The Court Comes Calling
*Taken from "Tales from the Boardroom," in the Summer 2009 issue of BoardLink*

In each issue, we plan to share with you a sticky governance scenario that has arisen in some form in one of our bar associations. How would such a scenario play out in your bar? We'll propose a few ways we would deal with the situation.

The facts of the matter
- An influential bar board member asks the bar to contribute $5,000 to the retirement celebration for a local judge.
- The board member is married to the court's chief administrator, which he discloses.
- The board member explains that the court's budget has been slashed, and that the court will not have the resources to hold an event comparable to those held in years past. The board member advocates strongly that this is an important way for the bar to support the local legal community.
- Board discussion:
  - One board member observes that the bar has the money to contribute. Law Week activities are coming in under budget; several committees haven't met and, thus, also are under budget.
  - Another board member observes that this judge generally has been supportive of the bar, and periodically participates in bar-related activities.
  - A third board member expresses concern about the appearance of not contributing. What might this say about the bar's willingness to work with the courts, and what happens next time we need them?
  - A fourth board member suggests that she believes the bar should contribute something, but feels more comfortable with a slightly smaller figure. She makes a motion to contribute $3,000 to the event.
  - The president calls for a vote; the board member abstains; the motion passes.

How do you think this issue would have played out at your bar association?

It's all about context
Many bar associations make contributions to judges' retirement celebrations, and it's quite possible this was a perfectly prudent decision by the board of directors. However, while some pertinent questions were asked, many other important questions were not. Bar members rely on the board to decide how best to use the bar's resources.

As the bar's stewards, here are a few questions we'd suggest this board should have posed:
1. Does the bar have a history of making contributions to these sorts of celebrations?
2. If we make this contribution, what precedent does it set?
3. How does funding a judge's retirement party advance our mission? What, specifically, do we expect this expenditure of resources to accomplish?
4. What are we not doing in order to make this contribution? Is this truly the best use of our resources, or is this simply what's in front of us?

5. By the way, as a follow-up discussion, why do we have inactive committees? What other questions would you have asked?

And what about conflicts of interest?

This board member appropriately disclosed the conflict of interest as he made his pitch, and he abstained from the vote. However, he participated in the discussion and was present in the room for the vote. Were his actions adequate?

Board best practices hold that, if there is a conflict of interest situation, interested parties should not participate in the vote nor in the discussion that precedes it. Most model conflict of interest policies also require the interested parties to physically leave the room for the discussion and vote, although it may be necessary for the individual to remain in the room to provide clarification on questions that arise. Why is it recommended that the individual step out? It's possible the questions we listed above weren't asked because board members felt uncomfortable challenging a peer at the table.

- Does your bar association have a conflict of interest policy? If not, we have samples.
- Is your board aware of the requirements of the bar's conflict of interest policy? Does the policy require members to disclose possible conflicts on an annual basis? Do board members understand how conflicts are to be handled? For example, does the policy require interested parties to step out of the room?
- And it's one thing to have a policy. Does your board actually abide by the policy when conflict situations arise?
Conflicts of Interest
Taken from "Tales from the Boardroom," in the Winter 2012 issue of BoardLink

Tales from the Boardroom case studies are fictional examples created by the editor to illustrate common governance challenges.

Our scenario:
The Local Bar Association is about to make a major investment in some new membership management software. The executive director has outlined the pros and cons of three different packages, and is prepared to make a recommendation to the board at today’s board meeting.

During the meeting, a board member mentions the bar’s conflict of interest policy, discloses that a co-owner of one of the software companies is a family member and that she should probably abstain from the discussion. The president waives his hand. “It’s fine. You have important insight in the technology arena. We’d like your input.” The remaining board members are silent, and the board member remains in the room for the discussion and participates in the vote.

What’s the problem?
According to BoardSource:

“Board service in the nonprofit sector carries with it important ethical obligations. Nonprofits serve the broad public good, and when board members fail to exercise reasonable care in their oversight of the organization they are not living up to their public trust. In addition, board members have a legal responsibility to assure the prudent management of an organization's resources. In fact, they may be held liable for the organization’s actions. A 1974 court decision known as the "Sibley Hospital case" set a precedent by confirming that board members can be held legally liable for conflict of interest because it constitutes a breach of their fiduciary responsibility.” ("Why must we be concerned about conflicts of interest?" BoardSource Knowledge Center Q&As)

And, if we learned nothing else from Emily Chan’s article “Form 990 Policies – Is it better to check ‘yes’ or ‘no’?”, we should know that it can be more damaging to have a conflict of interest policy and ignore it than not to have one at all. It’s the entire board’s responsibility to ensure that policies are observed and enforced.

Sample bar policies can be found on the Division for Bar Services Form 990 Resource Page.

Write me at jennifer.lewin@americanbar.org with your bar’s good practices and suggestions. We’ll share them in the next issue.
To Disclose or Not to Disclose?

*Taken from "Tales from the Boardroom," in the Fall 2009 issue of BoardLink*

**The Situation**

The Bar Association Board of Governors needs to appoint a new bar liaison to an important state commission. Three individuals express interest in the position. The board engages in a spirited debate about the strengths and weaknesses of each candidate and which one would best represent the bar’s point of view. The vote is close between two of the candidates, with the winner receiving twelve votes, and the other candidate receiving ten. Immediately following the board meeting, a board member contacts the candidate who had received the ten votes, relays the details of the board discussion and who had voted for whom. Insulted and embarrassed that he had been described by a board member as “not as well connected” and “occasionally brusque,” the member stops attending events and participating in bar association committee work.

How might this situation have been avoided?

