

Fine Print: Legal Issues of Serving a 501(c)3 Not-for-Profit Corporation

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Introduction

A Professional Society with a Charitable Mission is composed of individual members holding professional status within a specific field or industry, joined together in support of exclusively charitable and educational purposes.

The ASME Constitution states that we exist to “promote the art, science and practice of mechanical engineering and the allied arts and sciences: (MM-1).” The IRS has ruled that ASME is exempt from federal income taxation and that contributions to the Society are deductible for federal income, gift, and estate tax purposes, because the Society is a “scientific, charitable” organization.

As a not-for-profit organization, ASME may not have shareholders, and its net earnings, if any, may not be distributed to members. Internal Revenue Code Section 501(c)(3) imposes a variety of other limitations on ASME, including exclusively charitable and educational purposes, no political campaign activity, and sharp limitations on legislative lobbying. The Internal Revenue Service enforces these rules.

Legally, ASME is:

1. Incorporated in, and subject to, the corporate and other laws of the State of New York;
2. Subject to regulatory oversight by the Charities Bureau of the Attorney General of the State of New York; and
3. Governed by the ASME Board of Governors, acting through ASME officers, committee members and others who have delegated authority.

As ASME officers and volunteer leaders, you have delegated authority from ASME’s BOG to conduct your volunteer leadership activities. However, there are limits to your delegated authority that exist for your protection—and certain responsibility that comes with your authority. Let’s review these now.

Fiduciary Duties

NY Not-for-Profit Corporate Law (NPCL) states that, “In carrying out their responsibility for managing the Society, the Board Members are in a position of trust and are thus required to meet certain Fiduciary Duties.” The duty and responsibility delegated to you by the Board implicitly carries with it fiduciary duty on your part.

Webster defines Fiduciary as, “Founded in confidence or Trust.” Fiduciary Duties include:

1. Duty of Care
2. Duty of Loyalty
3. Duty of Obedience

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Duty of Care:

- Act as an “ordinary prudent person” would in a similar situation.
- Act in “good faith.” In so doing, you may rely on information, reports or statements, including financial statements and data prepared by:
 - a. One or more ASME officers or employees whom are believed to be reliable.
 - b. Counsel, public accountants who you believe to be within such person’s professional or expert competence.
 - c. A duly designated committee of the Board.

Duty of Loyalty:

- Officers must act in good faith” and primarily in the interest of ASME and not in the interest of others or his/her own to the detriment of the Society.
- Officers are expected to protect confidential information obtained while serving in a fiduciary role with the association.

Duty of Obedience:

Officers must keep the purpose of ASME in mind and use best efforts to carry out its mission (but not micro manage).

Conformity:

The NPCL states that officers of Not-For-Profit Corporations enjoy the benefit of the “Business Judgment Rule,” which is a legal presumption that officers have acted correctly and in conformance with their fiduciary duties if they:

1. Do not have a conflict of interest;
2. Are reasonably informed; and
3. Have taken actions which are at least plausibly rational, *even if in hindsight they turn out to be wrong.*

Due Diligence:

The bottom line in fulfilling one’s fiduciary obligations is to give “due diligence” by:

1. Using Common Sense;
2. Attending meetings;
3. Requesting and reviewing relevant information;
4. Doing homework; and
5. Asking enough questions to be satisfied that the information provided is reasonably necessary to make a decision.

Contracts & Meetings

Many ASME meetings and events involve entering into contractual arrangements, for example with hotels, caterers, A/V service companies, and other organizations.

Three things you need to know:

1. Contracts can only be signed by two ASME officers: Michael Weis, Assistant Treasurer and Thomas Loughlin, Executive Director. “Any contract or other obligation to pay money in the work of the Society shall be valid only when signed by the Executive Director or the Assistant Treasurer” B4.4.8.
2. All contracts must come to the Manager, Legal & Contracts for review.
3. Apparent Authority:

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- Clearly identify yourself when representing ASME.
- Many will assume you have authority to negotiate and make commitments in your role as a representative of ASME.
- You can assume personal liability and financial risk. Therefore, when sending correspondence or speaking with a representative from a venue, be clear that you do not have authority to sign contracts on ASME's behalf. Tell them you will forward any communication or proposal to an ASME officer for review.

Public Affairs & Public Statements

Use of ASME Letterhead

Any communications, including, but not limited to, position statements, general position statements, invitations to participate in Society functions, and requests for proclamations with government, the media, or other organizations, may only be issued on ASME letterhead if they have been approved in advance by an Officer of the Society.

Public Affairs

When advocating, informing or advising as ASME leaders, we often interact with the mass media, the general public, government bodies and other interested audiences. Members of the Society are encouraged to participate as individuals in public affairs activity and ASME's policy 15.1, "Public Affairs and Public Statements," is not intended to limit this participation. Rather, it is designed to facilitate ASME involvement in public affairs by clearly identifying the appropriate procedures.

Authority to Express Views A member may represent the Society, presenting or explaining current, approved ASME statements or positions, only if expressly authorized by the President or by the appropriate vice president. Otherwise, a statement by a member must be identified as a personal viewpoint.

