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SYMPOSIUM

GETTING ON BOARD: LEGAL, ETHICAL, AND PRACTICAL CONSIDERATIONS FOR NONPROFIT BOARD MEMBERS*

Hannibal B. Johnson†

I. OVERVIEW: THE ROLE OF THE BOARD OF DIRECTORS

Volunteerism is an American staple. Volunteers shore up the work of governments, private institutions, and individuals by devoting countless hours, substantial monies, and considerable expertise to communities all across the nation. Members of the boards of directors of America's nonprofit corporations ("nonprofits") are a peculiar species of volunteers with a particular set of "rights" and responsibilities.

This article explores some of the general legal, ethical, and practical considerations surrounding service on the board of directors of a nonprofit through the prism of a realistic hypothetical. Every board member (and potential board member) of a nonprofit would do well to take a fresh look at the unique set of rights and responsibilities that form the essence of board membership. Having done that, board members may then approach their volunteer service with a view toward minimizing risks, maximizing the nonprofit's potential, and optimizing opportunities for personal growth and development.

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Both nonprofits and the pool of volunteers from which they draw their boards of directors should ask themselves: "Who properly belongs on a non-profit board of directors?" The standard nonprofit mantra in this regard holds that anyone who offers one or any combination of the three Ts—time, talent, and treasure—is a desirable candidate. But that formula offers only half (at best) of the truth. Without doubt, nonprofit boards need individuals who have time to devote to programs and projects. It is equally true that nonprofits can always utilize the services of individuals with particular talents—lawyers, public relations specialists, and accountants come immediately to mind. And it almost goes without saying that no nonprofit turns a blind eye toward "deep pockets," individuals with personal wealth and/or access to wealth. With respect to nonprofit board composition, time, talent, and treasure are necessary, but not sufficient. Commitment is the other half of the equation. Absent committed board members—individuals who internalize the organization's mission and believe in its vision—all the time, talent, and treasure in the world cannot propel a nonprofit into the realm of excellence.

Even a committed nonprofit board member may not understand her proper role. Most nonprofits consist of an ill-defined duality—a volunteer board of directors and a paid staff. But who "runs" the organization? Who does what for whom? Fundamentally, misunderstanding looms over one central issue: What is properly the province of the nonprofit board of directors and what is a matter of staff prerogative?

Dr. John Carver, a leading authority on nonprofit management, has developed a helpful dichotomy, a conceptual framework, for distinguishing the role of a nonprofit's board of directors from that of its staff. Simply put, the board should focus on the organizational mission—the "ends." The staff, in turn, should concentrate its energies on implementation—the "means." Under Carver's governance model, then, the board *as a board* addresses what the organization does, for whom, and at what cost (including "opportunity cost"—what the organization chooses not to do so that it may do that which it chooses to do). The board should also set affirmative limits for the staff (*e.g.*, conduct that the board will not countenance, such as the violation of ethical and legal standards and behavior that is somehow imprudent).¹ All else is the province of the staff. It should be noted that an individual board member may, consistent with the Carver model, become involved with the nonprofit on whose board he sits in on a variety of levels *as a volunteer* if the staff desires and requests his assistance. For example, the executive director of a small nonprofit may of necessity depend on volunteers from her board of directors to participate in the planning and implementation of programs and projects. Carver's straightforward paradigm clarifies, with remarkable simplicity, an area on nonprofit management rife with misunderstanding and fraught with potential conflict.

1. See JOHN CARVER, *BOARDS THAT MAKE A DIFFERENCE* (Jossey-Bass Inc. 1990).

The mission of the nonprofit serves as the lodestar that should drive both board and staff. The board decides what the mission is. The staff determines how best to implement the mission. But there is an additional piece to this macro view of the nonprofit board/staff relationship. Both board and staff must come to agreement, within the context of their mission-focused analysis, on core values. What fundamental precepts (*e.g.*, trust, integrity, responsibility) will guide the nonprofit? Such principle-centered leadership at both the board and the staff level is a necessary ingredient to the long-term success of the organization.²

