

Attorneys on Nonprofit Boards

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Sometimes, it boils down to a question of hats.

Two hats, to be exact. And understanding that wearing both of those hats at once can lead to big trouble.

Should Attorneys Serve on Charity Boards?

“We already have legal counsel because we have an attorney sitting on our board.” That’s what we’re told over and over by nonprofit organization executives.

Attorneys on nonprofit boards? It happens all the time. It’s likely that every lawyer reading this post has been approached more than once to accept a directorship at a charitable organization. But is it a good idea?

To the charity, it feels like a no-brainer. The organization gets a bright person trained in the law who may give free legal advice. The lawyer enjoys benefits as well: networking opportunities, increased professional stature, and a way to help out a favorite cause or fulfill a *pro bono* obligation.

What could possibly go wrong? It *can* work out well, and often does.

But there are significant lurking dangers. It is – (as we lawyers cautiously describe many arrangements) – “not without risk.”

The Hat Trick

The common thread popping up in these lawyer-as-board-member situations is that the lawyer wears the wrong hat at the wrong time. Of that the lawyer tries to wear both hats at once – often at the innocent and misguided urging by the organization.

Simply put, this professional with the hat dilemma has multiple legal, professional, and ethical obligations. There are director duties and there are attorney duties; they may conflict unless great care is taken.

The ramifications for the attorney are potentially more serious than for the organization on whose board he or she serves, but the charity may sometimes suffer as well.

Director Duties

The board of directors is the governing body of the charitable organization. It's responsible for planning and carrying out the mission and operations, and safeguarding the organization's financial health and the assets held in charitable trust for the general public.

The authority to make decisions rests with the full board acting collectively. No board member has authority to act alone, but each director has the *separate* and *independent* fiduciary duties of: (a) due care and (b) loyalty. That means the director must act "in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."

The duty of care means that the director will act competently, and be an active and informed decision-maker. The duty of loyalty imposes an obligation on the director to avoid conflicts of interest. (At a minimum, any potential conflict must be disclosed and the involved director should not participate in any action taken regarding that conflict.)

Attorney Duties

An attorney has additional – and sometimes colliding duties – because of the status of being a member of the state bar.

In particular, a lawyer may not represent a client if the representation involves a conflict of interest. That's because the lawyer must be loyal to the client and be able to exercise independent judgment. There are specific rules that apply when a lawyer serves on the board of a corporation that is his or her client. The potential for conflict increases in that situation because the "client" is the corporation itself – not the founder, or executive director, or any one person.

An additional duty is the obligation to perform legal work competently. A lawyer asked to serve on a charity board may have little specific experience in the types of legal matters that arise; for example, the rules of tax-exempt status, third-party liability, or employment law matters generally or as specifically applied to nonprofits.

The View From The Organization's Perspective

There are risks to the charitable organization if an attorney serves on its board. They may arise in a number of situations including, for example:

- The attorney-director may not know much about nonprofit law, or other legal issues that arise and that the organization wants or expects the lawyer to do, like preparing a tax

exemption application package, writing employment contracts, amending bylaws, or maintaining corporate compliance.

- The attorney-director may have more influence (intended or not) than the other directors; this is contrary to the notion that each director is as important as every other director, for purposes of board deliberations, and must exercise independent judgment.
- The attorney-director may not have adequate time and schedule flexibility to take on the director duties, including the requirement to be informed and involved.
- Both the attorney-director and the other board members may be unclear about when the lawyer is giving ordinary director-type advice or giving legal advice. That's important because it can indicate that a lawyer-client relationship has been established and the protection of attorney-client privilege applies.
- There are so many inherent and potential conflicts of interest, the attorney-director may be required to frequently withdraw from participating in consideration of a particular issue or resign entirely from the board.
- The attorney-director's insurance coverage may not apply to pro bono services or to participation in charity board activities.

The View from the Attorney-Director's Perspective

There are risks to the attorney arising from service on a charity board. For example:

- It may be unclear in which capacity the attorney-director is voicing an opinion – as a director or as an attorney. An attorney-client relationship may be inadvertently created when none is intended.
- There may be confusion about who is the client – the organization or one or more individuals closely associated with it.
- There may be problems in voting on matters in which the attorney-director had a hand in creating; for instance, bylaws amendments or employment contracts.
- In certain circumstances, it may be intended that an attorney-client relationship be created for consideration of a specific issue, and that attorney-client privilege apply, but the circumstances are ambiguous.
- The attorney-director may feel obliged to do legal work for the organization on matters in which he or she lacks sufficient experience or competence.
- In some situations, the attorney-director may be called on to advise the corporation in matters involving actions of the directors in performing their duties. There is a risk that this dual role will compromise the person's independent professional judgment.
- The attorney-director's insurance coverage may not apply to pro bono services or to participation in charity board activities.

Conclusion

It's important for both the attorney and the organization to approach the decision about service on a charity board with eyes wide open.

Some of the risks may be mitigated by taking precautions: for example, making sure everyone is clear about when the lawyer-director is acting as an attorney and as a director only; disclosing actual and potential conflicts of interest; and candidly discussing the pros and cons of an attorney serving on the board.

In certain cases, though, the risks so clearly outweigh the benefits for either or both parties that the attorney should decline an offer of a seat on the board.

— *Linda J. Rosenthal, J.D., FPLG Information & Research Director*