Board With Care

Perspectives on Nonprofit Governance

Prepared By:
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Problem Boards or Board Problem?

by William P. Ryan, Richard P. Chait, and Barbara E. Taylor

The past 20 years have seen the steady growth of training programs, consulting practices, academic research and guidebooks aimed at improving the performance of nonprofit boards. This development reflects both hopes and doubts about the nonprofit board. On the one hand, boards are touted as a decisive force for ensuring the accountability of nonprofit organizations. On the other hand, the board is widely regarded as a problematic institution. And it's not just the occasional nonprofit financial implosion or scandal that's troubling. All institutions, after all, have their failures. Perhaps more worrisome is the widespread sense that underperforming boards are the norm, not the exception.

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After contributing to these board-improvement efforts for over two decades, as both researchers and consultants, we have recently looked afresh at the challenge of improving nonprofit boards as part of the Governance Futures project. Conceived by BoardSource (formerly the National Center for Nonprofit Boards), in collaboration with the Hauser Center for Nonprofit Organizations at Harvard University, the project seeks to reconceptualize governance. Although it ultimately intends to generate new and practical design strategies, we have focused first on the problems of the board—on the theory that a better framing of the problem will lead to better responses. Through dialogue with practitioners, a review of the literature on nonprofit governance, and the application of various intellectual frameworks (from organizational behavior to sociology), we have begun to see the cottage industry of board improvement in a new light. Most importantly, we have concluded that we have been working on the wrong problem.

Problems of Performance

The problem with boards has largely been understood as a problem of performance. Judging from our recent discussions and interviews with board members, executives and consultants, three board-performance problems appear most prevalent. First, dysfunctional group dynamics—rivalries, domination of the many by the few, bad communication,

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and bad chemistry—impede collective deliberation and decision-making. Second, too many board members are disengaged. They don't know what's going on in the organization, nor do they demonstrate much desire to find out. Third, and most important, board members are often uncertain of their roles and responsibilities. They can't perform well because they don't know what their job is. When we spoke with 28 nonprofit governance consultants about their recent engagements with troubled boards, 19 characterized the client's problem as ignorance or confusion about roles and responsibilities.

Scores of analysts have addressed this problem and, in response, offered one version or another of an official job description for the board. The vast, prescriptive literature can fairly be distilled into five functions:

1. Set the organization's mission and overall strategy, and modify both as needed.
2. Monitor management, and hold it accountable for performance.
3. Select, evaluate, support and, if necessary, replace the executive director or CEO.
4. Develop and conserve the organization's resources—both funds and property.
5. Serve as a bridge and buffer between the organization and its environment, advocating for the organization and building support in its wider community.

The roles-and-responsibilities conception of board performance has obvious appeal. With a problem defined as ignorance, the solution becomes knowledge. And since we already possess—in the form of official job descriptions—the knowledge that boards need, we need only disseminate that knowledge to unenlightened trustees to cure the problem. The expectation is that we can train our way out of board problems.

Behind these problems of performance, however, looms another, more fundamental problem: one of purpose. Some advocates of a roles-and-responsibilities approach inadvertently acknowledge this problem when they reason that, since the board endures as an institution, it must be important. "The widespread existence of boards," writes Cyril Houle, "means that they must possess values which are apparently essential to modern life. It will therefore be useful to assess the reasons why boards are important."[1] The very formulation of this approach—or variations common in the literature—betrays a fundamental problem. If the board is so important, why do we need a whole literature to explain why? This question raises another: What if the central problem plaguing boards is not ignorance about important roles and responsibilities, but lack of a compelling purpose in the first place?

Problems of Purpose

We can approach the problem of purpose in two ways. We can attempt to expose the board as an irrelevant institution constructed around a set of hollow roles and responsibilities. Or, as we prefer, we can ask whether the purposes now ascribed to boards might be necessary, but insufficient, to sustain engaged and effective service by nonprofit board members. Even this approach, however, requires some reflection on the problem of purpose. We start with three causes of the problem.

The Substitute's Dilemma: The Most Essential Work Can Be the Least Meaningful. By law, the board's fundamental purpose is to hold a nonprofit accountable to the broader community. The law offers little guidance, however, on how boards should do so—beyond referring to broadly conceived "duties of loyalty and care." The standard statements of roles and responsibilities offered to board members attempt to add flesh to this legal skeleton. But a job predicated on legal accountability is, almost by definition, not a compelling job. To ensure this accountability, boards focus on norms and standards of minimally acceptable behavior. Trustees are tasked to prevent trouble more than promote success.

This approach places board members in a position akin to that of the maligned substitute teacher. As an institution, the substitute teacher works effectively. The device assures school administrators and parents that children who might otherwise run amok will remain under control. But the job of the substitute teacher is singularly unattractive. Adherence to minimum standards—not trying to teach but merely trying to keep order—is as or more challenging than actually teaching. It is also far less rewarding. So it is with board members. What we have essentially asked is that trustees keep order.

Why not concede that boards do unglamorous but essential work and get on with it? The reason lies again in the paradox of substitute teaching. The teacher who educates children actually stands a better chance of keeping order than the teacher required only to keep order. Similarly, the board that is expected to improve organizational performance also stands a better chance of assuring accountability. By focusing primarily on accountability, we have created a job without a compelling purpose. As a result, board members become disengaged. And the more disengaged they are, the less likely trustees are to ensure accountability—the very reason we created boards in the first place. By asking for a little, we get even less.

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The Monarch's Challenge: Important Work Is Sometimes Institutional, Not Individual. The problem is not that the board is some pointless appendage that renders board members inconsequential. To the contrary, the board, as an institution, is so important and effective that it can sometimes function almost without regard to the effort of individual board members. In that sense, a board may be more like a heart—too vital to rely on conscious effort to perform. Consider four cases where the board can perform well and thus leave board members little to do.

First, boards provide legitimacy for their organizations. Unlike the business sector, where stakeholders can judge a corporation by financial performance, the prospective funders, clients and employees of the nonprofit sector often rely on signals and proxies—none more compelling than the presence of a distinguished board—to assess an organization's efficacy. But beyond lending their names to the organization's letterhead, and occasionally attending a public function or official event associated with the organization, board members need not do anything to create legitimacy. They merely confer it.

Similarly, the board provides managers with what organizational theorists call "sense-making opportunities" simply by meeting, writes Karl Weick.[2] The mere prospect of a board meeting—where little or nothing may actually happen—requires managers to prepare written and oral reports that make sense of organizational events, challenges and data. Management must be able to communicate to the board an integrated and sensible account that describes and interprets the organization's situation. Presumably, a more

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curious or inquisitive board will compel managers to be better sense-makers, but the mere occasion of board meetings goes a long way by itself.

The board, as an entity, also encourages vigilance by managers. Nonprofit executives often say, "The board keeps me on my toes" or "I can feel the board looking over my shoulder." Henry Mintzberg, a strategy theorist, likened the corporate board to a bumble bee[3] that buzzes around the head of the CEO. Ever mindful of the possibility of being stung, the CEO remains vigilant. As that image suggests, even random, annoying activity can be sufficient to keep managers alert. The flurry of activity alone has important effects.

Parsing these individual and institutional roles, we return to the legal role of the board as an accountability agent. We can construe society's mandate to the board as an active one: ensure accountability. But it's also true that the wider society's interests are satisfied to a large extent by the mere existence of the board, which serves as a legally answerable entity in the event of wrongdoing by the organization. The board assumes the ultimate legal responsibility. We hope that responsibility leads the board to "due diligence," but nothing in the law can compel the board to also be high-performing.

As trustees attempt to define the purpose of a body that, in some ways requires little of them, they face something of the predicament of a monarch in a modern, democratically governed state. It's the institution of the monarchy—not the individual monarch—that does much of the work. The monarchy helps to create a national identity, reassuring and unifying the country (especially in times of crisis), marking important events through ceremony and, not least, developing the tourism economy. Some monarchs are more likeable than others, but most purposes of the institutional monarchy can be fulfilled regardless of the individual monarch's capabilities or personality. For a monarch, the solution to this problem of purpose is to respect the official job description, however limited, and then to invent an unofficial job description in order to use the position to advance causes close the monarch's heart. Board members face the same challenge. If they rely on the institution of the board to generate meaningful work, they are likely to be disappointed.

The Firefighter's Down Time: Important Work Is Episodic. Sometimes boards resemble neither substitute teachers nor modern monarchs. Sometimes boards are personally engaged in important work where the trustees' performance proves decisive. Under these circumstances, such as hiring a CEO, considering a merger, deciding whether to expand or eliminate programs, or dealing with a financial crisis or personnel scandal, boards are called on to be diligent and purposeful. But in times of calm, when there is no one to hire or fire, no strategic choice to make, and no crisis to manage, then what is the board's purpose?

We tend to take little account of the fact that important board work can be highly episodic. Board members meet at regularly prescribed intervals, even when there is no urgent work to do. If boards are to be strategy-makers, as many governance gurus advise, can management realistically devise an agenda replete with important "bet the company" questions at every meeting? In response to this demand for strategic content, staff may begin to inflate routine issues into questions of strategy. Board members and staff alike soon begin to equate meeting with governing. And when the important work that boards sometimes do remains undifferentiated from the mundane or even contrived work that comes in the intervals, the important work becomes devalued. Encouraged to go through the motions, board members are frequently driven to ask the ultimate question of purpose: Why am I here?

Boards once filled “down time” by taking a direct role in managing the organization. But the rise of professional nonprofit management has discouraged—though not eliminated— that practice. With the widespread acceptance of the official job description for boards, such hands-on work now constitutes “meddling” or “micromanaging”—a breach of the staff-board boundary. The modern consensus is that nonprofit organizations do not need boards to manage operations. But does it follow that nonprofits need boards to govern every time they convene, even when there are no strategic imperatives to decide?

In most fields where important work is episodic, practitioners do not insist otherwise. A firefighting company, for example, spends only a small fraction of its time actually fighting fires. Some time is devoted to training; some is used to maintain equipment; some is spent on fire prevention; and some is simply spent waiting—cooking, eating, watching television and informally strengthening the camaraderie of the group. Instead of making the preposterous claim that a fire company is always fighting fires, fire departments put down time to good use.