A director owes the nonprofit he serves a commitment to the overall welfare, well-being, and viability of the organization. In legal parlance, this commitment translates principally into three legal "duties": (i) the duty of care; (ii) the duty of loyalty; and (iii) the duty of obedience (*i.e.*, faithfulness to the nonprofit's mission).³ A leading commentator summarizes these duties as follows:

The duty of care concerns the director's competence in performing directorial functions and typically requires him to use the care that an ordinarily prudent person would exercise in a like position and under similar circumstances. The duty of loyalty requires the director's faithful pursuit of the interests of the organization he serves rather than the financial or other interests of the director or of another person or organization. And the duty of obedience requires that a director act with fidelity, within the bounds of the law generally, to the organization's 'mission,' as expressed in its charter and bylaws.⁴

These duties, while not the focus of this article, form the legal backdrop against which nonprofit directors may measure their actions on a recurring basis.

The role of a nonprofit board member—seeing to it that the organization achieves its "ends," its mission—may at times be daunting. Moreover, the commitment, responsibility, and accountability required of a nonprofit board member seems, at first blush, at odds with the "volunteer" status of the position. "Volunteer" status carries with it the unfortunate connotation of diminished commitment, attenuated responsibility, and indirect accountability. Nothing could be further from the truth. That one generally receives no remuneration for nonprofit board service does not eliminate the real and significant obligations attendant to such service. Dr. John Carver puts it this way:

Boards of nonprofit and some public organizations think of themselves primarily as volunteers. This identity as volunteers adds little and potentially costs a great deal. Responsibility, authority, job design, and demands of a board are not affected by being paid or unpaid. Except that it strengthens the sense of public service, being a *voluntary* board is irrele-

2. See, *e.g.*, STEPHEN R. COVEY, *PRINCIPLE-CENTERED LEADERSHIP* (Summit Books 1991).

3. David B. Rigney, *Duties and Potential Liabilities of Officers and Directors of Nonprofit Institutions and Organizations*, *NONPROFIT GOVERNANCE: THE EXECUTIVE'S GUIDE* 91 (Victor Futter gen. ed. & George W. Overton mng. ed., American Bar Association 1997).

4. *Id.* (citing DANIEL L. KURTZ, *BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS* 21 (Moyer Bell Ltd., 1988).

vant to governance and its attendant burden of accountability. On the other hand, some connotations of voluntarism can detract from the board's job, severely reducing its ability to lead.⁵

The following hypothetical makes clear the ease with which internal organizational discord may unexpectedly embroil "volunteers" in legal, ethical, and practical dilemmas for which they are singularly unprepared. The hypothetical poses some of the significant legal, ethical, and practical issues that may arise in the context of a nonprofit board of directors. While not all nonprofit boards of directors reach "crisis mode," some do. In any event, the issues raised by the hypothetical and the questions and answers that follow offer useful guidance for developing preventative management strategies.

II. "THE BOARD IN CRISIS"—A TEACHING HYPOTHETICAL

Joe B. Liberal was hired as the executive director of Urban Horizons, a 501(c)(3)⁶ social service organization funded through individual contributions and grants from private foundations and the state and federal governments, on August 1, 1986. On August 1, 1996, Joe, together with the entire Urban Horizons board and staff, celebrated his tenth anniversary on the job with a special luncheon in his honor.

On August 27, 1996, Sterling Silver, a member of the executive committee of the board of directors of Urban Horizons, received a phone call from Joe's executive secretary, Penelope Pitstop. Her voice quivering, Penelope, told Sterling, "I called you because you are a lawyer and because I trust you." Penelope then alleged in specific and graphic detail conduct on the part of Joe that she deemed "sexual harassment." Among the allegations were unwelcome physical advances, lewd jokes, and constant requests for dates and sexual favors. Stunned by these revelations, Sterling asked Penelope whether she thought other staffers at Urban Horizons might have similar complaints. Penelope emphatically replied, "Yes."

Sterling immediately called Max E. Mize, the Urban Horizons board president, who, after reviewing the Urban Horizons bylaws, promptly convened a meeting of the executive committee of the board. The executive committee, after consulting with E. Z. Goins, one of Sterling's law partners and an employment law specialist, immediately issued a comprehensive policy on sexual harassment to all Urban Horizons employees and conducted a full-blown investigation of Penelope's allegations, commencing on September 6, 1996. Using teams of two or three of its members, the executive committee interviewed every Urban Horizons employee, asking a series of open-ended questions designed to assess overall working conditions. The investigation uncovered at least three other females with allegations which, if proven true, would constitute

5. CARVER, *supra* note 1, at 16.

6. I.R.C. § 501(c)(3) (1988).

flagrant acts of sexual harassment. The investigation also revealed serious fiscal and managerial concerns.

