Trustee Insights

FIDUCIARY DUTIES

Trustee Roles and Responsibilities of Not-for-Profit Organizations

Making a distinction between management and trustees is essential to the success of all leaders

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For those serving as trustees of not-for-profit (NFP) health care organizations, the experience of service is oftentimes quite rewarding, but at other times, extraordinarily frustrating. While in most instances trustees have served on other boards and are aware of the differences between governance and management boards, frustration may result when trustees do not all have the same awareness or follow the same behaviors when acting in a governance role. Further, if there is any uncertainty or ambiguity about the responsibility to act in a particular way when unexpected situations occur, the nature of the relationship between the governing board and the management team of NFP health care organizations may undergo significant stress. This is compounded when the board members of an NFP health care system consist of individuals whose careers and board service originate in for-profit (private or public) enterprises. The vested interest(s) of typical board members in for-profit companies lends itself to those members exerting a more managerial influence on operational decision-making in order to protect those interests. Additionally, if those members do not have any experience in health care delivery, their behaviors may not always be regarded as aligning with the mission of community health. This is especially true when serving alongside those whose experiences mostly originated in NFP settings.

One of the most challenging aspects of any trustee's responsibility is determining the line between operations and governance. It takes intentional effort by the board chair and the trustees to implement that practicality, but it can nevertheless be difficult to maintain, and we know that many boards struggle to establish it during times of board membership turnover. This is also true when systems are under considerable strain, particularly in the last five years since the start of the COVID-19 pandemic. It is incumbent more than ever to work constructively to define the responsibilities and the scope of authority of the members of the governing board of a community-based NFP health care organization. This is particularly acute when some board

members are naturally inclined to continue patterns of behavior honed in a for-profit enterprise when serving in management, executive leadership or on the board. It is not uncommon for those types of trustees to exert their expertise in a way that leaves little room for dissent or an alternative course of action when things run amiss. The hidden, undeclared hierarchy of such tenured trustees can consciously or unconsciously inhibit a sharing of perspectives and generation of consensus for what is in the best interest of the organization. This is coupled with those trustees who hold too rigid to the notion of maintaining a clear separation between their fiduciary responsibilities of pure governance and that of C-suite management. While noble in intent, this viewpoint can confound the collective efforts of the board to act when necessary.

When boards recognize deficiencies and management failures, they can act accordingly without fear of crossing the line between governance and operations. In fact, it can be argued that those boards have an obligation to the community (to whom the organization belongs) that should prompt the trustees to intervene to prevent an existential mistake, even at the risk of crossing the line between operations and governance. That is not to suggest that directors should usurp the day-to-day management of the organization but rather to encourage directors to intercede when they are confronted with managerial decisions which constitute existential threats to the community's asset to which their fiduciary duty extends.

To define that line more precisely between governance and operations, leaders need to explore how trustees of community-based, NFP health care organizations are identified, appointed, oriented and educated. Leaders need to discuss the skills that trustees should bring to the board and how those skills should be deployed to assist the organization. Of critical importance is the discussion regarding how directors should communicate with management and how directors should exercise their responsibilities for oversight of the organization.

Too often, trustees of NFP health care organizations are overly deferential to the management of the organization. This reluctance to ask tough questions and suggest different approaches arises from a number of factors, including:

1. Frequently trustees of health care organizations are executives and managers of other organizations in the community. Those individuals tend to be the kind of trustees that they would like to have as board members of their own organizations. That is, they like trustees who do not interfere with management, do not ask too many difficult questions and who praise management whenever possible.

2. Most trustees of NFP health care organizations receive nominal, if any, compensation. Thus, they are not incentivized to create the unpleasant, adversarial relationships that often develop when a trustee raises sensitive questions or dissents from proposed actions in the course of a "job" for which they are not being compensated.

3. Oftentimes trustees of NFP community health care organizations have other relationships, either business or social, with their fellow board members or with individuals on the executive management team. These trustees may be reluctant to express disagreements for fear that the disagreements will affect these other relationships.