What do boards do with their down time? In practice, of course, we know that boards do more than govern in formal board meetings. For example, we asked board members to think about a “no-board scenario” by posing the following question: What would be the single gravest consequence to your organization if the board did not meet or conduct board business in any way for a two-year period? In response, board members said the organization would suffer the loss of fundraising capacity, loss of good advice or expertise and loss of contacts in the community. Though these assets certainly help nonprofit, and may improve organizational performance, they are not governing *per se*, and they are not always developed or delivered during formal meetings. They are down-time activities that boards pursue when they are not called upon to govern. If boards approached the question of how to use down time explicitly, rather than lament the absence of a perpetually strategic agenda, they might, in fact, become more valuable assets to their organizations.

Specifically, board members might tackle the question of what constitutes effective preparation or readiness to govern. In lieu of formal board training events at long intervals, boards could construe learning about their communities or constituencies as vital, continuous preparation for governing. Instead of merely recruiting members who appear to be well informed, organizations could use their meetings to promote learning by all board members. Board members could construct and pursue a learning agenda through field work, meetings with other boards, or extended interaction with constituents. By learning as a board, the board would have a deeper and shared body of knowledge available when the time comes for important decisions.

If board members are not simply uninformed about their roles and responsibilities, but are struggling to find meaningful work in an institution beset by problems of purpose, then what kind of board-improvement strategies do we need? If we can’t train our way out of problems of purpose, then what?

If board members are not simply uninformed about their roles and responsibilities, but are struggling to find meaningful work in an institution beset by problems of purpose, then what kind of board-improvement strategies do we need?

Problems of Reform

In recent years, the field of nonprofit governance has approached the challenge of board improvement by continually trying to narrow the scope of the proper work for boards to a set of canonical responsibilities. Given the persistent dissatisfaction with board performance, perhaps this approach should be reconsidered. We can start with three questions. Why have we felt compelled to narrow board work to certain prescribed functions? Have we trimmed board service to the right set of essentials? And does the official job description really advance better governance?

We can start with three questions. Why have we felt compelled to narrow board work to certain prescribed functions? Have we trimmed board service to the right set of essentials? And does the official job description really advance better governance?

The official job description undoubtedly represents an earnest effort to improve governance by focusing boards on the fundamentals. But it also solves another pressing need: how to divide organizational labor between nonprofit board members and an ever more professionalized nonprofit management. After all, the rise of professional management, rather than a sudden decline in trustee knowledge and intelligence, may best explain why board members have become increasingly uncertain about their roles. In a word, they have been displaced. As Harold Wilensky argues in a seminal analysis, the rise of new professions typically involves "hard competition" in which a would-be profession "sloughs off dirty work" on nearby occupations.[4] Doctors gave unpleasant tasks to nurses, who shifted them off to nursing aides, where they will remain until the emergence of a nurse's aide profession. Faculty offloaded admissions and advising on a new cadre of student personnel administrators. Though not as ungracious as sloughing off dirty work, professional nonprofit management has gently kicked the boards upstairs—confining them as much as possible to policy and strategy (even though there is little evidence that boards are as influential as managers in the policy-and-strategy spheres).

Many board members have trouble staying there, and when they cross the boundary into management territory, many executives and consultants are quick to condemn them as either woefully ignorant or downright mischievous. Whatever the reason, when boards so "misbehave," managers proffer the official job description as guidance, or wave it like a restraining order. But in reality, it's hard to discern the line that divides policy and strategy from administration and operations. How can we be sure an operational matter is not of sufficient significance to warrant the board's attention? It doesn't help to assert that governors should not manage when the difference between management and governance is not crystal clear. It's also hard to govern at arm's length from the organization and without first-hand knowledge of the "business." How can a board develop strategy without direct contact with the operational realities of the organization—which is precisely where new strategies and ideas often emerge and are invariably validated or discredited? How can a board evaluate the performance of an organization without some direct knowledge of the enterprise?

About the Author. *William P. Ryan* is a consultant to nonprofit organizations and a research fellow at the Hauser Center for Nonprofit Organizations at Harvard University. *Richard P. Chait* is a professor at the Graduate School of Education, Harvard University. *Barbara E. Taylor* is a governance consultant and senior consultant with Academic Search Consultation Service.

Rather than narrowing our sense of the board's work, we should try to broaden it. In fact, in developing managers or leaders, we do precisely this.

All A-Board

by Karl Mathiasen

A fully engaged, working board must faithfully struggle to form a body within which there are shared values, understanding, tolerance and mutual respect.

The word advocacy can mean many different things in the nonprofit world and can be at the heart of activities, strategies, mission, core values, and overall organizational effectiveness. Fundamentally, advocacy is about speaking out and making a case for something important. The target of the advocate's voice is most often a person, group or institution that holds some power over what the advocate wants.

It is an underlying assumption of this article that most of us want a working board and, if this is what we want, the personal qualities of board members are enormously important. Why?

A fully engaged, working board must faithfully struggle to form a body within which there are shared values, understanding, tolerance and mutual respect. It does not have the time to deal with those who come to the board without real commitment or are unwilling to learn about and follow the dynamics of that board.

Thus, as difficult as the task of identifying desirable personal qualities might seem at first glance, it remains an important and worthwhile task. My observations about some desirable and undesirable qualities for board members follow.

Desirable Qualities

Commitment. The most important quality a nominating committee should seek in a board member is commitment to the organization's cause or purpose, or at least openness to that commitment—a demonstration of a potential for commitment, and evidence that the candidate shares the values of the organization.

What do these candidates do with their time, and what other causes or purposes do they support? Do they have a history of committing time and energy to an agency, are they faithful, and do they follow through? If an agency is dealing with social-change issues, other social-change organizations may offer prospective candidates.

People's interests vary enormously, and different things turn them on. It is a common error to expect that a good board member in one organization will make an equally good board member in another organization—perhaps in moving from an arts organization to an action-oriented public interest group. Gather some other evidence of the candidate's interests.

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Common Sense and Good Judgment. Common sense is unfortunately a rather rare commodity. But it can be found, and is sorely needed when board tempers flare, when the presentation of new ideas is upsetting, when strong positions are taken, or pressure for decisions mounts. People with common sense somehow know that nothing is as good as it seems; they sense that amid adamantly held and apparently opposite points of view, there is common, sensible ground, and they are instinctively aware that the need for haste and immediate action is always exaggerated.

Judgment relates to common sense, obviously, but it has more to do with how one proceeds as a board member. People with judgment understand how and when to raise issues. They know when to support the staff or the staff leader, and how and when to confront leadership without raising staff defenses more than is necessary or useful.

An important piece of information that nominating committees can seek is whether that person has been able to raise difficult issues in other situations, in a way that has been firm but helpful. That sort of person is what a board needs, rather than someone who enjoys the heady role of the adversary, one who is determined to win at any cost, or even one who is willing to be a "yes" man or woman.

Respect for Group Process. Another desirable quality is found in those people who really like working in group situations—those who actively enjoy helping a group come to a good conclusion.

Let's face it, we all have friends who are fine, bright people and yet have very little tolerance for any sort of group process. Often they ridicule group decision-making, feeling that it reaches the lowest common denominator, rather than the best decision. Again, one way of considering whether people have this quality is to see what they do in their lives. Do they often involve themselves in group situations? Are they members of other working organizations and have they been members—successful members—of other boards? What do others think of them in terms of their capacity to work in group situations?

A fourth quality is *centeredness*. People who are centered and self-aware have come to some reasonable acceptance of who they are. They are not joining a board solely to prove something, or simply as a way of gaining recognition.

Centered people often have the courage to raise the hard questions, the dumb questions, and to risk.

This is not to say that people should not join a board out of self-interest. Quite to the contrary, while a good board member must be committed to the organization's interests, the best board members often have personal goals that they hope will be furthered in part through their board service.

At a minimum, most people who serve on a board believe that their own standing in the community will be improved. What is difficult for a board to bear, however, is a person who is so self-important—or perhaps so insecure—that every question requires an answer, every remark requires a riposte, and all situations require the wisdom that only that board member can impart.

Nominating committees will need to ask questions about how that board member is perceived by others. Does that person seek to be heard and acknowledged, or is he or she able to listen to others, speaking only when a genuine contribution can be made?

Centered people often have the courage to raise the hard questions, the dumb questions, and to risk. They will say things that others with less courage or self-acceptance might not be willing to say. These people often reassure weaker board members by their limited use of power, and frequently provide much of the cement that binds a board together.

Openness. People who have this quality are open to new ideas. They manifest in all that they do—in their career paths and their community endeavors—that they are not stuck, that they quest for what might work, and what might help. They are not unreasonably angry at the changes in our society, hoping only to go back to the "good old days." They do not hold on for dear life to what is, or what they dream must have been, but demonstrate a keen interest in going forward in the face of upheaval and uncertainty. They are also wise enough to know that the future offers choices—often difficult choices—and do not insist that one particular approach is the only path an organization can take.

I'm vividly reminded of a woman who has devoted 40 years of effort to the issue of peace. After describing her work, she said, "We've lost every significant battle for 40 years. The masses of armaments accumulate and the danger of nuclear holocaust increases." Still, she is ready to go again, and seeks new ideas and possibilities that can serve as tools for peace.

People like this, people who are excited by the possibilities of life, are assets to a board. They can be life-giving—not only to the board, but to the whole organization.

Sense of Humor. This last quality may seem idiosyncratic or frivolous, but it is no less central than the other qualities discussed above. Having a sense of humor does not imply that a person must be humorous, but it does suggest that if board members do not have modest vestiges of humor, board work can become irritating, arduous, boring and unrewarding.

Boards of directors do odd and perplexing things. In response, one can become annoyed or one can adopt a more philosophical stance, and a sense of humor helps. A tolerance for the strange and wonderful things people do in groups is enormously important, particularly for caring and committed board members. It is, after all, better to laugh than to cry.

A second value provided by those who have a sense of humor is the capacity to relax and not take themselves too seriously. Board members rarely win or carry their points, and will more than likely have to compromise or adjust to the emerging consensus. People who see the humor in a situation, and those who can perceive the possible absurdities in their own positions, are generally more satisfied—and satisfying—board members. They often make the most of their points or positions as well.

Of course, one may say, you will never be able to find people for your board like those described. Is your organization not good enough to attract such people? Or have you simply not taken the task seriously enough, and not devoted enough energy to the job?

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Some Less Desirable Qualities

Years of experience in the boardroom, coupled with a persistent, puzzling sense of concern, have led me to try to identify several kinds of people who prove to be unhelpful in the boardroom or, worse, both frustrating to board members and disruptive of the board's work.