The executive committee summoned Joe and gave him an opportunity to confirm or deny the allegations. He admitted the substance of the allegations with respect to Penelope, but denied the allegations with respect to the other individuals. Asked what she wanted to happen to "make things right," Penelope said, "I just want all this to stop—and I want Joe to apologize to me and my husband."

On November 1, 1996, the executive committee voted to reprimand Joe, stipulating bluntly that "any future unwelcome conduct of a sexual nature will result in the termination of your employment." Joe, promising to modify his behavior, vowed that there would be no future instances of "sexual harassment." Humbled and contrite, he apologized in person to Penelope and her husband.

Information about the sexual harassment allegations at Urban Horizons leaked to the press despite oral agreement on the part of all parties to keep the matter confidential. News stories, print and broadcast, painted the atmosphere at Urban Horizons as chaotic, unseemly, and sexually charged. The executive committee denied repeated and persistent press requests for documents related to the allegations. The executive committee did, however, release a terse statement: "We are concerned about and are investigating serious allegations at Urban Horizons which, if proven, will be dealt with expeditiously and appropriately. We have no further comment at this time."

On December 20, 1996, Mahogany Wood, another staffer at Urban Horizons, called Sterling. She alleged that Joe had "sexually harassed" her during the summer of 1996, but that no such conduct had occurred since then. Mahogany said that fear kept her from coming forward during the investigation conducted in September of 1996. This brought to five the total number of women whom Joe had allegedly sexually harassed. During the course of the investigation, several other employees mentioned Joe's annoying habit of telling graphic, off-color, sexually-charged jokes.

Sterling notified Max, who again convened the executive committee. The executive committee decided that it had "lost confidence in the managerial and interpersonal skills of Mr. Liberal."

The executive committee offered Joe a settlement to avoid any potential litigation. Joe was given the option to resign with salary continuation through year-end in consideration for his agreement to forgo the litigation of all matters pertaining to his employment with Urban Horizons. Joe declined the settlement offer.

The Urban Horizons personnel manual, not updated since 1980, provided that all employees are employed "at will" and may be discharged at any time and for any reason. However, the manual provided: "The executive director will be assisted, to the extent feasible, with deficiencies in his job performance prior to being subjected to any disciplinary action."

At a special meeting of the full board of directors on December 1, 1996, Joe appeared with his lawyer, Lucky Lyons. Lucky had once been a member of

the Urban Horizons board of directors, and had occasionally advised the board on employment matters. Joe, through Lucky, pled his case. The board was represented by E. Z. Goins, Sterling's law partner. The press were kept at bay outside the meeting hall, where they remained until the meeting concluded hours later.

In the meeting, Joe again apologized for his actions with respect to Penelope, but maintained his innocence with respect to the other claims. Joe noted that Mahogany Wood's claims arose prior to his reprimand on November 1, 1996. He pointed out that the Urban Horizons executive committee had agreed, at least implicitly, not to terminate him unless there were *future* (i.e., post-November 1, 1996) instances of misconduct. Joe requested the pre-disciplinary "assistance" offered in the personnel manual. The board of directors of Urban Horizons denied Joe's request, and voted by secret ballot to terminate Joe effective as of January 1, 1997. After the vote, several board members resigned.

On January 20, 1997, Joe B. Liberal filed suit against Urban Horizons and the individual members of its executive committee, alleging wrongful discharge. He specifically alleged that his termination constituted a breach of contract and tortious interference with an employment relationship. Moreover, Joe claimed invasion of privacy in connection with the information about the alleged harassment leaked to the press.

