

**SOCIETY OF AMERICAN MILITARY ENGINEERS
LEGAL DUTIES, RESPONSIBILITIES AND RISKS
OUTLINE**

OFFICERS AND DIRECTORS:

DUTIES:

- Fiduciary duty
- Duty of care (exercise of reasonable business judgment)
- Duty of loyalty (to the membership)
- Duty of obedience (to the governance documents)
- Officer can be held to higher standard

RESPONSIBILITIES:

- Know organization (articles of incorporation and tax exempt purposes)
- Know governance (constitution and bylaws)
- Know who you represent (the membership)
- Understand your role (directors direct; staffs perform)
- Prepare for and attend all meetings (a must)
- Assure adequate facts are available and presented (fully informed)
- Exercise good faith independent judgment (sound business judgment)
- Vote (a must)
- Avoid and self-report conflicts (duty of loyalty)
- Confidentiality (duty of loyalty)

RISK EXPOSURE:

- To Society
 - Failure to fulfill duties causing harm
- To individuals or other entities
 - Personal injury (examples: libel, slander, business interference)
 - Negligence
 - Breach of contract

RISK EXPOSURE MINIMIZATION:

- Indemnification
- Statutory protection
- Insurance
 - Liability coverage
 - Directors and Officers (D & O) Insurance

SOCIETY AS A 501(c)(3) ENTITY:

DUTIES AND RESPONSIBILITIES:

Maintain 501(c)(3) tax-exempt status

Responsibility primarily of boards of direction (national and each post)

VOLUNTEERS:

SAME EXPOSURE:

SAME is responsible for the actions of its volunteers. Both Society and individual volunteers are exposed to suit.

STANDARD OF CARE:

Volunteers must operate within scope of duties to gain statutory protection from liability to those harmed by volunteer actions

RISK EXPOSURE MINIMIZATION:

Sound planning and oversight

Statutory (most states have statutes limiting liability of volunteers as long as volunteer acts within scope of duties, in good faith and without willful intent to harm)

Insurance (Society liability insurance including directors and officers, whose coverage extends to volunteers)

Liability waivers (minimizes risk to Society by volunteer waivers of liability)

Workers compensation (injury to volunteer may be covered)

Ownership of materials (for materials produced by volunteers, can be addressed up-front)

EMPLOYEES:

SAME EXPOSURE:

Employees are subject to the same rules and laws imposed on for-profit corporations, including such things as equal employment, disability, leave, wage and hour requirements. SAME's Employee Handbook defines rights and process.

RISK EXPOSURE MINIMIZATION:

Follow the Handbook

Recusal of department head or executive director as appropriate

Insurance

**SOCIETY OF AMERICAN MILITARY ENGINEERS
DUTIES, RESPONSIBILITIES AND RISKS
NARRATIVE**

OFFICERS AND DIRECTORS:

DUTIES: Directors and officers are fiduciaries of not-for-profit organizations. As fiduciaries, there are three broad duties imposed on officers and directors: the duty of care, the duty of loyalty, and the duty of obedience. These same duties extend both to the national officers and directors and to every officer and director at the post level. As officers and directors, they also apply to the RVP's.

The duty of care is met by discharging the duties of the position (1) in good faith, and (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances. While subjective, this means in general that one must be attentive to the fiscal affairs of the organization, must conscientiously keep apprised of the affairs and important matters of the organization, must strive for full information, and must serve as a check or veto when necessary on management. Put another way, it requires paying attention, acting diligently and reasonably and using the basic attributes of common sense, practical wisdom and informed business judgment. This duty of care must be exercised both with decision making such as with board votes as well as with on-going monitoring of the organizations activities over a period of time. It is much more than just sitting through a board meeting and casting one's vote.

The duty of loyalty recognizes that officers and directors are put in place by membership. They act for the membership and in the interests of the organization's mission and basic well-being. It requires that directors exercise their powers in good faith and in the best interests of the organization, rather than in their own interests or the interest of another entity or individual. Conflicts of interest are a violation of the duty of loyalty.

The duty of obedience concerns a director's obligation to ensure that the mission of the organization is upheld and perpetuated. Directors and officers are responsible to ensure obedience to the charter, the by-laws and the mission of the organization. It also extends to compliance with the law, such as socio-economic protections, taxation, restrictions on self-dealing and antitrust statutes.