Johnny One-Note. This is an old rubric derived from an Ethel Merman song, about a person who is only able to sing one note. Unfortunately, Johnny One-Note is seen only too often in non-profit boardrooms, raising one particular concern meeting after meeting, sometimes relevantly, but most often irrelevantly. The issue or concern has become the focus of that person's life, and so dominates his or her existence that it must be drawn into every discussion at the slightest provocation—or even without provocation. The issue itself may indeed be legitimate and important (special education, healthcare for the elderly, affirmative action, environmental preservation, etc.), but it has become an obsession.

Board members don't know how to respond, or how to incorporate that person's views, and often end up feeling both irritated and guilty. It takes a skilled chair to acknowledge this individual, and then to restart the discussion that has been interrupted. Boards need people who will venture beyond single compelling concerns and join with fellow board members in determining what is best for the whole organization.

The Over-Boarded. Every community has a distinguished panel of well-known board-sitters and every board aspires to bring these people to its organization. Yet for all of their allure, they are usually so committed to other activities that they will do little for a working board.

Somehow we are so dazzled by these people that we all miss those who are competent, potentially open to commitment, and anxious to serve their community. They are next year's movers and shakers, and are worth seeking out. Most often, they make better board members for the kinds of organizations we serve than those who are community stars.

The Devil's Advocate. "It is my job to raise issues that will not otherwise be considered by this board as it rushes to achieve consensus," says the devil's advocate. Self-appointed, and a bit sanctimonious, this person enjoys pulling the board back, insisting that each issue be carefully dissected for hidden pitfalls and "what ifs."

Boards do need to ponder carefully what course they choose to take, and that is hard work. But it is presumptuous—not to say annoying—for one person to assume that role for the board. It demeans the capacity and the credibility of other board members and retards the work of the whole board. Such people are easy to spot in conversations, and often actually offer themselves to board nominating committees as devil's advocates. Beware!

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Authority Figures. Boards are often disabled by having one among them who is regarded with such respect or awe that other board members are reluctant to speak their minds. Intentionally or unintentionally, these people exude such authority that board meetings can become little more than monologues. Policies are not thoroughly and usefully thought out, but are pretty much preordained.

A board either needs to aim to have a number of authority figures—preferably of differing points of view—or decide that it can do well enough without any. Those who are accustomed to leading find it hard not to run things, and thus tend to dominate meetings.

Off-the-Wall Artist. There must be a much more genteel term that describes this person but, after several months' thought, none has come to mind. Perhaps little needs to be said about the people who somehow seem to misunderstand the role of a board member. They are happiest when the discussions at board meetings stimulate them to propose a tangential—or even farther out—idea about what the organization might do. They tend to be stimulated rather frequently, and their ideas usually don't fit in well, or at all, with where the organization is going. Undaunted, they bask in their own sense of creativity and frequently lead the board astray.

A companion characteristic of these off-the-wall artists is a tendency to do nothing or virtually nothing between board meetings. The feeling of having been so immensely creative at the last board meeting often appears to have exhausted their capacities until the next meeting.

Final Thoughts

These two lists are undoubtedly incomplete, and experienced board members could surely add to them. But the central point is this: since most of us recognize the desirability and undesirability of the people described above as board members, it's well worth the effort to avoid those who are truly unsuited and uncomfortable with board work, and to seek out those who understand, respect, and enjoy working with others.

Endnote. This is article is excerpted from "Board Membering: What kinds of people make good board members? What kinds of people are needed to make up a good board of directors? Reprinted with permission. Copyright 1986, Management Assistance Group. The entire article is located at their Web site: www.managementassistance.org.

About the Author. *Karl Mathiasen* is one of the nation's leading experts on board/staff dynamics and board development, and co-founded the Management Assistance Group (MAG) more than 25 years ago. Based in Washington, D.C., MAG is a nonprofit that helps social justice organizations to plan strategically and to address organizational challenges in areas such as management, board and staff development, fundraising, and adjustments to change and growth. Mathiasen has served on more than 35 nonprofit boards of directors.

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Exploring the Puzzle of Board Design: What's Your Type?

by David O. Renz

Thoughtful board design involves the consideration of many factors and, fundamentally, offers important choices regarding power, control, engagement, accountability, and autonomy.

THIS ARTICLE BEGAN AS SOMETHING OF A CHALLENGE. COULD WE DEVELOP A BASIC typology of nonprofit boards that would offer nonprofit leaders a useful framework—a framework that would help them develop boards that are functional and truly add value to the execution of their missions and visions? The question of board types is really about design, and in reality, most of us are living with a board design that is not of our own choosing. In too many organizations, one might even question whether anyone actually designed the board. But if you had the option to choose a design, what type of board would you choose?

Thoughtful board design involves the consideration of many factors and, fundamentally, offers important choices regarding power, control, engagement, accountability, and autonomy. Designs that enable an agency to achieve its goals are grounded in a solid understanding of its mission, vision, core values, the nature of its work, and the characteristics of its operating environment. Building from this understanding of the context and results we seek, we can begin to clarify which types of boards may be better aligned with the needs of our agencies.

Nonprofit boards have shared roots in the legal structures of corporate and tax law, but beyond that, a good share have been created by mimicking each other—taking their bylaws and practices from other organizations with which their founders had experience:

What should we have in our bylaws?

Let me give you a copy of the bylaws from this other board on which I serve—it seems to work pretty well!

But are these similarities just window dressing that obscures a more important set of dimensions from which board design should flow?

A few authors have suggested frameworks for typing nonprofit boards, usually by explaining boards as types that may be rated along a single continuum. It is our experience that the use of a single characteristic to explain variations and commonalities across all types of boards is overly simplistic and mechanistic. Therefore, we suggest an approach

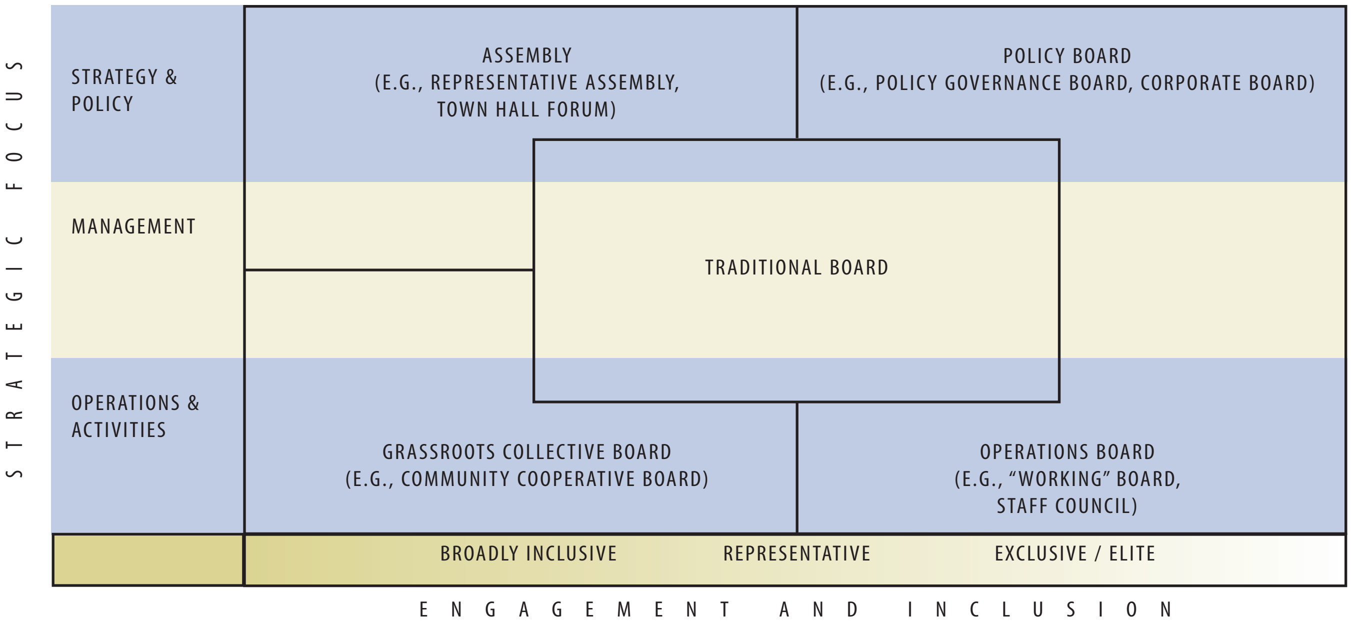

TABLE 1: BOARD TYPES RATED FOR STRATEGIC FOCUS AND STAKEHOLDER ENGAGEMENT

that builds on a mix of the constructs from both organizational research and nonprofit board literature but, perhaps not surprisingly, ends up focusing on two primary aspects of governance that many would consider most critical to the nonprofit sector.

The Two Primary Dimensions

When we distill the organization research concepts that are most germane to the world of nonprofit boards, the result is a core typology that emphasizes two dimensions: strategic focus and stakeholder engagement. This is because, when designing a nonprofit board, there are two central questions to address:

What is the work this board needs to accomplish to meet the needs of this organization?

How do we best connect this organization to the community and its most important constituencies?

Not everyone gives these questions explicit consideration (many boards are developed in a very ad hoc, intuitive manner) yet the answers to these questions fundamentally define the type of board the organization needs. Further, once implemented, the choice of type shapes the nature of the board's performance with regard to these two fundamental matters—whether the choice is productive or not! Developing these questions from the perspective of organization design, therefore, results in two primary dimensions of board type:

Strategic Focus: The degree to which the board's work emphasizes leadership, strategy, and policy, versus the implementation of operations and activities. Boards have no choice regarding whether they will work on long-term and strategic decisions for the organization; this is a core responsibility. However, to the extent that there is no staff or other volunteers, the board may invest a significant share of its time in the actual implementation of the organization's operations. The options along the Strategic Focus continuum are as follows:

What is the work this board needs to accomplish to meet the needs of this organization? How do we best connect this organization to the community and its most important constituencies?