III. ANALYSIS OF "THE BOARD IN CRISIS"—LEGAL, ETHICAL, AND PRACTICAL CONSIDERATIONS:

Questions & Answers

Q. Did the Urban Horizons executive committee properly handle the sexual harassment allegations?

A. Probably. Initially, it should be noted that sexual harassment is precisely the kind of issue a nonprofit board may face. It is the province of the board, under Dr. John Carver's model mentioned previously, to set limits for the staff. One such obvious limit is that staff take no action in violation of law. The board in the hypothetical took immediate steps to procure legal representation on a matter it recognized as serious and significant. From the facts provided, it appears that the board's executive committee: (i) promptly interviewed Penelope, the complainant, and asked her how she would like to have the situation resolved; (ii) conducted a thorough investigation, using open-ended, non-leading questions, of the entire Urban Horizons staff; (iii) issued a sexual harassment policy (Urban Horizons should have already had such a policy in place); (iv) took immediate disciplinary action against the admitted harasser, Joe, who apologized to the complainant and agreed to refrain from such conduct in the future; (v) took further disciplinary action against the harasser when it became apparent that the harassment was more widespread than initially thought; (vi) provided Joe with two separate opportunities to respond to the sexual harassment charg-

es; and (vii) attempted to maintain the confidentiality of the investigative and disciplinary processes. The executive committee took immediate corrective action, precisely what is required under the circumstances.⁷

Q. Was the termination of Joe B. Liberal by the Urban Horizons executive committee consistent with the law?

A. Probably. Note once again that the board in the hypothetical sought legal counsel prior to making the decision to discharge Joe. Generally, employees in Oklahoma are employed "at will." Either the employee or the employer may terminate the relationship at any time. The issue in the hypothetical is whether the personnel manual, by offering "assistance" to Joe prior to the imposition of disciplinary action (which "assistance" was never provided) and by telling Joe that "any future unwelcome conduct of a sexual nature will result in the termination of your employment" created an implied contract, thereby changing the nature of the employment relationship. Under current Oklahoma law, the finding of an implied contract that would alter the "at will" employment relationship is highly unlikely. Simply put, there is no indication that these rather vague statements communicated to Joe by Urban Horizons were supported by adequate consideration (*i.e.*, something of value given or done by Joe in favor of Urban Horizons) and relied on by Joe to his detriment, two general requirements for the finding of an implied contract in such a situation.

As previously noted, Urban Horizons had an affirmative responsibility to take immediate corrective action to rid the workplace of sexual harassment. As a practical matter, a finding by a court that Joe had an implied contractual right to continued employment would force Urban Horizons into the unlikely and untenable position of being legally bound to keep an admitted harasser in the workplace. Accordingly, Joe's termination would likely withstand a legal challenge.⁸

Q. Are board members acting in their official capacity as such protected by statute?

A. Yes. Both state and federal law offer limited protection for board members acting in their official capacity as such. These "shield" laws are designed to encourage volunteerism by circumscribing the extent to which civil lawsuits may be filed against them for actions taken within the scope of their volunteer activities on behalf of nonprofits.⁹ Such laws come into play when, as in the case of Joe's termination in the hypothetical, a situation arises that might otherwise more readily subject board members to legal liability.

The Oklahoma statute,¹⁰ adopted in 1986, generally protects board mem-

7. See, *e.g.*, *Sex Discrimination* (United States Equal Employment Opportunity Commission, Technical Assistance Program, May 1995).

8. See, *e.g.*, *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989); *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987); *Beck v. Phillips Colleges, Inc.*, 883 P.2d 1283 (Okla. Ct. App. 1994); *Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. Ct. App. 1976); *Johnson v. Nasca*, 802 P.2d 1294 (Okla. Ct. App. 1990).

9. See OKLA. STAT. tit. 18, § 865 (1991); OKLA. STAT. tit. 18, §§ 866-867 (1991 & Supp. 1997); 42 U.S.C.A. § 14501(a) (West Supp. 1997).