The executive committee is a "subcommittee" of the board of direction. As such, its members carry the same duties of office as the full membership of the board. However, in effect, the duties are "tighter" because executive committee members are in a more demanding position. For example, satisfaction of the duty of care is measured against those in "like position," in effect raising the bar. Those on an

executive committee are in a more responsible “like position,” so the standard is higher.

For officers, the standards are even greater. Officers have the responsibility of implementing the directives of the board. They don’t carry out the directives; that is the responsibility of staff, but the officers and the executive committee are accountable to the board and, in turn, to the membership.

RESPONSIBILITIES: Ways in which to fulfill the duties are set forth in the outline above. Pay attention; do due diligence; be engaged. If information seems lacking, inquire. Be a “devil’s advocate” when appropriate; be an advocate no matter what. Being informed, preparing for meetings or votes, attendance at meetings and responding to matters raised whether within or outside meetings, undertaking due diligence and then exercising sound judgment are minimums.

RISK EXPOSURE: The failure of officers or directors to fulfill their duties and responsibilities can place SAME as a whole at risk. Just consider the financial side. Poor decision-making regarding investments or investment and reserve management are easy examples. Damage or injury to third parties can arise from a failure to meet the duty of care. For example, board decision-making based on insufficient information or lack of guidance that libels a member or breaches a hotel contract places SAME at jeopardy but also places board membership at risk if in fact board members violated the duty of care in their deliberative process. This applies to individual board members as well as to the board as a whole.

RISK EXPOSURE MINIMIZATION: Basic ways in which an organization minimizes its risk exposure include avoidance in the first instance, indemnification, statutory protections, and insurance. Avoidance comes about through such things as education, sound planning, and good management and oversight.

Consulting with national headquarters for guidance or assistance as appropriate can maximize avoidance by the posts. Headquarters is there to help.

Some organizations provide for indemnification to officers and directors through bylaws. SAME’s bylaws do not provide such protection. However, SAME might voluntarily agree to indemnify an officer or director, but that would be solely and exclusively up to the board.

SAME has directors’ and officer insurance. The insurance is broader than it sounds. It extends to directors, officers, committee members, and volunteers acting within their scope of authority. It covers the Society itself (including such things as personnel actions and publishers liability) as well as providing protection to individual directors and officers. There are some exclusions from coverage however,

including such things as bodily injury claims, property damage, dishonest acts, and breach of contract claims (such as hotel or other facility contracts).

There is a so-called “model act” that is designed to provide “best practices” governing non-profit corporations. Many states have followed the model act with regard to liability exposure but often not precisely. D.C. law, the place of SAME incorporation, would govern the national board. Post boards will be governed by their own state laws.

As a partial response to increasing exposure to board members and officers, many states have enacted director liability limitations to such things only of “gross” negligence, recklessness or willful misconduct. The “model act” would absolve a director for liability either to the organization or to outside parties except for intentional infliction of harm, an unlawful distribution of funds or an intentional violation of criminal law.

SOCIETY AS A 501(c)(3) ENTITY:

SAME RISK: As a section 501(c)(3) organization, it is the responsibility of the Society as a whole to maintain its activities overall so as to not jeopardize its tax-exempt status. Tax-exempt status is a privilege, not a right. It is conferred by the tax code only if certain requirements are met. To be a 501(c)(3), an organization must be organized and operated exclusively for charitable, religious, educational, literary, or scientific purposes. “Organization” and “operation” are two separate tests, with “operation” as an on-going test.

SAME’s grant of 501(c)(3) status is premised on education and scientific purposes. This grant of exemption extends to all posts, including the separately incorporated posts. All posts must keep in mind that they too must operate in furtherance of the stated purposes of SAME.

There are a lot of regulations in the tax code that prescribe, proscribe and define requirements and restrictions to maintain tax-exempt status. Proscribed activities include allowing net earnings to inure to private individuals. Another is political activity. No political activity whatsoever is permissible. However, the regulations specifically allow lobbying on behalf of legislation as long as such lobbying is not a substantial activity.

A 501(c)(3) can engage in unrelated business activity that still furthers the purpose of SAME without disqualifying SAME from tax-exempt status. However, there is a set of regulations that govern taxation on unrelated business activities and its income (known as UBIT for unrelated business income tax).

RISK MINIMIZATION: It is incumbent upon the national board and the boards of each post to ensure operations in line with the educational and scientific purposes of SAME. That is the only way to protect the special status of SAME. There is no insurance as a fallback.