4. Health care is an unusually complex business and, ideally, laypersons on the board should offer deference to the health care providers who serve on the board or reside in the C-suite. Unfortunately, those same laypersons can be paralyzed by the complexity, and may either be overly deferential to those on the board with prior experience in health care delivery or to those in the C-suite who profess subject matter expertise. This position may result in an inappropriate avoidance of broad perspectives and consensus building.

5. Some trustees join the board of an NFP health care organization simply for the perceived prestige of such a position and take less responsibility for their fiduciary responsibilities and offer minimal input. Those same trustees may be either consciously unwilling or simply unable to critically analyze the information presented to them and fully contribute to the role.

6. Senior management may be active in identifying and recruiting new trustees. Those newly identified board members often have the idea that they owe their position on the board to the CEO or other senior manager and that criticism or dissent is disloyal to that manager.

With these factors in mind, we now return to the issue of defining the proverbial line between governance and management.

As derived from the Revised

Model Nonprofit Corporation Act, the trustees of an NFP corporation owe a duty of care, a duty of loyalty and a duty of obedience. The duty of care imposes a responsibility to ensure that all assets of the organization, including its facilities, its employees and its goodwill are used prudently to advance the objectives of the organization. The duty of loyalty includes an obligation to ensure that the activities and transactions of the organization advance the objectives of the organization. The duty of obedience requires that the directors ensure that the organization adheres to its governing documents, to applicable laws and regulations and to its mission. These are the basic tenets that support the role of governance and oversight of the organizational leadership (i.e., management) and serve to reinforce that board members are to be focused on organizational adherence to its mission rather than to day-to-day operations. Unwittingly, however, these tenets can negatively reinforce all the behavioral factors listed above insomuch that trustees should not challenge management activities as this crosses the proverbial dividing line. When organizations are in decline, as described in A.O. Hirschman's classic 1970 book, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States, it is useful to remember that the use of 'voice' accompanied by 'loyalty' can serve to re-orient the organization away from a negative decline and push the trajectory back onto a favorable path.

Further, the Revised Model Nonprofit Corporation Act, which has been adopted in various versions in a majority of states, requires that a trustee shall "… discharge his or her duties … in good faith, with the care an ordinarily prudent person in like position would exercise under similar circumstances and in a manner the trustee reasonably believes to be in the best interests of the corporation." In discharging those duties, a trustee may rely upon information, opinions, reports, statements, including financial statements and financial data, presented or prepared by officers or employees of the corporation whom the trustee reasonably believes are reliable and competent, or by legal counsel or public accountants as to matters within the person's professional competence, or by a committee of the board within its jurisdiction, if the director reasonably believes the committee merits confidence. On the other hand, The Model Act also provides that a director is not acting in good faith if the director has knowledge that makes reliance upon the above information unwarranted. In instances where trustees have knowledge, directly or indirectly, that the information presented to the board is not reliable, accurate, or ethical, then the trustee has a fiduciary obligation, irrespective of personal motives or relationships pertaining to their board seat, to address such matters in executive session and, when necessary, with the entirety of the board in order to exert its governance, even to the extent that it replaces the managers and operates the corporation until such time as it is reasonable to return to its primary role of governance.

An objective assessment of the reasons for trustees' over-reliance on management and the reluctance to challenge the validity of management's presentations and/or conclusions should cause trustees to conclude that the days of accepting membership on a board for the prestige of the appointment or as an act of support to a fellow director or to lend support to management ended long ago. Trustees must regularly and carefully analyze their fiduciary obligations and subsequently understand the fiduciary duties that they undertake as board members, not only from a legal viewpoint but also from the viewpoint of their ethical duty to their community. This is particularly relevant in a post-COVID 19 landscape when the compression of margins and the workforce issues have placed intense pressure on health care systems to continue to provide for the health and well-being of the community they serve. Now is not the time to be timid and stay with outdated traditions, norms, or behaviors, but to be progressive, proactive and intentional about upholding the nobility of caring for other people.

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