10. See OKLA. STAT. tit. 18, § 865 (1991); OKLA. STAT. tit. 18 §§ 866-867 (1991 & Supp. 1997).

bers of nonprofits from civil liability for damages resulting from: (i) the negligence of an employee of the nonprofit, or (ii) the negligence of another director of the nonprofit. Only vicarious liability is rejected by the statute.¹¹ Thus, intentional torts or grossly negligent acts or omissions personal to the director of the nonprofit at issue may give rise to civil liability.¹² Moreover, a director who participates with a nonprofit in transferring assets to evade the satisfaction of a civil judgment cannot claim immunity under the statute.¹³ Finally, the statute provides that a director of a nonprofit may not be held accountable for monetary damages to the nonprofit or its members for breach of fiduciary duty as a director.¹⁴ This grant of immunity does not extend to: (i) a breach of the director's duty of loyalty to the nonprofit; (ii) acts or omissions taken in bad faith or involving intentional misconduct or a knowing violation of law; or (iii) transactions from which the director derives an improper personal benefit.¹⁵

The 1997 federal statute¹⁶ extends immunity to volunteers serving nonprofits and governmental entities. To be covered under the statute, a volunteer must have been acting within the scope of her volunteer responsibilities at the time of the act or omission giving rise to suit.¹⁷

Called the "Volunteer Protection Act of 1997," the federal statute does not protect volunteers who cause harm through willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual(s) harmed by the volunteer.¹⁸ Moreover, it exempts from its protective ambit volunteer misconduct that is or involves: a crime of violence; a hate crime; a sexual offense; the violation of a state or federal civil rights law; or misconduct while the volunteer was under the influence of alcohol or drugs.¹⁹ The Volunteer Protection Act of 1997 also does not apply to volunteers operating vehicles for which an operator's license or insurance is required under state law.²⁰ Where licensure, certification, or authorization is required of one performing the service the volunteer provides, the volunteer must be so licensed, certified, or authorized to obtain protection under the federal statute.²¹

The Volunteer Protection Act of 1997 does not affect civil suits brought by the entity for whom an individual volunteers against that volunteer.²² Other state-based limitations may apply.²³ The Volunteer Protection Act of 1997 provides limited immunity for individuals. It provides no immunity for the

11. See OKLA. STAT. tit. 18, § 866 (1991 & Supp. 1997).

12. See *id.* at 866(B).

13. See *id.* at 866(C).

14. See *id.* at 867.

15. See *id.*

16. See 42 U.S.C.A. §§ 14501-14505, Pub. L. No. 105-19 (West Supp. 1997).

17. See *id.* at § 14503(a)(1).

18. See *id.* at § 14503(a)(3).

19. See *id.* at § 14503(f)(1).

20. See *id.* at § 14503(a)(4).

21. See *id.* at § 14503(a)(2).

22. See *id.* at § 14503(b).

23. See *id.* at § 14503(d).

nonprofits and governmental entities for whom the covered individuals "work."²⁴ The Volunteer Protection Act of 1997 severely limits the availability of punitive damages and liability for noneconomic losses.²⁵ It preempts inconsistent state laws, but allows states to "opt out" of its provisions by affirmative legislation with respect to civil actions filed in state court where all parties are residents of the state, and permits states to provide, through legislation, additional volunteer protection.²⁶

Q. Does the Oklahoma Open Meeting Act apply?

A. Yes. Because Urban Horizons receives state funds, the Oklahoma Open Meeting Act applies. It is not clear whether the notice requirements of the Oklahoma Open Meeting Act, set forth below, were met. As will be shown, with respect to the initial meeting of the executive committee with Joe, the executive session exception to the Oklahoma Open Meeting Act could be applicable if certain procedural requirements were met. Finally, the full board meeting that resulted in Joe's dismissal falls within the Oklahoma Open Meeting Act. From the facts in the hypothetical, it appears that no exception applied. Thus, the Oklahoma Open Meeting Act would require, at a minimum, that: (i) such a meeting be open to the public and (ii) any votes taken at the meeting be cast publicly and recorded.