Primary and Secondary Dimensions of Board Type

Primary Dimensions:

SCALE A: STRATEGIC FOCUS:

THE MAJORITY OF THE BOARD'S WORK ACTIVITY IS FOCUSED ON:

STRATEGY & POLICY	(4) *S*	(3)	(2)	(1)	(0)	(1)	(2)	(3)	(4) *A*	OPERATIONS & ACTIVITIES

SCALE B: STAKEHOLDER INFLUENCE & ENGAGEMENT:

STAKEHOLDER/CONSTITUENT ENGAGEMENT (NATURE OF INVOLVEMENT AND INFLUENCE) IN AGENCY DECISION PROCESSES IS:

BROADLY INCLUSIVE	(4) *I*	(3)	(2)	(1)	(0)	(1)	(2)	(3)	(4) *E*	EXCLUSIVE/ELITE

Secondary Dimensions:

SCALE C: MISSION ACCOUNTABILITY:

THE ACCOUNTABILITY AND FOCUS FOR THE ORGANIZATION'S WORK DERIVES PRIMARILY FROM:

PROFESSIONAL/PRACTICE CONTENT FOCUS	(4) *P*	(3)	(2)	(1)	(0)	(1)	(2)	(3)	(4) *M*	COMMUNITY-MARKET FOCUS

SCALE D: BOARD AUTONOMY:

THE DEGREE OF INTERNAL VERSUS EXTERNAL CONTROL OVER THE APPOINTMENT AND RETENTION OF BOARD MEMBERS IS:

SELF-PERPETUATING SELF-REGULATING	(4) *SR*	(3)	(2)	(1)	(0)	(1)	(2)	(3)	(4) *X*	EXTERNALLY APPOINTED & REGULATED

SCALE E: DECISION CENTRALITY:

GOVERNANCE AND LEADERSHIP DECISION PROCESSES ARE DOMINATED BY:

CEO/STAFF DOMINANT	(4) *C*	(3)	(2)	(1)	(0)	(1)	(2)	(3)	(4) *B*	BOARD DOMINANT

TYPICAL BOARD LABELS OR TYPES	PRIMARY DIMENSIONS OF BOARD TYPE		SECONDARY DIMENSIONS OF BOARD TYPE		
	STAKEHOLDER ENGAGEMENT	STRATEGIC FOCUS	BOARD AUTONOMY	MISSION ACCOUNTABILITY	DECISION CENTRALITY
POLICY GOVERNANCE BOARD	E	S	SR	ANY	B
MANAGEMENT BOARD	E	-0-	SR	P	-0-
CORPORATE BOARD	E	S	SR	P	C
TRADITIONAL/CLASSICAL BOARD	-0-	VARIES	SR	-0-	-0-
OPERATIONS OR "WORKING" BOARD	-0-	A	SR	ANY	C
FUNDRAISING BOARD	-0-	A	SR	P	C
REPRESENTATIVE ASSEMBLY	-0-	ANY	-0-	M	B
COMMUNITY COLLECTIVE BOARD	I	S	X	M	B
TOWN HALL ASSEMBLY	I	A	X	M	B

TABLE 2: PROTOTYPICAL CHARACTERISTICS OF COMMON BOARD TYPES

Strategy and Policy: All board work is focused on the strategic, long-term direction of the organization, including external scanning, goal and strategy development, policy development, and overall evaluation and accountability.

Strategy, Policy, and Management: Most board work is focused on strategy and policy, but also includes some high-level management functions.

Management: The majority of the board's work is comprised of managing the operations of the agency, including planning, organizing, directing, supervising, and evaluating agency operations.

Management and Operations: The board spends most of its time managing the operations of the agency, but also serves as the actual workforce for certain administrative or programmatic operations.

Operations and Activities: The majority of the board's work is comprised of actually doing the frontline operational work of the organization, because board members also are the organization's staff or volunteers.

Stakeholder Influence and Engagement: The central question of this continuum focuses on the nature and scope of the involvement of key stakeholders in the decision-making processes of the organization. Usually, the stakeholder group comprises some mix of clients and other beneficiaries, key funders and donors, community leaders, and others. Is stakeholder engagement (involvement and true influence) in decision processes broadly inclusive of all stakeholders, or is it relatively exclusive? The range of variations may be described as follows:

Broadly Inclusive: All key stakeholders serve as members of the governing body and are directly involved in all decisions of the agency.

Inclusive/Representative: Board members are widely representative of all key stakeholders of the agency and make regular decisions; key stakeholders are directly involved in the major decisions of the agency.

Representative: Stakeholders are involved in the decisions of the agency through their official representatives, who serve on the board and are accountable to stakeholders.

Less Inclusive: Most decisions are made by a relatively select group with occasional involvement of select stakeholders (directly or via representatives) in the process of making selected decisions of the organization.

Exclusive/Elite: All decisions are made by an exclusive and select elite with no significant involvement or engagement of any stakeholders in the decision processes of the organization.

Table 1 (on page 39) illustrates the range of options and the "location" of five general board types within this framework. These placements are only illustrative of general tendencies, however. While the table illustrates a likelihood that a given board type will be located in one part of the table or another, there certainly will be boards that claim to be of one type, yet exhibit practices not consistent with this schema. This is symptomatic of the reality that there is a rather low level of consistency linked to the various type labels. It also reflects that, while these two dimensions are primary, secondary dimensions also help explain some significant variation among boards that appear otherwise to be of similar type.

The traditional type of board occupies much of the middle, because it tends to be a midpoint compromise for each of these primary dimensions, and its many variations blur across different characteristics. This is why so-called traditional boards look different from each other, even though they are the same type. Their existence in the middle may also reflect a lack of clear choice-making and design.

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The more a given board becomes involved in operations (e.g., the so-called "working" or operations board), the less time it has for the strategic thinking and community engagement functions that are so central to effective governance.

It is important to recognize that there is no single type that will be best for all organizations. It is equally important to recognize that each of these types has distinct benefits and shortcomings—and weighing the tradeoffs is the essence of the design issue for every organization. For example, the more a given board becomes involved in operations (e.g., the so-called "working" or operations board), the less time it has for the strategic thinking and community engagement functions that are so central to effective governance. And if they wait for a good time to handle strategic governance matters, it won't happen—we know from experience that urgent matters interfere with the important; the immediate tends to overpower the long term. Further, many of us are living with designs adopted to serve an earlier stage of the organization's development; we just never got around to refining our board design and the agency developed and grew up around us!

Secondary Dimensions

We have found three additional dimensions that are especially useful in helping complete the picture that the Strategic Focus and Stakeholder Engagement dimensions begin to paint. These dimensions are as follows:

Board Autonomy: the degree to which the board is independent versus controlled by external entities. No board or organization is entirely autonomous, but a unique characteristic of many nonprofit boards is that they are independent and self-perpetuating (i.e., select their own members). These boards have much autonomy and are largely self-regulating. The alternative extreme is the board that has no power over who will be members. This is the case, for example, in membership associations, where organization members directly elect all members of the board.

Mission Accountability: this dimension explains the degree to which the organization's accountability for quality or performance is driven by the professional content of its work versus the extent to which the organization's accountability is driven by the needs and interests of its community or primary market. A hospital, for example, certainly cares about the community it serves, yet its key accountability standards come from the core content of the organization's work. Its accountability is grounded in the health professions and assessed by profession-based accreditors. The typical membership association, on the other hand, draws its benchmarks for accountability primarily from the expectations and demands of its members; there are no external quality assurance systems or criteria that play a significant role in defining acceptable performance for the organization.

Decision Centrality: this is the question of where primary decision authority lies. Are governance and leadership decisions made together by executive and board, or dominated by either the staff or the board? In some organizations, staff drives the strategic agenda and makes key decisions; in others, the board dominates the agenda and key decisions and the role of the staff is to implement. The midpoint of this continuum is the balance advocated in much of the prescriptive literature on boards, promoting the value of achieving a balanced partnership between the board and the chief staff position. A unique version of this is the founder-dominated board, where the founder (regardless of role) dominates all significant decisions of the agency.

There are other characteristics that influence the nature of the board, but we find they do not fundamentally differentiate one type from another. Often these are the outgrowth of a choice about board type. For example, board size (i.e., number of members) makes a difference in board dynamics, but the choice about size usually flows from the choice of a specific model (e.g., a "corporate board" will tend to be quite small and a "fundraising board" often will be quite large).

Thinking about Your Board Type

The framework proposed in this article is preliminary in nature, developed from our extensive research and consulting experience and informed by the literature of organization studies research. The next step in its development is to conduct empirical research to validate the framework and test its utility for board design and development. We welcome reflection and feedback from board and agency leaders, consultants, and researchers regarding the validity of the framework and its utility in explaining variation in board type.

This tool can be useful for an individual leader to use as they reflect on the implications of their board type for the work of their organization, but it will be more useful as a basis for dialogue among a group of agency leaders as they consider how their board works and the degree to which that type is suited to the organization and the community it serves.

Boards and Leadership Hires: *How to Get It Right*

by Deborah Linnell

Always involved in setting the organization's agenda, the board soon realizes that it has made a mistake.

How a board handles a leadership transition can have powerful and long-lasting effects. This article discusses how the board's handling of this pivotal moment can result in long-lasting problems—and what your board can do to get it right.

Consider this example. For three years, the board of an organization that promotes volunteerism has struggled with a lack of faith in its executive director. The mild-mannered director lacks personal energy and functions as a coordinator rather than as a manager. His leadership style creates a loss in momentum, although the organization's rates of volunteer participation are high. Made up of young professionals, the board has let its frustration build, prompting this executive to intuit that he has not met expectations and resign. The board decides it needs a real go-getter who will focus on fundraising, and it gets what it wants: a motivated, former junior staff consultant at a for-profit firm serving nonprofits, who drives ahead without consulting others. In fact, she often appears annoyed when others voice their opinions. Staff begins to filter out.

Deborah Linnell is the director of programs at Third Sector New England.

Always involved in setting the organization's agenda, the board soon realizes that it has made a mistake. The problem is, its members have spent valuable social capital in promoting the new director as organizational savior. The director leaves within the year and the organization—now significantly weakened and disheartened—is consolidated into another. How do such things happen?

Board Perceptions Inaccurate

By design, boards are often disengaged from the day-to-day work of an organization. This detachment means that boards do not understand an organization's cultural dynamics as its staff members do, and this lack of understanding can prompt a board to develop uninformed beliefs and make poor decisions based on those beliefs. In the above example, the board developed a narrative about its executive director but failed to recognize that the director's role as a coordinator encouraged the organization's numerous volunteers to step up and get involved in core functions. The new executive was given a "charge" by the board to take greater "executive" leadership, and her approach ultimately stripped the organization of what kept it alive during times of struggle.

Nonprofit Governance as Adaptive, Not Prescriptive

For several decades, nonprofit boards have adopted a prescriptive approach to governance. But given the variety and dynamism of nonprofit organizations, some of these prescriptions do not make sense. A primary consideration for recruiting board members should be their passion for organizational mission. Organizations should convince attorneys, accountants, and other experts to volunteer their time as needed. They should also create a fundraising committee that is not board-centric. Those who govern should focus on stewardship of the mission on behalf of the constituents in whose name the nonprofit holds its tax-exempt status.