The Treasury regulations provide that attempting to influence legislation includes (i) advocating the adoption or rejection of legislation, or (ii) approaching or urging the public to approach members of a legislative body for the purpose of proposing, supporting or opposing legislation. Legislation, however, does not include regulatory actions by administrative agencies. Moreover, the presentation of engineering or scientific facts and/or nonpartisan analysis, study, or research is not considered to be an attempt to influence legislation. In addition, state or local laws regulating legislative activities must be considered.

In the event that an ASME unit wishes to take a position on legislation in a state, contact should be made with the Secretary of State for specific regulations relating to lobbying for that particular state. All contacts by ASME members, Officers, and staff with federal, state, and local government officials for the purpose of influencing legislation are to be reported to the ASME Washington Office.

Categories of Public Statements on Issues

As used in this Policy, the term "public issues" includes, but is not limited to, pending or existing legislation or regulations. All statements made on behalf of the Society must be consistent with the terms and limitations of this Policy. Any such statement released to government bodies, public press, or other organizations must be on ASME letterhead. ASME has established two categories of public statements.

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1. **An ASME Statement.** A statement is designed to provide technical analysis and professional judgment concerning an issue and may also contain an opinion, advice, or conclusions on a technical, national, regional, or local issue.

Authorization & Approval

- a. Must be approved by the chair of the issuing unit
- b. Must be approved by the appropriate vice president(s) or senior vice president having cognizance over the area
- c. Requires an ASME Standard Cover Sheet as shown in Appendix I
- d. Must clearly identify the sponsoring ASME unit
- e. Must have appropriate disclaimer
- f. A copy must be sent to the Managing Director of Strategic Management at least one week prior to release

2. **An ASME General Position Paper.** This statement is intended to provide a balanced and objective review of an issue of broad interest. The position taken carries the full weight of the Society's influence.

Authorization & Approval

- a. Must be approved by the chair of the issuing unit
- b. Must be approved by the appropriate vice president(s) or senior vice president having cognizance over the area
- c. Requires an ASME Standard Cover Sheet
- d. A copy must be sent to the Managing Director of Strategic Management at least one week prior to release
- e. Requires a two-thirds vote of the Board of Governors
- f. In situations where time does not permit Board action, the President of ASME may at his discretion issue such statements on his own authority.

All proposed statements or general position papers should be plainly marked "DRAFT – NOT FOR PUBLICATION," until the final approved version is presented for signature.

It is important that the President be kept apprised on a timely basis of all statements made on behalf of the Society. Accordingly all unit leaders authorized by this policy to speak for the Society should seek to keep the President advised of any statements made or authorized to be made by them, preferably prior to public release. A copy of all statements must be sent to the Managing Director, Strategic Management to be received at least one week prior to release and accompanied by an ASME standard Cover Sheet. The managing Director will ensure that proper procedures have been followed, and will maintain a permanent file of all ASME statements.

Advertising

Units can solicit paid advertisements for both printed and electronic newsletters. But they need to be aware of postal laws. If a section is sending a printed newsletter out bulk rate, postal law prohibits advertising. They should check with their local postmaster on this.

If a section is using ASME.org as their server for their section website, they cannot place advertising on the site. This does not prohibit posting a newsletter on the site that has advertising.

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We are investigating whether sections can solicit sponsors for their websites. K&C needs to recommend a policy on this that is consistent for all of the units.

Deductible Travel Expenses

ASME is qualified as a charitable organization, so certain unreimbursed expenses incurred for approved volunteer activities, as well as donations made to ASME, may be deductible for United States income tax purposes. For more information, please refer to IRS Publication 526: Charitable Contributions, available at the link below.

<http://www.irs.gov/pub/irs-pdf/p526.pdf>

Please note that this information does not constitute tax or legal advice; therefore, you should consult your own tax professional for advice.

Summary

As ASME officers and volunteer leaders, you are helping ASME fulfill its vision “to promote and enhance the technical competency and professional well-being of our members, and through quality programs and activities in mechanical engineering, better enable its practitioners to contribute to the well-being of humankind.” Thank you for your service!!

You have been delegated authority by ASME’s BOG to conduct your volunteer leadership activities. However, there are limits to your delegated authority that exist for your protection—and certain responsibility that comes with your authority. The limits and guidelines are covered within ASME’s policies, all of which can be found on the ASME website. They are listed on the “Leadership” page of asme.org. The direct link is http://www.asme.org/Governance/Society_Policies.cfm.

The following policies can be used as a reference. We recommend you become familiar with them.

1. P-2.4, Insurance Requirements for Contractors to ASME
2. P-4.13, Alcohol and Controlled Substances
3. P-5.4, Chartering of Airplanes, Ships and Busses—Arrangement for Tours
4. P-12.1, Business Practices of Conferences and Events
5. 15.1, Public Affairs and Public Statements
6. P-15.9, Policy Against Discrimination (including Discriminatory Harassment)—Members

A couple simple rules:

- Do not sign contracts.
- Do not use ASME letterhead without approval of a Society officer.
- Do not represent your personal opinions as Society positions.

Adhering to these few guidelines will allow you to function effectively in your leadership role, and ensure that your volunteer experience at ASME is as rewarding and enjoyable as possible.