members do have personal liability!

Lessons:

1. If you feel called by God to serve on a not-for-profit board, obey God and do so, but serve with diligence. Do your homework. Read the reports submitted by the pastor or management. Ask questions. Review the minutes for accuracy. Consult with other board members to make sure you are adequately supervising the management of the church or other ministry or not-for-profit organization.
2. Make sure your organization has adopted in its by-laws an "indemnification for officers and directors." This is a provision which requires the organization to pay any damages or legal expenses that may be incurred by board members in the discharge of their duties. Such an indemnification will usually not apply if the board member is found to have been negligent or grossly negligent in the exercise of his or her duties. Of course, if the corporation is so badly mismanaged that it files bankruptcy, the indemnification may be worthless.
3. Make sure that the organization carries adequate Officer and Director Liability Insurance. Such insurance will usually cover attorneys' fees as well as damages that may be awarded.

Serving on a board is an opportunity to bless others in cooperative effort to serve and glorify God. Nevertheless, the exercise of those duties should not be taken lightly and the responsibilities are a serious privilege. ■