This kind of stewardship requires ongoing learning—about the organization, its culture, the field in which it works, the field's history and evolution, and the systems affecting constituents and the organization. It means adapting communication vehicles for this kind of ongoing learning and, most important, not relying only on the executive director to interpret the organization's current situation. This requires attracting board members who are system thinkers rather than bean counters and who can hold current reality and future vision in their minds while also aligning with the best elements of the organizational culture. This requires a different kind of recruitment, orientation, and ongoing management of governance and a deconstruction of the sacred-cow notion that board members should talk only with the executive director.

How Boards Can Get It Right

While the belief system of a board is developed upstream of an organizational transition, it flows down into the organization as a product of the hiring process. If boards want to do an excellent job at this powerful moment, they should take certain steps before a leader departs as well as once a leader decides to leave an organization.

Boards should take these actions before a leader declares readiness to leave:

- Board members should be recruited primarily for their commitment to the mission over skills, connections, or other characteristics.
- On occasion, have board members "intern" by taking part in the organization's core work so that they can familiarize themselves with the way the organization really functions.
- Create board/staff/stakeholder committees so that the board is integrated into organizational culture.
- Research nonprofit life cycles so that the board understands some of the reasons for an organization's behavior.
- Ensure that the organization has depth or bench strength to prevent overdependence on a single leader.
- Solicit information formally and informally and listen to constituents, clients, community members, staff, and funders; ask them to tell the truth. If an executive director is in continuous friction with any or all of these parties, he does not understand leadership, and the board should act to move this person out for the health of the organization.

Boards should take these actions once a leader declares readiness to leave:

- Do an early exit interview to get perspective on an outgoing leader's belief systems; style; and experience with board, staff, and other stakeholders.
- Assess the organization—its position in the field, its financial state, its relationships with stakeholders, its culture—any chronic problems and strengths and lay out a list of desired characteristics for a new director. It is almost always better for an external party to do this evaluation, but take the time to challenge your own assumptions about what the organization needs. Leadership transition consultants may be the best external candidates for this role.
- Create a position profile for the new executive based on internal and external assessments and a consideration of the organization's needs relative to its life cycle over the next five to seven years.
- Involve the staff and, where appropriate, other stakeholders in hiring the new director.
- Create a set of interview questions that identify the leadership qualities that promote a healthy organizational culture and ensure that regardless of the skill or experience of a new hire that these qualities remain "the essentials" for executive leadership.

Anyone who spends a lot of time in nonprofit environments has seen a hundred variations on this theme. The board sincerely believes that it has taken the organization "in hand" even while it eliminates some of its most useful assets. Even if a board listens carefully to an executive director, it may get a distorted view of what an organization needs. For instance, a board may "know" from the organization's executive director that the staff underperforms. But does it also know that keeping your head down and "covering your butt" are the order of the day? Seeing the production problem as the result of recalcitrant staff takes you someplace quite different from seeing the problem as a combination of these problems: a lack of distributed accountability, a fear of stepping out to make suggestions, and the absence of a passionate shared sense of mission. Many boards get stuck on a superficial characterization of the state of an organization that falls short of real understanding.

Disconnection becomes particularly acute when board members make assumptions based on a narcissistic attachment to their own knowledge and experience. Some board members join a board with a "deficit attitude" and assume that nonprofits do not understand how to operate well and that they need a more business-like approach. Boards are attracted to such people for three reasons: (1) boards believe it is best to recruit members from a short menu of professions, such as human resources, accounting, marketing, and law; (2) boards want members who can build a bridge to the money, and (3) boards tend to reproduce themselves, recruiting like-minded people to replace retiring members. But if these board recruits have little knowledge of an organization's history, context, or constituents and only the vaguest understanding of its programs, their conversations revolve around only what they know.

These misconceptions are not the fault of individual board members, whose orientation often does not require them to "live" in the organization's core work for a day or two. Some consultants and executives, in fact, frown upon "normalizing" board members (i.e., having them take part in an organization's day-to-day life), but the likelihood of board-staff misalignment increases when dialogue between board and staff members is discouraged. Lack of board-staff connection often occurs and is justified out of a fear of "inappropriate communication" between the bodies. The underlying thinking smacks of a fear of transparency and of a rigid organizational hierarchy that blocks board members' understanding and can make board members truly dangerous in the hiring process.

Leadership That Promotes a Healthy Nonprofit Culture

While no leader is perfect, an effective leader maintains the essential qualities of a healthy organizational culture: that is, being purpose driven, transparent, and accountable; having a commitment to ongoing learning with and on behalf of constitutents; and having sound management. These leaders can do the following and facilitate others to do so as well:

- *Partnership building.* Leaders who partner with and inspire the groups who make up the system to move together are able to leverage capacity toward achieving mission and vision.
- *Continuous learning.* These leaders actively seek constructive feedback to enhance leadership and professional skills and incorporate diverse opinions.
- *Analysis and synthesis.* Such leaders also analyze and synthesize historic and current patterns and systems affecting constituents or creating barriers to change. Recently popularized as "right-brain thinking," this approach enables leaders to see the interrelatedness of events and understand the impact of the community and constituents on the organization. Smart leaders enlist multiple perspectives to understand the current situation—its merits, flaws, and areas for change.
- *Whole-systems thinking.* These leaders understand that they are part of the system and organizational culture, not outside of it. Executive directors and board members often mistakenly believe that they are in charge. They can influence a system through their decisions, but those who make up the system affect it as well. Since no individual controls the organization, its members are in a continuous dance of influence with one another. Good leaders understand this and facilitate a mutuality of purpose and identify management disciplines that are most effective rather than exert individual mandates.
- *"Authentic" communication.* These leaders communicate authentically from their true selves and do so transparently with all stakeholders. Healthy, self-aware leaders who can communicate clearly and honestly enable organizational cultures to thrive. This means respecting confidence and boundaries, not hiding behind excuses like "The auditor says," or by "gatekeeping" information from staff, constituents, and, yes, the board.
- *Understanding of cultural dynamics.* These leaders understand the dynamics of the dominant culture within the organization (and the systems in which an organization exists) and its impact on diversity and the inclusion of people, ideas, activities, and community impact.
- *Effective management.* Finally, these leaders manage well. They ensure that finance, fund development, human resources, and facilities management are attended to and done well. Many good leaders have the various skills listed above but are undone by an inability to accomplish and delegate important management functions in a timely, well-organized way.

Defaulting to Individual Style

Over the course of three years, a large animal rescue league had two "unintentional interim" leaders after the founding director departed. The first was inexperienced and took all her direction from an overly involved board president who in essence ran the organization. Her inexperience caught up with her, however; the board of directors turned on the officious board president, and she was terminated. Another interim was hired who was extremely harsh on staff to the point of being disrespectful. The organization's reputation was in tatters; staff and all-important volunteers were demoralized and left in droves; and the board supported the inappropriate interim, believing that standing behind the executive director was its role.

But the executive director negelected one critical area: recruitment of board members who would align with the healthy culture he had built.

By threatening a union drive, the remaining staff forced the question and ousted the inappropriate interim. The organization lucked out with its next interim, who eventually became the executive director. He believed in supporting staff to become critical thinkers and reflective practitioners and asked for their opinions about everything. He also believed in stakeholder involvement and constituent voice and continuously surveyed for feedback on the organization's performance relative to its mission. In less than two years, the organization's operations had turned around completely.

But the executive director negelected one critical area: recruitment of board members who would align with the healthy culture he had built. Because he was a capable leader, he managed the board by producing excellence, good reports, good results, a good reputation for the organization, a rebuilt funding capacity, and even program innovation. But because of his lack of time, interest, or disbelief in the influence of the board of directors, he did not change board membership much. He did not ask board members to do what they had been required to do in the past: to volunteer for at least six months in the animal shelter learning the ins and outs of the business, getting to know staff and volunteers, and deeply understanding the culture of animal rescue work.

After seven years, the director decided to leave. He presented the board with materials on executive transitions, but board members decided to conduct the hiring process themselves. The next director they hired had an excellent fundraising résumé in a different field (social services) and had some experience as an executive director of a local affiliate of a national organization that had required a good deal of responsibility on the ground. But despite these experiences, the director came in and led hierarchically. Staff and volunteers who were used to a culture in which they were respected and their opinions were heard and most often acted upon, bristled under the directiveness of the new executive. Within a year, the director had undone the vibrant culture built by her predecessor over the prior seven years —and with the blessing of the board of directors, which was always slightly suspect of the former director's facilitative, flattery-based style of leadership but never questioned it given the unprecedented success of the organization under his leadership.

Boards often hire a manager and allow him to manage in whatever way he wants—as if management style were value-neutral.

In a matter of months, a healthy organization became unhealthy. The former executive could have helped the organization he worked so hard to rebuild with one small point of leverage: by developing a board of directors aligned with the culture of the organization he had built. If he had done so, the board would have understood that it would take a particular kind of leader to build on the success of the previous executive. And it might have prevented a new executive from managing based on her own dictates and without consideration for the organization's past, the field in which the organization was situated; or for staff, volunteer, and community needs. Four years later, this organization has lost more than 50 percent of its staff, and its reputation is once again suffering with funders and community partners.

In these situations, line staff members are often excluded from the process of selecting a new executive director. The expectation is that a new boss will "manage" staff, and boards fear self-interest will taint such participation.[1] But boards ignore an important perspective when they do so, since line staff tends to embody the culture of the organization. Rather than taking the time to hire a candidate who is a good match for the culture of an organization (someone capable of asking, "Does the organization need to be nudged in a new direction, or does it need its best characteristics reinforced?"), boards often hire a manager and allow him to manage in whatever way he wants—as if management style were value-neutral.

Management Trumps Leadership

For years, boards have hired for management skills over leadership skills. This trend has increasingly placed a premium on the ability to manage finances and fundraise over competencies that reflect whole-systems thinking, such as the ability to build shared vision and facilitate the ongoing engagement of multiple stakeholders toward that vision. Management skills are important, of course, but they aren't the drivers of true "nonprofit excellence."

Still, hiring primarily for management skills

If a board ignores its organization's constituents and its staff's requirements of a leader, the hiring of a new executive can create a disconnect that rocks organizational culture.

is understandable. Many nonprofits have trouble finding a visionary leader and a supermanager in the same person. And when organizations move from the first, or "family," stage to the second, or "improving management systems," stage, a board often defaults to management attributes simply because it has experienced the fallout of inadequate financial or human resource systems. Again, this focus is not necessarily wrong in the moment, but it may stall the organization for years to come by assuming that the preponderence of needs now (concerning policies and procedures, for instance) will remain the same over the next five or 10 years. Boards tend to hire based on their problems with a departing executive director. As a result, they often rush into the hiring process to "fix" those issues rather than take the time to reflect on where the organization is now, where it is going, and how to find the best leadership fit for the future.

