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Boards of Directors Play Important Role in Fulfilling Missions

By Barry Silverberg

The role of a nonprofit board of directors isn't primarily to raise money. The board's main function is to govern the nonprofit corporation to ensure that the entity achieves its mission.

The Sarbanes-Oxley Act adopted by the U.S. Congress in 2002 was initially intended to raise the bar for integrity and competence for publicly traded companies. According to Peggy Jackson and Toni Fogarty, authors of *Sarbanes-Oxley for Nonprofits: A Guide to Building Competitive Advantage*, the act's effect has been to promote greater accountability within the nonprofit and private sectors.

Despite only two Sarbanes-Oxley provisions that currently relate directly to nonprofits, the act has, attest the authors, established a platinum standard. The act spotlights the critical role the nonprofit board has in ensuring the achievement of the group's vision and mission.

In far too many cases, board members are ignorant of their legal duties, oblivious to their oversight roles and more attuned to managing than governing the organization.

Most boards are composed of volunteers whose skill sets mirror the organization's core operations. Members are selected based on their fundraising, marketing, legal, program or other expertise. They aren't selected based on their ability and willingness to govern.

Fundamentally, nonprofits exist to benefit the public and are accountable to their stakeholders and to the attorney general and IRS. They're controlled by their boards of directors that may, in turn, be controlled by the corporation's membership.

Accordingly, it falls to the board to fulfill the governance role of:

- Setting organizational priorities.
- Providing oversight.
- Ensuring the organization has the necessary resources to achieve its mission.

It's not the board's role to manage the nonprofit.

These roles can't be properly fulfilled without an understanding of the legal duties required of each board member: duty of care, duty of loyalty and duty of obedience.

In short, the duty of care, often defined as the "business judgment rule" requires the board's members to exercise the "care that an ordinarily prudent person would exercise in a like position and under similar circumstances." This can only be fulfilled with full participation in board deliberations and by staying fully informed and asking probing, and sometimes uncomfortable, questions about the state of the organization.

The duty of loyalty requires the board member to have undivided allegiance to the organization's welfare while operating as a member of a corporation's board. This is a critical issue requiring explicit attention when a board is composed fully or in part by people serving as representatives of other entities. In such cases, those board members, by definition, owe their loyalty to the entity they're representing rather than to the corporations on whose board they may serve.

These circumstances can cause significant disruption, distrust and disingenuousness within a board – regardless of whether it's acknowledged. All involved should be aware and sensitive to the potential conflicts of interest that will, inevitably, arise. The board should explicitly discuss the situation and agree upon ground rules to handle sensitive discussions and problems.

In addition, the board should define and be guided by a clearly articulated and widely understood conflict of interest policy. Such policies are now required by the IRS for an entity to receive its 501(c)3 or tax-exempt status.

The third duty of obedience requires the board member to be faithful to the organization's mission while serving on its board, setting policy and taking decisions on behalf of that board. Board members shouldn't take action inconsistent with that mission.

Donors have the absolute right to expect that their contributions are being used for the purposes for which they donated them. Yet, regrettably, even well-known national and international nonprofit corporations have violated this duty – in essence, exercising what they believe to be their better judgment and knowledge over the donor's intent. This is wrong and illegal.

The failure of a board to exercise its pre-eminent governance function leads, inevitably in the long-term, to a dysfunctional and ineffective nonprofit. The ultimate cost for a board's failure to fulfill its legal duties rests with those whose lives rely upon or are enhanced by the work of that nonprofit entity.

With mounting public pressure on for-profit and nonprofit corporations to be more accountable to the public, nonprofit board members should hold higher expectations and require greater engagement by their peers in governing their nonprofit organizations. To do so, board members should have fuller understanding of the role, responsibility and expectations of membership.

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Failing Board Symptoms

A board's failure to fulfill its governance function can be seen when:

1. Attendance at board meetings is uneven.
2. Senior management runs the board.
3. Board meetings are highly choreographed with superficial content and endless reports from senior management.
4. Information is suppressed or withheld by the executive committee.
5. Conflict is suppressed, or endless conflict is used to block conduct of business.
6. The board has no vision or strategic plan for moving the nonprofit ahead, or if it has such a plan, board members don't use it for this purpose.
7. Board members have been in place for a long time and there is little or no rotation of board members.
8. Financial statements and documents aren't presented in a professional format.
9. The auditor doesn't provide the board with a written opinion and recommendations following the audit.
10. The board micromanages the senior staff, and, as a result of these conditions, the board has difficulty recruiting members.

Source: Peggy Jackson and Toni Fogarty, *Sarbanes-Oxley for Nonprofits: A Guide to Building Competitive Advantage.*

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