In order to encourage and facilitate an informed citizenry's understanding of its government, the Oklahoma Open Meeting Act²⁷ requires that all "public bodies" in the state: (i) hold open meetings; (ii) provide advance notice in writing of the regular schedule of meetings by December 15th of each calendar year for the following calendar year (including the date, time, and place of the meetings) to the Secretary of State, county clerk, or municipal clerk as designated by statute; and (iii) post notice at least twenty-four hours in advance of each such meeting (including the date, time, place of the meeting and an agenda containing the matters to be covered in the meeting).²⁸ "New business" may be considered in the meeting even if it does not appear on the posted agenda. "New business" consists of "any matter not known about or which could not have been reasonably foreseen prior to the time of posting."²⁹ Any changes made to the regular schedule of meetings must be filed with the Secretary of State, county clerk, or municipal clerk, as specified by the statute, at least ten days prior to the implementation of such change.³⁰ If a meeting is continued or reconvened, public notice of the time, date, and place of such meeting is to be given by announcement at the original meeting. Only matters on the agenda of the original meeting may be considered at the continued or reconvened meet-

24. *See id.* at § 14503(c).

25. *See id.* at § 14503(e).

26. *See id.* at § 14502(a).

27. OKLA. STAT. tit. 25, §§ 301-314 (1977).

28. *See id.* at § 311.

29. *Id.* at § 311(9).

30. *See id.* at § 311(8).

ing.³¹

Special meetings require at least forty-eight hours advance public notice to the Secretary of State, county clerk, or municipal clerk. The notice must include the date, time, and place of the meeting, and may be given in writing, in person, or by telephone. A notice must also be posted at least twenty-four hours in advance of the meeting at the principal office of the "public body" or, if no such principal office exists, at the location of the meeting. The posted advance notice must contain the date, time, and place of the meeting and an agenda noting the subject matters to be discussed at the meeting.³² In the event of an emergency, the notice required is the amount and extent of notice reasonable and practicable under the circumstances.³³

"Public body" includes entities supported by public funds, entrusted with public funds, or administering public property.³⁴ Thus a nonprofit that receives state government funding (*e.g.*, Urban Horizons in the hypothetical) would fall within the ambit of the Oklahoma Open Meeting Act. Votes must be publicly cast and recorded.³⁵ Minutes must be kept and open to public inspection. Actions taken in willful violation of the act are void.³⁶

Informal gatherings and electronic or telephonic communications among a majority of the members of a public body, except with respect to a narrow group of specifically-delineated public bodies, may not be used to decide any action or vote on any matters.³⁷ Closed "executive sessions" may be held only in accordance with specific procedural conditions³⁸ and only to discuss certain matters, among them, employment actions, bargaining unit contractual negotiations, the purchase or appraisal of real estate, communications between a public body and its attorney about certain pending legal matters, and certain matters the disclosure of which would violate confidentiality laws.³⁹ The agenda for an executive session must: (i) put the public on notice that an executive session will be held; (ii) identify the purpose of the meeting and the business to be discussed; and (iii) specifically state the provision of the Oklahoma Open Meeting Act that authorizes the executive session.⁴⁰

Violations of the Oklahoma Open Meeting Act are generally punishable by fine of up to \$500 and/or imprisonment in the county jail for up to one year.⁴¹ However, willful violations of the Oklahoma Open Meeting Act's executive session provision may result in criminal sanction and cause the minutes of the meeting and all other records of the executive session to be immediately made

31. *See id.* at § 311(10).

32. *See id.* at § 311(11).

33. *See id.* at § 311.

34. *See id.* at § 304(1).

35. *See id.* at § 305.

36. *See id.* at § 312.

37. *See id.* at § 307.1.

38. *See id.* at § 307(E).

39. *See id.* at § 307.

40. *See id.* at § 311(B)(2).

41. *See id.* at § 314.

public.⁴²

Q. Does the Oklahoma Open Records Act apply?

A. Yes. Because Urban Horizons receives state funds, the Oklahoma Open Records Act applies. However, as will become clear, many of the records involved in the hypothetical may fall within exceptions to the Oklahoma Open Records Act and, for that reason, be properly kept confidential. The 1985 Oklahoma Open Records Act⁴³ is designed "to ensure and facilitate the public's right to access to and review of governmental records so they may efficiently and intelligently exercise their inherent political power."⁴⁴ Similar to the Oklahoma Open Meeting Act, it requires that "public bodies," the definition of which includes entities in the state supported with public monies, entrusted with public funds, or administering public property, must make available to the public for inspection, copying, and/or mechanical reproduction official records and documents.

As is the case with respect to the Oklahoma Open Meeting Act, a nonprofit receiving state government funding is subject also to the Oklahoma Open Records Act. Urban Horizons in the hypothetical falls into this category.

