Governance and Fiduciary Issues for Nonprofit Organizations in the Age of Crisis

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Fiduciary Duties: You Know the Basics

- Directors and officers owe fiduciary duties to the nonprofit organization: the duties of care, obedience, and loyalty.
- Directors and officers must act in good faith and in the best interests of the organization (e.g., work to fulfill the organization's tax-exempt purposes and maintain its tax-exempt status).
  - The Board is ultimately in charge and is responsible for the overall financial health and mission of the organization, but should avoid micro-managing staff.
  - Management is responsible for directing day-to-day operations under a Board-approved budget, making the Board aware of significant risks (financial, programmatic, operational, reputational), and working with the Board to address such risks.

There is no waiver or relaxation of these duties in times of crisis. Indeed, it is in times of crisis that they are customarily put to the greatest test.

Duty of Care

- Basic Prudence:
  - A duty to discharge a director or officer's position in good faith and with the care that an ordinarily prudent person in a like position would exercise *under similar circumstances*.
  - Encompassing the power to rely on qualified Board committees, outside experts, management and staff.
  - Encompassing a responsibility not to harm the organization, including with regard to the handling of its confidential information.
- Endowment Appropriation Prudence:
  - Basic prudence *plus* a duty to consider, if relevant, a set of factors specified under a given state's version of UPMIFA, including general economic conditions, total return from income and appreciation, and the investment policy.

Business Judgment Rule

- State corporate law typically recognizes a "business judgment rule," which establishes a presumption that a director or officer's conduct was prudent if the individual made fiduciary decisions on an informed basis, in good faith (e.g., without conflicts of interest), and in the honest belief that the action was in the best interests of the organization.
- This presumption can be overcome with a showing of gross negligence.

Duty of Obedience

- Officers and directors must not engage in *ultra vires* acts –
  - acts that the corporation, under its charter and applicable law, may not perform because such acts are prohibited or otherwise unlawful or beyond the scope of the corporation's powers and purposes.
- A nonprofit corporation must engage in activities that are consistent with its exempt purposes and the restrictions established by gift or contract on the use or purpose of assets.

Duty of Loyalty

- The duty of loyalty requires a director or officer to act *solely* in the best interests of the Organization rather than in his or her own interests or those of his or her family or associates. It is a duty of *undivided* loyalty.
- The duty of loyalty encompasses a director or officer's obligation to abide by the Organization's conflict of interest policy and not to abuse a position of trust (e.g., by taking advantage of a corporate opportunity or misusing confidential information).
- Breach of the duty of loyalty may allow a court to void a transaction in which a conflict was present.

Title search: Governance and Fiduciary Issues for Charitable Organizations in the Age of Crisis

Also available as part of the eCourse
Answer Bar: New Boardmember Basics

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