When boards do not recognize problems as being related to a stage of development—and in particular, when an organization is making the transition from the first to the second stage—it can make common mistakes with predictable outcomes. For instance, if a board overcorrects and hires a rigid and controlling director, the organization's staff, members, or constituents may revolt, spit out the newcomer, and return to the first stage.

Or if a board hires an operations person without strong leadership capacity, the organization may wander forward slowly without recognizing it has lost its potential for influence and excellence. Too many boards are satisfied with well-managed nonprofits and fail to question whether an organization has optimized its mission or validated its strategies through close engagement and work with constituents—even if the effort means the organization must reinvent itself to do so.

Risk-Averse Managers as Board Proxy

Boards may hire risk-averse executives in reaction to a visionary but unstructured leader. Boards who see themselves as protecting an institution's integrity often place a premium on financial and organizational stability over, say, fighting the good fight with the powers that be about an unpopular issue. Risk-averse hiring may also result in community institutions that feel more bound by their grants and contracts than by those they serve. In the end, this approach limits an organization's appetite for organizing, advocacy, and innovation and diminishes its focus on community impact in favor of institutional security.

Ideally, board, staff, and other stakeholders weigh risk taking and risk management and tip the scales in favor of constituents' best interests. This sometimes requires a willingness to choose the less secure path, but that choice becomes nearly impossible if a board hires a director who is more interested in compliance or the organization's image with corporate funders than in doing what is right on behalf of constituents.

Leaders in Board's Own Image

If a board ignores its organization's constituents and its staff's requirements of a leader, the hiring of a new executive can create a disconnect that rocks organizational culture. The mutual reinforcement of board members and executive directors concerning management style, choice of programmatic strategies, race, gender, and class creates a closed loop of people with the same attitudes, mental models, reference points, and blind spots. If they do not have a strong discipline of inquiry, a desire to challenge the status quo, and an ingrained curiosity about how best to serve constituents, this closed-loop system can't align with the community it serves and organizational culture fractures. Soon, it becomes a requirement to "gatekeep" ideas and approaches that diverge from the norm and to support the board's and the director's perspective—even if this perspective runs counter to the truth. Creative disruption is neither understood nor welcome.

Endnotes

1. Ori Brafman and Rod A. Beckstrom's book *The Starfish and the Spider: The Unstoppable Power of Leaderless Organizations* brings home the point that sustainable businesses and nonprofits rely on multiple leaders at all organizational levels rather than on one leader at the top.

Board Responsibilities: The Basics

by Herrington J. Bryce

This article outlines in clear detail the legal and ethical duties of the nonprofit board. "The key to avoiding failure," the author explains, "is the way the organization is managed. And at the very top of the management pyramid is the board of directors."

A BOARD IS NEEDED TO INCORPORATE a nonprofit, to get it tax exemption, to apply for a bank account, to properly file annual reports, and to do most important transactions. This is so because the principal roles of the board of directors are to represent the public (or membership) interests in the organization and to represent the organization as its legal voice.

The logic goes as follows: Nonprofit and for-profit corporations are not natural persons, meaning that they have rights and responsibilities but cannot read, write, think, or execute for themselves; corporations need a human group or person to do so and to guide decisions so that they positively influence the organization and the commitments it has made, including the choice of its chief executive and how it will carry out its mission.

In virtually every state, therefore, a nonfunctioning board is a cause for the involuntary closure of the organization by the attorney general, because this means it has no guiding or accountable voice—the CEO being the agent or instrument for implementing what that voice approves. What specific actions are required of the board to demonstrate and exercise its roles in guiding and representing the best for the organization? To fulfill these roles, the board must be able to accomplish at least the following essential tasks:

1. Approve the budget.
2. Review, sign, and assure submission of annual reports.
3. Review and authorize personnel policies relevant to hiring, promotion, dismissal, compensation, whistle-blowers, independent contractors, key employees, sexual harassment, and fairness to the disabled and other groups.
4. Meet annually and as needed, even if only electronically.
5. Review and approve plans of reorganization, growth, and contraction.
6. Review and approve plans for major asset sales and acquisition.
7. Review and approve major gifts, including the terms of the gifts.
8. Review and approve the organization's plans to do major borrowing.
9. Review and approve the organization's investment policy and plans to open banking and other financial accounts.
10. Review and approve major changes in retirement, benefits, and compensation for all employees, with special focus on reasonableness for top executives.
11. Review and approve amendments to the bylaws.
12. Provide and be prepared to receive complaints and allegations of wrongdoing that affect the senior staff—its omission or commission, including conflicts of interest.
13. Discharge and replace its members for reasons authorized by the bylaws.
14. Create committees and hire consultants.
15. Write policy and review status of its own membership for independence, conflict of interest, self-dealing, competence, performance of duties, and compensation.
16. Be prepared to authorize lawsuits by the organization, receive them, and dispose of them by settlement agreed upon by them, if necessary.
17. Authorize liability, bonding, and other insurance and indemnification.
18. Authorize collaborations, other commitments of the organization, and their terms.
19. Require accountability, transparency, loyalty, and conformity by key employees, and protect the identity and integrity of the organization.
20. Request dissolution and carry out its terms.

21. Approve changes in the organization's name and address.
22. Approve changes in the number, composition, qualifications, authority, or duties of the governing body's voting members; and in the number, composition, qualifications, authority, or duties of the organization's officers or key employees.
23. State the requirements for a quorum or for any class of issue.
24. State the conditions and procedures for calling emergency meetings.
25. Keep records of its activities.

Board Members and Conflicts of Interest, Nonindependence, and Self-Dealing

The relationship of the trustee to a family, to a business, and to the organization itself matters. Therefore, there should be a concern for conflict of interest (a concept that focuses on personal or private gains from a specific transaction), and concern for the independence of a board member (a concept that refers to the relationship of the board member to the organization: is he or she a part of the organization and therefore likely biased in favor of the organization rather than objective?). There should also be concern for self-dealing (a concept that describes using an organization to advance personal benefits when it is clear that the personal gains outweigh the gains to the organization).

The fact that a member may be nonindependent does not necessarily mean that the member has a conflict of interest. But it can raise the question: Is the person's view likely tainted or biased? When a board member is not independent, that has to be recorded, but it is not prohibited. Interlocking directorates may, therefore, have several members who are nonindependent but not necessarily self-dealing. For a member of the board to be considered independent, all four of the following conditions must be met:

1. The member may not be a compensated officer or employee of the organization, its affiliate, or other related organization, or any other with which the filing one does business.
2. The member may not have received compensation exceeding $10,000 from any of the above during the reporting year.
3. Neither the member nor a member of his or her family may have had an economic transaction with the organization or its affiliated or related organizations during the year.
4. Neither the member nor a member of his or her family may have had an economic transaction during the year with an organization doing business with the filing organization or its affiliates.

A member is not considered to be nonindependent just because:

1. The member receives compensation from the organization contingent upon his or her being a member of a recipient group of the organization.
2. The voting member is a donor of any amount to the organization.

Obviously, these concepts of conflict of interest, nonindependence, and self-dealing need to be given further and keener attention, depending on one's own organizational design and relationships (see Table 1).

Dealing with Possible Conflicts of Interest

A conflict of interest occurs when a person stands to gain from decisions he or she makes that are likely to benefit him- or herself, family, or business associates at the expense of benefit to the organization. A nonindependent board member may not necessarily have a conflict of interest vis-à-vis a particular transaction. A conflict of interest vis-à-vis a transaction may just as easily occur (if not more so) with an independent member of the board. A conflict of interest implies that the person has subordinated or is at the risk of subordinating his or her duty (loyalty) to the organization on an organizational matter to his or her

Table 1. Conflicts of Interest, Nonindependence, and Self-Dealing

Conflicts of Interest: This concept relates to specific transactions. Who in a particular transaction may be exposed to a conflict of interest (regardless of remuneration from any party) because of direct or indirect ties to parties standing to gain (and also lose) from the transaction directly or indirectly? If not the person, then relatives, associates, or businesses? A conflict of interest policy should apply to employees (especially those in senior management) as well as some independent contractors (especially those integral to the nonprofit operation; for example, doctors in a hospital).

Nonindependence: This concept applies primarily to voting trustees—those who by their actions can influence the decisions and direction of the organization. A person is not an independent trustee if he or she receives remuneration from the organization (other than from being a trustee), or if his or her relatives, businesses, and associates do business with the organization and any of its affiliates. Being a donor of any amount does not make a trustee nonindependent.

Self-Dealing: This concept applies to donors and other benefactors of the organization. It also applies to trustees and senior management when there are (a) excessive or prohibited transactions or (b) transactions from which a donor or member of the management can benefit or from which their relatives, associates, or businesses can benefit. This type of violation, unlike the two above, comes with financial penalties to management.

Except for self-dealing, where penalties may apply, the reliance is on transparency and good judgment. A policy on any or all of these should be part of the annual orientation of managers, and especially of trustees—principally because it is possible to be inadvertently trapped. Policy should be refreshed annually with a simple question: Have there been any changes in your condition or the condition of your relatives, associates, and businesses that could expose you to being classified as a disqualified person (to whom the concepts of conflict of interest, nonindependence, and/or self-dealing apply)?

own gain or the gain of a family member or business associate.

Every nonprofit organization needs to consider ways to avoid conflicts between the interests of the organization and those individuals in management, governance, and decision-making roles in the organization. The IRS has recommended that organizations consider adopting a conflict of interest policy that includes provisions to which these individuals should conform when considering transactions in which they have a potential, actual, direct, or indirect financial interest.

The Risk of Self-Dealing

Self-dealing is invariably a consequence of a conflict of interest. If the latter were the signal of a likely opportunity, the former is the action that takes advantage of the opportunity for personal, family, or business-related gains or the gains of another manager or independent contractor (such as excessive compensation).