VOLUNTEERS:

RISK EXPOSURE: Volunteers working on behalf of SAME are agents of SAME in the eyes of the law. This means that their acts or omissions and their care or negligence in performing activities as volunteers are, within limits, considered to be acts or omissions of SAME. As a general rule, non-profits will not be exonerated from liability arising from the conduct of volunteers simply because SAME is a 501(c)(3) or simply because the volunteers are acting without compensation.

SAME is responsible for the actions of its volunteers. Both the Society and the volunteers are exposed to suit. As an exception, as long as volunteers operate (act) within the scope of their duties, most if not all states have statutory provisions protecting the volunteer from liability to those harmed by their actions. However, that normally does not extend to the organization itself.

If volunteers are paid anything for their “volunteer services,” various issues arise. For example does the volunteer then become an employee subject to employment laws? Is the volunteer a third party agent providing service by contract, bringing into question contract issues including breach?

Selection of volunteers also can bring into issue discrimination questions. Even hard feelings from those not selected can arise. These things should be avoided or at least minimized in the selection process.

Another risk area involves those situations where the volunteer creates written curricula, video tapes, audio tapes, printed publications, photographs or other works. There should be preferably advance clarity over whether the volunteer or SAME owns the works with all or some rights reserved.

RISK EXPOSURE MINIMIZATION: Ways to minimize risk are to select volunteers wisely, have a planned course of action, have a communication process in place, and exercise an appropriate level of oversight including reporting of activities.

Some organizations have written standards for selecting volunteers. SAME does not. The risk that SAME volunteers may injure third parties is small. However, care should always be taken in selecting and approving of the right volunteers for the positions.

Volunteers should always be given clear directions and instruction as appropriate. Oversight of volunteer activities is important in minimizing risk.

As stated above, volunteers are often immune from individual liability if the volunteer has acted within the scope of his or her duties, and has acted in good faith, and injury is not caused by the volunteer's willful or wanton conduct. State law normally grants this immunity, but the terms of the grant of immunity can vary from state to state.

There is also a federal Volunteer Protection Act that provides some liability protection for volunteers of a nonprofit corporation. In general, under the federal statute, volunteers will not be held liable for harm they cause if they acted within the scope of their responsibilities, they met any required licensing or certification requirements, if any, the harm is not caused by willful or criminal conduct, gross negligence or reckless conduct, and the harm is not caused by the volunteer operating a vehicle for which the operator must have a license or that must be insured. The federal statute preempts state law to the extent state law is inconsistent with the federal statute unless the state law provides additional protection from liability relating to volunteers.

With regard to written materials produced by the volunteer, before the works are produced, there should be a preferably written understanding about ownership, usage rights and copyright protections. If owned by the volunteer, there should be a grant of license or assignment to SAME. This early clarification will reduce the risk of dispute later.

Finally, SAME carries insurance covering the acts of its volunteers, with some exceptions such as willful wrong-doing. Certain events may fall under the general liability coverage. SAME's directors and officers insurance extends to volunteers when the volunteers have acted within the scope of their authority on behalf of SAME. Unlike directors and officers insurance in the for-profit arena, such insurance in the non-profit world extends to the organization itself, as well as to the individual volunteers.

EMPLOYEES:

RISK EXPOSURE: All nonprofit corporations generally must comply with federal and state employment laws. SAME's employees are hired, fired and managed by its executive director in concert with department heads. Performance evaluations are conducted. In the case of the executive director, performance is evaluated by a select

group of officers and is not a matter for the board of direction. However, it is the board that approves on a 3-year cycle those filling the offices of executive director, treasurer and counsel. As with other matters, the board members have fiduciary responsibilities with regard to approval of the candidates for those positions. Otherwise, the executive director manages employed personnel.

Employment is subject to all federal equal employment opportunity laws, including such things as age discrimination, equal pay requirements, wage and hour requirements, disability requirements, pregnancy non-discrimination and uniformed service reemployment, among numerous others. Without getting into detail, with regard to employees and employment, statutes govern such things as background checks, email monitoring, identity theft protection, immigration, and workers comp, just as applies to any other employer.

Typical exposures to risk exist such as claims of negligent hire or negligent supervision, wrongful discharge, privacy violation and lifestyle discrimination

RISK EXPOSURE MINIMIZATION: SAME has an employee handbook that sets forth personnel policies including such things as grievance procedures and benefits.

While the Society stands at risk for the acts of its employees, acts of employees undertaken within the scope of services but harming others fall under the Society's directors and officer insurance. SAME's directors and officer insurance also covers its own employment practices. In effect, the directors and officer policy serves de facto as an employment practice liability policy. Nonetheless, that should be a last resort.