



## **Boards: When Duty Calls**

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It is a truism that well run tax exempt organizations have effective Boards of Directors. For this reason alone, selecting and maintaining the composition of the Board is critical to the current success of the Board, and therefore, the future success of the organization. Many factors are considered when potential Board members are nominated, including experience, intelligence, credibility, past volunteering, and a deep understanding of, and involvement in, the profession and/or industry.

Often, and for good reason, members of Boards are leaders in their own right, even senior executives at successful corporations. Many times they are members of the Board of Directors of their employer corporations. All of these factors lend gravitas to the tax exempt organization's Board of Directors. The organization's members, the community, Congress, state legislatures, the press and countless other constituents are appropriately impressed with the "Dream Board."

But problems may lurk. CEOs and Board members of successful tax exempt organizations must remain diligent about making sure the Board is functioning properly and acting in the best interests of the tax exempt organization. Why the alarm? After all, the Board is made up of the pillars of the profession, all people who are beyond reproach and whose reputations are impeccable. Given the composition of the Dream Board, how could it not be acting properly?

Assume that your organization has a Dream Board. It is comprised of senior executives, board members, and/or owners of successful business enterprises, all well respected within the profession or industry. What if the Dream Board is considering taking a policy position that is the opposite of the position that would be taken by the employer of that Dream Board member? What should that Board member do? To whom does she owe a fiduciary duty? What if the Dream Board actually takes a policy position that is opposite of the position taken by the employer of that Dream Board member? What should that Board member do? To whom does she owe a fiduciary duty?

She owes a duty to the organization on whose Board she is a member. She, like many Board members, comes to the Board table with different views, experiences and perspectives. The Board and organization should want and demand the sharing of diverse views. This leads to better discussions and conclusions. She, like her Board colleagues, will express her opinions strongly. But while doing so, she may espouse only the positions that she believes are in the best interests of the organization. That is her fiduciary duty.

Those views may be different than what is in the best interests of her employer. If that is the case, she must notify the Dream Board about her possible conflict of interest. She may decide to recuse herself. She may be asked to recuse herself. Neither of these events would be inappropriate, and in fact, may be required depending on the circumstances. No matter what, she must notify the Dream Board about the possible conflict of interest. If she doesn't, she will be acting inconsistent with her fiduciary duty.

But, that's not the end of the analysis. What if she notifies the Dream Board about her possible conflict of interest and recuses herself from involvement regarding the issue at hand? Let's assume the Dream Board adopts a policy position that is contrary to her employer's position. The organization has taken a stand. This may hurt her employer. In that situation, she hasn't participated in the Board's decision. Does that mean that she can advocate the position that supports her employer? Can she do so with notice to whomever she is speaking that, even though she is a member of the Dream Board, she is advocating on behalf of her employer?

The simple answer is no. She must act in accordance with her fiduciary duty to the tax exempt organization. If she has a conflict of interest, she will be recused from further debate and decision making. That's one step. But she has to do more. As a Board member, she must continue to represent the organization's interests. That may be different than the interests of her employer. When faced with this type of situation, her best course of action is to decline discussing the issue with any third party on behalf of the organization and her employer. Someone else from her employer can advocate a position contrary to the organization's position. She should not be in that position. The employer doesn't have a fiduciary duty to the organization, only she does. So, it is fine for her employer to have a position that is not in the best interest of the organization. It is fine for her to have a view that is contrary to the Dream Board's final decision. But, when the final Dream Board's decision is made, she either must advocate for that position, or remain silent on the issue and defer to the dedicated spokesperson to advance the organization's interests. She may not undermine the organization.

These issues are serious. They can be complex. They can become even more complicated when Board members are also members of their employer company's Board of Directors. How does she deal with her fiduciary duties to both organizations when their interests are different and perhaps even conflicting? Does she need to resign from one or both Boards of Directors?

Clearly, both the tax exempt organization and her employer need to be aware of these issues and the difficulty she may face in dealing with her dual responsibilities. A thorough analysis of these issues is warranted so everyone's roles are clear. At the end of the day, it is imperative that Board policies and procedures reflect the expectations, responsibilities and duties of all Board members.

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