Section 5233 of the California Corporations Code clearly defines self-dealing as any transaction involving the organization and in which one or more trustees or officers have a material financial benefit, unless: (1) the attorney general gave approval; (2) the organization entered into the transaction for its own benefit; (3) the transaction was fair and reasonable for the organization; (4) it was favorably voted for by the majority of the board, not including the affected members; and (5) the board had information that more reasonable terms were not available. In addition, the California law, as in most states, not only defines self-dealing but also gives the time period in which it must be reported or corrected and the way liabilities are shared. A sixth condition that is covered separately stipulates this. The penalty for the infraction of self-dealing may include the return of the property with interest, payment of the amount by which the property appreciated, and a fee for the use of the property. It may also include a disciplinary penalty for the fraudulent use of the assets of the organization.[2]

Again, self-dealing does not bar an honest, arm's-length transaction that benefits the nonprofit and does not unduly favor the trustee or officer over others. These types of transactions should always be approached with very careful legal and ethical scrutiny and within the scope of a carefully crafted and existing policy. Discussions involving the questioning of the involved parties—as well as decisions—and the supporting or exculpatory information should always be retained.

Dealing with Nonindependence

Each member of the board has to be classified as independent or not, and if not, why and how. Moreover, there is no prejudgment that is correct about the relevance of nonindependence. A key employee who might also be a member of the board is nonindependent by virtue of his or her employment in the organization, and another member of the board who is not an employee may be nonindependent because his or her firm has a close relationship with the organization—such as sponsorship of its operations or services to it, or being a client of the organization (or vice versa). Knowing where board members may be coming from is important in evaluating the possible impact or perspective they might bring to specific board decisions—especially transactions with financial implications.

Standards at the Root of All Trustee Actions

At the root of conflicts of interest, nonindependence, and self-dealing are three simple standards: *duty of loyalty*, *duty of care*, and *duty of obedience*. Together, they define the fiduciary responsibility of the trustees and the officers of a nonprofit, both of whom can be held personally liable for monetary damages for breaching these duties. A trustee who behaves in conformity with these standards escapes personal liability for his or her action on behalf of the organization, even if the result is an error so serious as to cause the organization to lose its status. The standards guide actions; they do not judge their brilliance or consequences.

These standards recognize the possibility of error, so they judge only unintentional negligence—not whether the decision was fruitful or intelligent. The application of these principles in a court of law prohibits second-guessing as long as the trustees made their decisions in good faith. This is called the *business judgment rule*. What follows is an explanation of the three.

Duty of Loyalty

The duty of loyalty means that while acting in the capacity of a trustee or manager of a nonprofit, a person ought to be motivated not by personal, business, or private interest but by what is good for the organization. The use of the assets or goodwill of the organization to promote a private interest at the expense of the nonprofit is an example of disloyalty; in such cases, an individual places the nonprofit in a subordinate position relative to his or her own interest. The nonprofit is being used. One purpose of the annual reporting referred to above is to check on self-dealing.

Self-dealing is a form of disloyalty. As described earlier, self-dealing means using the organization to advance personal benefits when it is clear that the personal gains outweigh the gains to the organization. A trustee is not prohibited from engaging in an economic or commercial activity with the organization. Such a transaction can, however, be construed as self-dealing if it can be shown that: the trustee gained at the expense of the nonprofit; the trustee offered the nonprofit a deal inferior to what is offered to others or what the nonprofit could acquire on the open market; or, the nonprofit was put in a position of assuming risks on behalf of the trustee. A numerical amount, $5,000 or more, makes the self-dealing an illegal—not just an unethical—infraction.

Another form of self-dealing can occur when two or more nonprofits merge assets or transfer assets from one to the other, and they have the same trustees. Here, the issue is whether a good purpose is being served. Therefore, before consummating a merger, or any other major transaction, it is wise to set a barrier against self-dealing.

One might assume that a common way the board of trustees must defend the nonprofit organization against self-dealing is in cases of corporate officers abusing their trustee status for the benefit of their firms; however, this is not the case. A board will more likely need to defend its organization against the organization's founder(s). It is not unusual to find that after years of personal sacrifice in calling the public's attention to a good cause, founders of organizations confuse the assets of the nonprofit with their own, confuse the interests of the organization with their own, and begin to take dominion over these assets or install themselves or relatives in highly favorable tenured positions. Operating under the burden of loyalty, boards must separate these persons from the organization.

Duty of Care

The duty of care requires trustees of nonprofits to act in a manner of someone who truly cares. This means that meetings must be attended, the trustees should be informed and take appropriate action when needed, and the decisions must be prudent.

The test of prudence depends on state law. In many states, the trustees of nonprofits are held under the same rules that govern trustees of for-profit corporations. In these states, prudence can be construed to mean making decisions not unlike those expected of any other group of trustees faced with relatively the same "business" facts and circumstances. In other states, nonprofit trustees are held to a higher standard, where prudence means using the same wisdom and judgment that one would if his or her own personal assets were at stake. The first is called the *corporate model* and the second is called the *trust model*.

The duty of care can deny using ignorance as a defense. Therefore, it is inconsistent with this duty to allege that a trustee or manager does not hold any responsibility merely because he or she is unaware. To know *is* the duty. It is this duty that makes many compassionate but busy people reluctant to serve on nonprofit boards. In a real sense, they can't care enough—that is, not in the legal sense.

Duty of Obedience

The duty of obedience holds the trustee responsible for keeping the organization on course. The organization must be made to stick to its mission. The mission of a nonprofit is unlike the mission of a firm. The mission is the basis upon which the nonprofit and tax-exempt status are conferred. Unlike a firm, a nonprofit cannot simply change its mission without the threat of losing either its nonprofit or tax-exempt status, or both.

Economic Transactions and the Trustees

Table 2 (following page), enumerates certain economic transactions that require decisions by the trustees—and, therefore, carry the possibilities of conflict of interest, self-dealing, corruption, malfeasance, and personal penalties on the trustees for failure to comply with the duties of loyalty, care, and obedience. The member may not be excluded from participation but may recuse him- or herself, or require a vote or permission by the board for his or her participation. Furthermore, these transactions come with the right of the trustees to be informed by the operating managers of the organization—and may even require the approval of the trustee either by bylaws, state laws, or by the other parties to the transaction. They are inescapable in the role of being a trustee.

Excessive Economic Transactions and Due Diligence

Every economic transaction has the potential for some form of compensation where—by a lack of exercising their duties of loyalty, care, obedience, and the additional duty of due diligence—trustees agree to or put forward a compensation that is offensively excessive. This occurs with compensation of key employees, the trustees themselves, and with independent contractors and vendors.

Trustees are responsible for negotiating and agreeing to executive compensation and key employee contracts. Key employees satisfy two criteria: (a) their full aggregate compensation of all types from the organization (its subsidiaries, its affiliates, and disregarded groups—joint ventures and corporations of which the nonprofit is sole member and must include in its 990 reports) exceeds $150,000 annually, and (b) they hold a position of responsibility for making the decisions concerning any of the key employees. The federal law, "Taxpayer Bill of Rights 2," makes trustees disqualified persons. For purposes of compensation, a disqualified person is any trustee, manager, donor, or entity (and in the case of a hospital, any physician) who had substantial influence over the organization in the five years preceding the date of the "excess transaction." Any firm in which a member of the board directly or through family relationship owns or controls 35 percent or more of the voting stock is itself a disqualified person. Therefore, the firm would also be limited in its economic relationship with a nonprofit organization. This is to prevent a member of a nonprofit board who is also a business owner—or who is related to one—from doing business with the organization and for excessive fees.

Any such disqualified person (the trustee or the firm that he or she—or his or her relatives—controls) who obtains excess benefits (such as overcompensation) can be subject to an excise tax of 25 percent of such an excess; and any disqualified person who knowingly participated in this agreement would additionally be subject to an excise tax of 10 percent of the excess up to $10,000. The focus of this law is on executive compensation, but it applies to all kinds of transactions—including the payment of trustees or any other disqualified person as defined above, or the payment in a sale of a product or service rendered by them. The law considers excessive compensation to any disqualified person to be self-dealing; for example, using the assets of the organization for personal benefit.

Participation in self-dealing is willful if the disqualified person engaged in the act voluntarily, intentionally, and consciously. Self-dealing refers to benefiting—or having some other related person benefit—excessively from a transaction. It can occur from an act or the failure to act when one is required to express an opinion or decision about that transaction and fails to do so. Therefore, liability also arises from silence and the lack of action to stop or to record objection to an excess benefits transaction—unless there is reasonable cause to believe that the trustee or other disqualified persons did not know of the transaction, and did not know that the transaction would be deemed self-dealing. Failure to have inquired about whether the transaction was an act of self-dealing, where this inquiry is clearly indicated, does constitute an act of negligence and could likewise result in being penalized by the imposition of the excise tax.

But when is compensation excessive? It is excessive when the compensation

Table 2. Economic Transactions That Require Decisions by Trustees

1. Changes in financial advisors or institutions
2. Changes in the mission of the organization, whether by amendment, interpretation, or by emphasis
3. The allocation of the annual budget, both costs and expenditures
4. The sale of the organization's assets
5. The acquisition of capital assets or initiation of programs
6. The annual performance of the organization—financially and in terms of its output
7. Hiring, departure, or transfers in the top tier of the organization
8. The signing of contracts by independent contractors as well as key employees
9. Major collaborations or partnership arrangements involving the organization
10. The leasing of major assets by the organization, whether as lessor or lessee
11. Disputes in which the organization is likely to be involved, whether by clients, employees, or others
12. Planned changes or agreement to any compensation schemes of employees, executives, and independent contractors, or compensation that could be considered excessive
13. Independent assessment of financial activities and performances of the organization
14. Specific performances of endowments and other funds subject to restrictions—dealing separately with restrictions imposed by donors from restrictions imposed by the trustees
15. A projection of earnings and expenses by source with caveats of a projection, and the identification of any uncertainty, twists, turns, and plans for more than a year, if that is feasible and requested
16. A discussion of diversion of funds and taking action
17. The written authorization of debt and of any specific borrowing arrangement
18. The written authorization of fundraising campaigns and contracts and choice of firm
19. The hiring of auditors, receiving of their reports, and requiring organizational response
20. Discussion prior to acceptance of large gifts, whether outright or deferred, and their terms
21. Claims and potential settlements of corruption, discrimination, negligence, or harassment
22. Any legal action against the organization, including failure to file proper documents
23. Establishment and monitoring of internal controls
24. Approval of major advertising or use of the organization's logo or reputation
25. Decisions on dissolution, major collaboration, mergers, and other reorganizations
26. Setting investment policies for unnecessary risk exposure and investment protection
27. The assessment of purchasing contracts
28. An assessment of the organization's business-income stream and alliances
29. Any cross-subsidization or subsidization of one program by another or by the organization that is tenuous
30. Minimization of self-dealing, conflict of interest, personal inurement, and manipulation, fraud, and failure to comply

exceeds the economic value of the benefit the organization got in return or when the compensation is calibrated to the organization's revenues or reflects personal inurement.

