



The Nonprofit Ethicist

by Woods Bowman

In the case where an organization has the power to nominate a majority of members to a sister organization's board, those members' duty of loyalty is to their organization, not the one that nominated them. If you are invited to a board in order to provide your professional services, it's ethical to accept (so long as you aren't paid) but it isn't wise. And gifts in kind are tricky things—proceed with caution.

DEAR NONPROFIT ETHICIST,
My question/concern is this: when one organization establishes another and nominates a majority of members to the other's board, does that change the duty of loyalty that the nominees have to the other organization in any way, and if so, how?

I have been involved with two organizations for forty-plus years. For the sake of anonymity, I'll call them Organization A and Organization B (the latter owns and operates a facility for the benefit of multiple nonprofit organizations, like Organization A). According to B's bylaws, A is allowed to nominate the majority of B's board members. There are also other groups that use Organization B's facilities, each nominating one representative to B's board; some board members are unaffiliated with any facility user. Finally, a majority of board members nominated by Organization A must approve certain kinds of changes to the bylaws.

Thus, while the history and structure of B's board suggests that it was intended to pay close attention to the needs of A (and the other users of the facility), the general standard of fiduciary duty includes that of loyalty, meaning that members of B's board must do what is best for B, regardless of impact on A.

The reason for my concern is as follows: Initially there was a very close tie between A and B; however, in recent years the relationship became pro forma, with A taking less and less interest in B and not paying much attention to whom A nominated to B's board, and B having a director who increasingly chafed at A's assumption that it could more or less dictate the terms of its use of B's facilities. This director has taken the board—which now has very few members committed to A, even though nominated by them—in the direction of making B more independent.

Organization A has also changed. Its longtime director resigned, and the new director's primary interests do not lie in A's relationship with B (although the new director is generally supportive of B because programs there bring in needed income). A's programs at B, which had once had long waiting lists, now leave significant spaces unfilled, and this has had negative impacts on both A and B, and exacerbated the conflict between them.

I've come across literature on nonprofit management and governance that suggests these circumstances are not unusual ones, and most often come up in hospitals setting up subsidiaries, with some authors suggesting that these

circumstances change the duty in some way and others saying it doesn't. I'm struggling to get my head around the fact that A nominates people to B's board who then are expected to pay little or no attention to what is best for A.

The conflict for me, as a current (and past) member of B's board, and former member of A's board nominated to B's board by A, is that I am aware of the different sides of the situation yet see no way to make use of that knowledge when my duty of loyalty limits me to concern only for B. It is true that because the organizations are so intertwined, B's policies that negatively impact A may also negatively impact B in the long run, so in that case it is appropriate to point to this interaction. However, that is not always the case. Is there a way to include the history of the organizational relationship in decision making as a board member of B?

Conflicted

Dear Conflicted,
Notwithstanding the interesting layers and historical details of these entwined organizations, this is one of those cases that seem complicated but are really quite simple. As you correctly perceive, persons who serve on B's board have a duty of loyalty to B, not to A—even those

whom A nominated. However, the duty of loyalty does not preclude B's board members from considering the impact of their decisions on all stakeholders—including, but not limited to, A. In this case A has clearly dropped the ball. It takes little interest in B and its facilities; it seems indifferent toward its nominees, and has lost its credibility with B's executive director and board. Organization A deserves whatever B dishes out.

*Dear Nonprofit Ethicist,
I am a professional fundraiser and I have been asked to sit on a nonprofit board to help with developing a fundraising plan, among other things. I'm not sure how that will be perceived. Any advice?*

*Sincerely,
Being Courted*

Dear Being Courted,

If they pay you, it would be a conflict of interest to sit on the board. If you donate your time, it is ethical but unwise. Suppose the board doesn't like your plan? If they fail to implement it properly they are more likely to blame *you* than to own up to their shortcomings. If you are on the board, things could get acrimonious. If you like this organization and want to donate your time while sitting on the sidelines, then go ahead. After they begin to implement your plan, when it's clear that they are pulling their weight and not just looking for a free ride, you could drop hints that you would be willing to join the board.

Additionally, would your paying clients assume that you are less committed to them than to the organization that you serve as a board member? It just sounds like a bad idea from every angle.

*Dear Nonprofit Ethicist,
My agency receives gifts in kind in the form of new and used household items and clothing. We sort the items, attach a monetary value to the items, record*

the gift in our donation records, and then send the donor a receipt for tax purposes. Donations that we cannot use we offer to other area organizations that could better utilize them. Is it appropriate to count the items that are discarded as gifts to the agency?

*Sincerely,
Bewildered*

Dear Bewildered,

Gifts in kind are tricky. Let's start with recording their value. As you may know, you need this information for your financial statements, but you should not—repeat, not—share your estimate with the donor. Your acknowledgment of the gift should describe the goods and the date received. It is the donor's responsibility to have the goods appraised and to justify the deduction to IRS auditors when they come calling.

You should be able to give away unneeded donations to another 501(c)(3) agency. However, you must still record the gifts on your books, and I would assign a value of zero. The IRS has called to task some large agencies for “daisy chaining” gifts in kind. The practice results in the recording of a single gift multiple times as received and expended—sometimes complete with a vastly marked-up value. By the way, if you ever get vehicles, real estate, appreciated securities, historical treasures, or artworks, please consult IRS regulations. These items may be very valuable, but the special rules that apply to them can be a real headache.

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