Organizations may, consistent with the strictures of the Oklahoma Open Records Act, impose reasonable administrative fees for copies of requested documents, may make such documents available only during regular business hours, and may establish reasonable procedures covering access to requested documents.⁴⁵ One or more persons must be designated and authorized to release the organizational records consistent with the Oklahoma Open Records Act.⁴⁶

Records protected by state evidentiary privileges or compiled in conjunction with meetings closed pursuant to the Oklahoma Open Meeting Act (*e.g.*, records of an executive session conducted to discuss certain personnel matters) are not covered by the Oklahoma Open Records Acts.⁴⁷ Records containing information only a portion of which is subject to the Oklahoma Open Records Act must be redacted and released.⁴⁸ Some personal notes and personally-created materials are excluded from coverage.⁴⁹ Likewise, some personnel records are excluded from coverage.⁵⁰ Federal records maintained by a public body may be kept confidential to the extent required by federal law.⁵¹ Other information that may be withheld from disclosure, including certain bid information, computer programs, real estate appraisals, information relating to the location of

42. *See id.* at § 307(F).

43. OKLA. STAT. tit. 51, § 24A.1-24A.20 (1991 and Supp. 1997).

44. *Id.* at § 24A.2.

45. *See id.* at § 24A.5.

46. *See id.* at § 24A.5(6).

47. *See id.* at § 24A.5(1).

48. *See id.* at § 24A.5(2).

49. *See id.* at § 24A.9.

50. *See id.* at § 24A.7.

51. *See id.* at § 24A.13.

a prospective business, and research documents.⁵² Finally, a public official may keep confidential personal communications received from a person exercising his rights under the federal or state constitution. The public official's response to such communication may be kept confidential only to the extent necessary to protect the identity of the person exercising his constitutional rights. However, the fact that a communication was received and whether the communication does or does not constitute a complaint must be disclosed.⁵³

Penalties for violation of the Oklahoma Open Records Act include a fine of up to \$500 and/or imprisonment in the county jail for up to one year.⁵⁴ A person denied access to a document may file a civil suit seeking declaratory or injunctive relief and, if successful, recover reasonable attorney fees. If the public body successfully defends such a suit and the court finds that the suit was frivolous, the public body is entitled to reasonable attorney fees.⁵⁵ A public body or public official (*i.e.*, an official or employee of a public body) cannot be held civilly liable for providing access to documents consistent with the Oklahoma Open Records Act.⁵⁶

Q. Did Urban Horizons provide insurance for its board of directors?

A. The hypothetical does not indicate whether Urban Horizons provided insurance for its board of directors. Non-profit organizations should procure insurance that protects board members acting in their official capacities from civil liability.⁵⁷ Before accepting a board position, a prudent candidate should inquire as to the nature and extent of board liability insurance coverage. Moreover, a prudent board candidate will want to review the organization's bylaws, particularly to ascertain whether indemnification is available to directors in the event of a lawsuit.⁵⁸

In the event of a lawsuit to which the insurance coverage attaches, board members should be advised that the insurance company will select the legal representative. This may pose practical difficulties.

Since "choice" is absent from the representational equation, board members may not be happy with the designated legal representative. The counsel for the insurance company may be "capped" in terms of rates (remuneration for the representation). As such, the board's legal team may be less aggressive, and perhaps less attentive, than would be the case had legal representatives been "chosen" in the traditional manner. Finally, ethical issues may arise since the insurance company, not the board *per se*, both hired the legal representatives and is footing the bill for the representation.

Typically, the insurer retains control of the defense and the decision as to

52. *See id.* at § 24A.10.

53. *See id.* at § 24A.14.

54. *See id.* at § 24A.17(A).

55. *See id.* at § 24A.17(B).

56. *See id.* at § 24A.17(C).

57. NONPROFIT GOVERNANCE: THE EXECUTIVE'S GUIDE 265 (Victor Futter gen. ed., & George W. Overton mng. ed., American Bar Association, 1997).