The law does provide for the organization to indemnify or insure the disqualified person against the cost of any penalty or taxes due to an "excess transaction." It does, however, also require that this insurance or indemnification be included in the compensation. Hence, the more the organization covers for the disqualified person, the greater the tax or penalty on all disqualified persons found to have knowingly participated in the transaction.

The principal defense against excessive economic transactions is comparable compensation information—in other words, do comparable organizations justify what is being accepted or offered?

Duty of Organizations to Trustees and Their Rights

Trustees have the right to expect that the nonprofit organization has exactly the same duty to them as they have to the organization. They should expect obedience to their policies that are consistent with the mission of the organization. Trustees share liability for infractions; therefore, they should expect that their directions will be obeyed. It is they, rather than the employees, who represent the public interest. Timely and relevant information and interaction consultants (including auditors, compensation experts, lawyers, and the chief executive of the nonprofit) are first defenses against unwitting self-dealing, conflict of interest, and general failure to perform their duties of loyalty, care, and obedience. Trustees, therefore, have a right to know, and the organization has a duty to keep them informed.

Accordingly, trustees should expect a duty of care directed toward them. As their duty of care toward the organization means that they need to be informed and to act prudently on behalf of the organization, they should expect that they will be kept informed about those things that matter. These include being kept up to date on major changes in the organization's direction or assets, annual budgets and financial statements, changes in key employees, new risks to which the organization is exposed, employee compensation packages, and evaluations of the organization's performance.

The duty to the trustees also encompasses loyalty. This concept implies a protection of the trustees. Trustees have a right to presume that the relationship between them and the organization is aboveboard (so to speak), at reasonable arm's length, and that the organization does not expose any trustee to personal or professional risks—even if it forewarned him or her that such risks might be present. Put simply, they have a right to expect that they are not being used or "set up," that the information given them to form the basis of their decisions is as clear, complete, correct, and relevant as possible, and that the organization will not act imprudently.

Consistent with the exercise of prudence, trustees may rely on information they obtain from appropriately assigned employees, accountants, lawyers, engineers, and other experts. Relying on the expertise of such persons is an act of prudence and not necessarily a skirting or shifting of responsibility.

In the *Guidebook for New Hampshire Charitable Organizations*, New Hampshire's attorney general advises that directors should have the following specific rights (in addition to others):

1. To have a copy of the articles of organization (incorporation or deed), by-laws, and other documents that are necessary to understand the operations of the organization.
2. To inquire about an orientation session for board members and about a board manual containing the policies and procedures for the organization.
3. To have reasonable access to management and reasonable access to internal information about the organization.
4. To have reasonable access to the organization's principal advisors, including auditors and consultants on executive compensation.
5. To hire outside advisors at the organization's expense.[3]

Observe that these rights are consistent with exercising the duty of care, and with the law's protection of trustees and officers if they rely on the expert judgment of persons such as auditors and accountants, lawyers, and investment advisors. They are also consistent with the organization's duties to the trustees.

These rights translate to the trustees' right to know, be informed, and have their actions followed. Some of these are required by law, such as trustee approval of amendments; some are required by practice, such as a bank's stipulation that a trustee resolution be supplied before it extends a loan; some of these are subtle, such as informing trustees about major transactions so that they can determine if there is a potential conflict of interest; and some of these are early warnings or pleas for help, such as giving a projection not simply of the annual data but of what they may look like under certain projections—such as if trustees continue to operate as they have been.

Liability of Trustees

No matter how much protective action is taken, there is always the possibility of a trustee's being sued or involved in a lawsuit against the organization. How does the organization protect the trustee?

First, by timely information as discussed above, so that the trustee can take adequate action; second, by covering the trustee through insurance and indemnification; and third, by disclosures.

The board of trustees of a nonprofit organization may be sued by (1) the members in a so-called *derivative suit*, whereby the members are suing the trustee on behalf of the greater good of the organization; (2) a third private party; (3) a government; and (4) one of its own members or employees. Liability may arise either for actions taken or for the failure to act. Furthermore, in some instances, liability may arise because of the actions of other trustees or officers. For example, a trustee can be held liable for failing to block an inappropriate action by other trustees or by management. The duties of care and loyalty mean that a trustee cannot choose to look the other way when an officer or another trustee may be involved in actions that are wrong.

This liability threat would discourage many good people from serving nonprofits. If the trustee can be held personally liable, then he or she faces the possibility of being sued and having to pay monetary damages out of personal resources. Even if monetary damages are not assessed, the trustee faces the unpleasant possibility of having to spend time and resources in a personal defense. In addition, there are the emotional and social costs.

Recognizing this deterrent, many states have taken actions to limit a trustee's personal liability. For volunteers as well as trustees, states range from no protection to protection only if the act was not intentional, was the result of negligence or breach of fiduciary responsibilities, was a knowing violation of the law, or was a result of a reckless action or one done in bad faith.

In general, an officer or trustee is immune from civil suit for conducting the affairs of a nonprofit unless the action taken is willful or wanton misconduct or fraud, or is gross negligence, or if the person personally (or through a relative or associate) benefited from the action taken.

A trustee is liable for unlawful distributions of the assets of the organization. An unlawful distribution can be one that is inconsistent with the mission of the organization, inconsistent with the bylaws and tax-exempt laws, outside the powers of the organization, and for private gains of the trustee or associates. A loan to a trustee is just one type of unlawful distribution. Using the assets for political purposes is another, and so is excessive executive compensation.

Not only are the trustees who voted in favor of the unlawful distribution liable, but so are all other directors who failed to voice an objection. Arizona 10–3833 requires that objections be noted in the minutes of the meeting when the act was taken or by 5:00 p.m. the next business day. It further states, "The right to dissent does not apply to a director who voted in favor of the action." Still further, any trustee found liable for the unlawful distribution shares that culpability and can be held equally liable with all trustees who voted affirmatively, all trustees and members who shared in the distribution, and all who failed to dissent in the manner prescribed by law.[4]

Even though the nonprofit has the power to indemnify a trustee or officer, some states specify the conditions under which such indemnification can be offered. In Mississippi 79–11–281, indemnification can be offered only if the trustee (1) conducted him- or herself in good faith and (2) believed that the conduct was in the best interest of the organization—or at least not contrary to its best interest or those of its members.[5]

The nonprofit may not indemnify the trustee or officer when he or she is judged to be liable to the nonprofit or in any situation where he or she benefited improperly. Indemnification may be limited to reasonable expenses incurred. Generally, reimbursement may occur only after the case is disposed, but Mississippi, as an example, provides for payment in advance. However, the trustee must provide a written statement attesting to having undertaken the action in question in good faith, stating that the trustee promises to repay the sum if the judgment is against him or her, and declaring the act not one that would otherwise preclude indemnification. A trustee that is entitled to indemnification may turn to the court to have such indemnification paid by the nonprofit. If the proceeding is against the organization rather than against the trustee, the trustee may be indemnified by the organization for his or her expenses. This is the case if the trustee acted in good faith.

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A board of directors or trustees of a nonprofit organization is an essential part of the design of the organization and how well it abides by its mission, the expectations of its members, its clients, and state, local, and federal governments. The way a board is constructed is important because it affects the representation of various interests and the efficacy of the board.

The composition has to do with the number and distribution of persons on the board and the way it is divided by function. The functions are not perfunctory; they facilitate the capacity of the board to carry out its principal purpose of being the voice of the organization and the various interests that the organization serves. To do this competently involves carrying out a variety of specific activities and first being true to the organization in doing so. This means putting the organization first (loyalty to it and the care it takes to do that well). Self-dealing is to be avoided; conflicts of interests are to be minimized.

The issues here are not just ethical; they are also legal and therefore given attention as core duties of the board. The single best advice: board members must care sufficiently to be fully informed, fully involved, and fully compliant. Short of this, there is personal risk of liability and organizational risk of failure—to the detriment of those the organization was intended to serve.

The success of the board depends upon all that has been outlined above, but to carry out any of these best practices requires that the organization—especially the chief executive—recognize the importance of providing the board with timely information. Society depends upon nonprofit organizations for a variety of essential functions—from education to health, art to social services, and housing to general welfare, to name a few. The success of these organizations in serving the public depends not only upon monetary resources but also on the ability of these organizations to function in an orderly and efficient manner. When a nonprofit organization fails, promises fail—and so do the expectations of the public and the direct clients and donors. And society has one organization less that it can call upon to provide needed services. The key to avoiding failure is the way the organization is managed—and at the very top of the management pyramid is the board of directors.

Notes

1. Herrington J. Bryce, "Decision-Making and Governance Structure in Lessening the Burden of Government," in *Nonprofits as Policy Solutions to the Burden of Government* (Berlin, Germany: De|G Press, 2017): 125–43.

2. "CORPORATIONS CODE – CORP, TITLE 1. CORPORATIONS [100 - 14631], DIVISION 2. NONPROFIT CORPORATION LAW [5000 - 10841], PART 2. NONPROFIT PUBLIC BENEFIT CORPORATIONS [5110 - 6910], CHAPTER 2. Directors and Management [5210 - 5260], ARTICLE 3. Standards of Conduct [5230 - 5239], § 5233," California Legislative Information, leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=5233.&lawCode=CORP.

3. *Guidebook for New Hampshire Charitable Nonprofit Organizations*, 1st ed. (Concord, NH: Office of the NH Attorney General Charitable Trust Unit, 2005), web.law.columbia.edu/sites/default/files/microsites/career-services/Guide%20for%20New%20Hamphire%20Charitable%20Nonprofit%20Organizations.pdf.

4. "§ 10-3833. Liability for unlawful distributions," Arizona State Legislature, www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/10/03833.htm.

5. "2013 Mississippi Code, Title 79 - CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS, Chapter 11 - NONPROFIT, NONSHARE CORPORATIONS AND RELIGIOUS SOCIETIES, MISSISSIPPI NONPROFIT CORPORATION ACT, § 79-11-281 - Indemnification of director, officer, employee, or agent," law.justia.com/codes/mississippi/2013/title-79/chapter-11/mississippi-nonprofit-corporation-act/section-79-11-281/.

Herrington J. Bryce is the Life of Virginia Professor (corporate finance) at the Raymond A. Mason School of Business, College of William and Mary, an affiliate of its Thomas Jefferson Program in Public Policy, and the author of several books on nonprofits, including *Financial and Strategic Management for Nonprofit Organizations* (De|G Press, 2017), a comprehensive guide to all phases of nonprofit management.

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