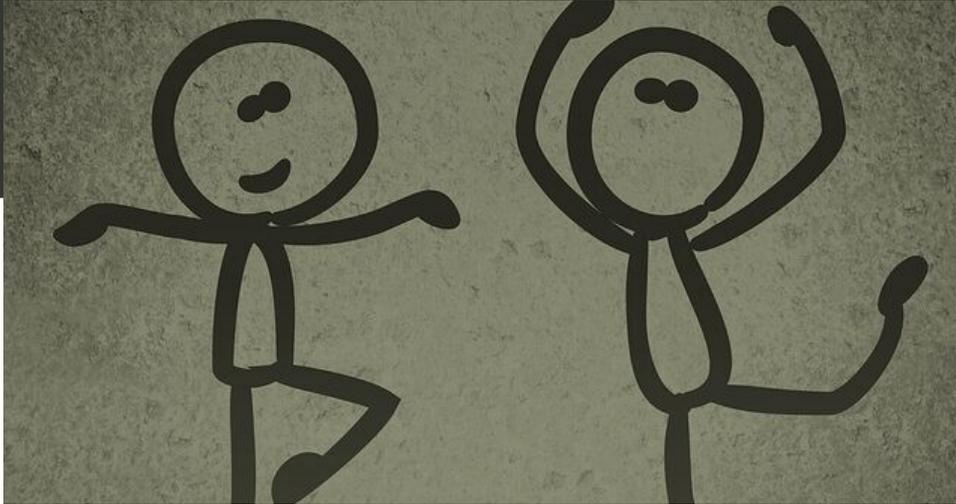


The Delicate Dance of the Nonprofit Board and Staff

02.25.22 | Linda J. Rosenthal, JD



Despite good intentions and high hopes, worthy and promising nonprofits may collapse on themselves and fail.

Sometimes – (often, perhaps, say expert consultants and professional advisors) – a peek behind the curtain reveals dysfunction and conflict between the board of directors and the executive staff. And the root of the problem may have been that the two sparring sides did not know or understand sufficiently their legally distinct and separate roles and duties.

“The nonprofit board vs. executive director balance can sometimes become a tug of war!” explains Molly Cullinane, Esq., in *Who’s in Charge Here? Role of the Board of Directors vs. Role of the Executive Director*. A “nonprofit’s effectiveness can be hampered when the board and executive director step on each other’s toes....”

Michael Davidson at Board Coach agrees. He is frequently asked: “Who is ultimately in charge here?” But “[t]here are no firm guidelines about where the board oversight leaves off and executive management begins. In this grey area, struggles for power and authority often emerge.”

The Governance Basics

So let’s review the basics.

In the United States, most new organizations choose to set up in the corporate form, and the vast majority go on to seek and obtain tax-exempt status under 501(c)(3).

The issue of governance is a matter of each state’s corporation statutes; many now have separate and special rules for nonprofit corporations. In any event, the key concepts are the same: “A nonprofit [corporation] is hierarchical in structure by fiat. Every nonprofit has a board of directors

that is the ultimate responsible body for the organization.” See *Dividing Duties Between Board and Staff* from *Nonprofit Network*.

In the early days, it’s common to find board members wearing “different hats” including functioning in a “staff capacity.” But as soon as possible, “most boards designate or hire their first chief executive who then manages the daily affairs. The chief executive reports to the board and other staff hired later on report to the chief executive. The structure defines accountability but everyone working together for the same objective is what makes these partnerships succeed.”

Using California as an example, an organization like this would be set up as a nonprofit public benefit corporation, most likely without “members.” (In this context, and under current law, supporters who make monthly pledges during telethons and receive mugs or tote bags are honorary members only; they are not “statutory members” with express voting rights.)

California Corporations Code section 5210 is short and to the point. It begins: “Each corporation shall have a board of directors.” [Use of the term “shall” indicates a mandatory provision; “may” is used for permissive though not required actions.]

The statute continues with a caveat: “Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), ...”

That’s the reason why so many modern nonprofits choose not to have official “members” with voting rights; it’s an unnecessary hassle.

Now we get to the meat of the statute: “... the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised **by or under the direction of the board...**”

But – “The Board **may delegate the management of the activities** of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised **under the ultimate direction of the board.**” (emphases in orig.)

A Delicate Balance

“In general terms,” attorney Molly Cullinane summarizes, “the board of directors provides oversight and guidance to the executive director and the nonprofit’s other staff members. The board ensures that the organization stays aligned with its mission and values in addition to complying with all federal and state laws.”

“Board members are the fiduciaries,” explains the National Council of Nonprofits in *Board Roles and Responsibilities*, “who steer the organization towards a sustainable future by adopting sound, ethical, and legal governance and financial management policies, as well as by making sure the nonprofit has adequate resources to advance its mission.”

Once the board hires a “talented CEO/executive director,” that person will then “run the day-to-day management activities of the organization.” In other words, once the organization has “paid staff in place,” the role of the board of directors changes, moving on from “steer[ing] the boat by managing

day-to-day operations” Instead, “board members provide foresight, oversight, and insight: think of them as up in the crow’s nest scanning the horizon for signs of storms or rainbows to explore,....”

“The board of director’s oversight role brings a fundamental tension to the board/executive director relationship,” adds Board Coach’s Michael Davison.

And that’s where the success or even viability of the organization rests on the ability of the board and executive director/staff to develop a respectful and flexible relationship that works for that nonprofit and for those people involved.

Resources

There are many approaches and explanations of how to proceed. Among the helpful resources available online to review and consider are the ones already cited here:

- *Board Roles and Responsibilities*, National Council of Nonprofits
- *Dividing Duties Between Board and Staff*, Nonprofit Network
- *Board/Executive Director Tensions*, Board Coach
- *Who’s in Charge Here? Role of the Board of Directors vs. Role of the Executive Director*, Molly Cullinane, Esq.

And here are a few more to chew on:

- *The Difference Between Non-profit Board & Staff Roles*, Aprio Board Portal
- *Nonprofit Boards: Duties And Responsibilities*, Gene Takagi, Esq.
- *Legal Duties of Nonprofit Board Members*, Jeffrey S. Tenenbaum, Esq.
- *What Every Board Member Should Know*, Adler & Colvin

Conclusion

Fleshing out the details of a satisfactory plan is both a challenge and an opportunity to take advantage of all of the talent, expertise, and enthusiasm in the organization.

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