58. David B. Rigney, *Duties and Potential Liabilities of Officers and Directors of Nonprofit Institutions and Organizations*, NONPROFIT GOVERNANCE: THE EXECUTIVE'S GUIDE 94 (American Bar Association 1997).

whether to settle a claim. This arrangement is fraught with potential for conflicts of interest. The insurer wishes to reduce its costs by limiting the scope of its coverage. The insured seeks maximum coverage and optimal representation by the insurer-designated attorney. In such cases, there are in reality dual clients for the attorney—the insurer and insured. Ethical standards recognize this duality and focus on whether the lawyer's professional judgment is impaired by competing interests of the insured and the insurer. Generally, the insurance company lawyer owes primary allegiance to the insured. As such, the arrangement by which his services are procured must be such as to insure the lawyer's professional independence and enable to lawyer adequately to represent the client.⁵⁹ Rule 1.7 of the Model Rules of Professional Conduct⁶⁰ provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Q. Did any of the board members, through their employer or otherwise, have insurance that covers their official actions as board members of Urban Horizons?

A. The hypothetical does not provide sufficient information to answer this question. As a practical matter, however, a board member may be covered by his corporate employer's insurance for official actions as a board member. In such a case, the individual (more likely, the employer of such an individual) may insist that the employer's legal representatives participate in the representation, particularly if the individual is or may be named in a lawsuit in his individual capacity.

Q. Is there a conflict of interest (or a potential conflict of interest) involved in Lucky Lyons' representation of Joe B. Liberal?

A. Lucky Lyons representation of Joe B. Liberal poses a potential conflict of

59. See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, sec. 8.4.1 (West 1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Amended Feb. 17, 1987, ABA House of Delegates, New Orleans, La., per Report No. 121).

interest. Rule 1.9 of the Model Rules of Professional Conduct⁶¹—ethical rules for lawyers (adopted in Oklahoma) provides: “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.” Was Urban Horizons a “former client” of Lucky Lyons? Did Lucky Lyons represent Urban Horizons “in the same or a substantially related matter?” If both questions are resolved in the affirmative: (i) are the interests of Joe B. Liberal and Urban Horizons “materially adverse”?; and, if so, (ii) did Urban Horizons consent to the Lucky Lyons’ representation of Joe B. Liberal after consultation? These questions are factual. The hypothetical provides insufficient information upon which provide definitive answers.

Q. When should a board member resign?

A. In the hypothetical, a few board members resigned after Joe was terminated. A nonprofit board member has the right, of course, to resign at any time. Indeed, a member of a nonprofit board of directors does the organization a disservice by begrudgingly staying the course when doubt exists as to whether she can live up to the responsibilities of the position. A board member should resign if, for whatever reason, she can no longer contribute meaningfully to the mission and/or vision of the organization.

Q. What about board orientation?

A. The hypothetical does not indicate whether Urban Horizons guided its board members through an orientation process. Board orientation is, however, an opportunity to ask all the right questions. Ideally, the board orientation will enable a new board member to feel sufficiently comfortable with an organization so as to enable her to determine how she may contribute meaningfully to the fulfillment of the organization’s mission and the realization of its vision.

IV. CONCLUSION

The foregoing hypothetical raises legal, ethical, and practical issues that may confront a nonprofit board of directors. The particular issues posed are intended to be representational only. Clearly, all manner of issues may arise in the context of a nonprofit board of directors. The hypothetical simply illustrates how one nonprofit board of directors chose to address tough issues under difficult circumstances. One thing is certain: issues falling within the realm of a nonprofit board of directors should be dealt with diplomatically, systematically, and responsibly. Sound legal advice, whether from an attorney on the board of directors or retained outside counsel, is often crucial.

Board service is a mission-driven job requiring commitment, responsibility, and accountability. Serving on the board of directors of a nonprofit can be one

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (Amended Feb. 17, 1987, ABA House of Delegates, New Orleans, La., per Report No. 121; Feb. 7, 1989, ABA House of Delegates, Denver, Colo., per Report No. 120 A).

of life's more rewarding, fulfilling, and challenging opportunities. It can also be contentious, time-consuming, and frustrating. If the staff and the board understand and are comfortable with their respective roles and are aware that legal counsel may at times be both prudent and necessary, the experience is likely to be a positive one. Whether such an understanding and awareness exists depends largely on the leadership of the nonprofit at issue.