**Our View**

While bar associations certainly should conduct their business with a spirit of openness, boards inevitably will have discussions that are complicated, messy, and where board members may strongly disagree with one another. Reaching the best decision sometimes requires us to air difficult or challenging opinions. So, it’s essential that the board meeting is a place where board member candor is respected and protected.

The ABA’s Guidebook for Directors of Nonprofit Corporations describes board members’ responsibility this way:

“A director should not, in the regular course of business, disclose information about the corporation’s legitimate activities unless they are already known by the public or are of public record.

In the normal course of business, a director should treat as confidential all matters involving the corporation until there has been general public disclosure or unless the matter is of public record or common knowledge. The individual director is not a spokesperson for the corporation and thus disclosure to the public about corporate activities should be made only through the corporation’s designated spokesperson …”

If you, as a board member, disagree with a decision the board is making, you have a right to have your dissent officially recorded in the minutes. However, once the decision has been made, it’s also every board member’s responsibility to support it.
On Confidentiality

Taken from "Tales from the Boardroom," in the Spring 2010 issue of BoardLink

The Metropolitan Bar Association is hiring a new executive director. There are four finalists; one is an internal candidate, the assistant executive director. A board member who serves on the search committee runs into the assistant executive director at a social event, and proceeds to describe the backgrounds and qualifications of the other three finalists. After the assistant executive director’s final interview with the search committee the following week, the same board member gives him a thumbs-up and whispers “great job, you’re going to get it” as he walks out the door. The committee subsequently selects one of the outside candidates.

So, what’s the problem?

It’s a natural human inclination to want to share. Were there any doubt, all we need to do is consider the ubiquity of Facebook. However, one of the most important responsibilities of board members is to observe confidentiality with regard to board matters.

But it’s not just confidentiality for confidentiality’s sake. Let’s think about the practical impact of this board member’s actions.

- He’s significantly raised the staff member’s expectations about getting the job. No doubt there would have been disappointment in any case, but what a perfect way to unnecessarily embitter a key staff member, not to mention the other staff colleagues who may have been supporting him.
- He’s just complicated the new executive director’s life. Those first steps in an executive director’s tenure are so crucial: a unified vote of confidence from the board and a constructive transition into the position. So much for the unified vote! Additionally, the new executive director may now be faced with a (rightfully) disgruntled staff person, upon whom she will need to rely.
- Finally, let’s acknowledge that there is always great interest in a major hiring decision like this. Word travels. What should have been a professional search reflecting the prestige and competence of the organization has been bungled by one person’s indiscretion. Board members are responsible for protecting and advancing the reputation of the organization. Clearly, that didn’t happen here.

In closing, here’s some guidance from the ABA Guidebook for Directors of Nonprofit Corporations:

“In the normal course of business, a director should treat as confidential all matters involving the corporation until there has been general public disclosure or unless the matter is of public record or common knowledge.”
A Deferring Board?

Taken from "Tales from the Boardroom," in the Winter 2011 issue of BoardLink

Our scenario:

In 2007, the president of the State Bar Association wanted professionalism to be the emphasis of his term, and for the bar to create a professionalism program. The program he and the staff developed was well received at the time, but the energy surrounding it waned when his term ended. While the president felt it was an important topic, it wasn’t an organizational priority supported by the other officers and the board. By 2010, program attendance was low. Those who did attend were leaders in the bar community, but not those for whom the program was intended. In 2010, registration fees failed to cover the cost of the program and members’ dues dollars subsidized the shortfall.

As the board worked with the finance committee to develop a balanced budget for 2011, the board decided to eliminate the professionalism program along with two other programs that were expensive to run and were not having the desired effect. When the past president got word that the program would be eliminated, he made an impassioned plea to keep it, emphasizing the necessity for a forum for exchange on professionalism topics. The board was swayed and balanced the budget instead through a variety of other cuts.

So, what’s the problem?

It’s possible the board made the best decision in this situation. However, this scenario raises a couple of important issues:

1. Success measures are important to evaluate program impact. They also can help mitigate the personal. This board intuited that the professionalism program was marginal, but there weren’t agreed-upon expectations that allowed the board to evaluate the program objectively. In this case, the lack of clear expectations may have left the board susceptible to one president’s force of personality. Did the board truly make the best decision for the organization, or was it the easier decision?

Who is responsible for setting priorities? The board appears to have yielded to this individual president to set direction for the organization. While professionalism is an important topic, this issue wasn’t at the top of the bar’s priority list. Whose responsibility is it to ask tough questions and help steer the president closer to the organization’s most pressing needs? (Hint: It should be a collaborative effort.) In fact, the board and staff should work together to keep leadership focused on the issues that are most critical to the bar’s success.
Constructive Disagreements
Taken from "Tales from the Boardroom," in the Spring 2012 issue of BoardLink

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Our scenario:
The Metro Bar Association has been deliberating whether or not to enter into a partnership with a local social services organization on a community service effort. The organizations have worked out the funding model and other details, and the board votes to proceed with the partnership. Three board members oppose the move. In his frustration, one of the board members opposed to the partnership posts a negative comment about the decision on the bar’s Facebook page.

What’s the problem?
It would be a problem if there were not disagreement on the board. Different perspectives bring valuable insight and, hopefully, result in better decisions. However, board members are expected to manage that disagreement. Board members are bound by their Duty of Loyalty to always act in the best interest of the organization. It is the rare circumstance that public criticism could be construed as acting in the organization’s best interest. (Knowledge of illegal activity taking place either by or on behalf of the organization is one situation that may require disclosure outside the organization, but board members should consult personal counsel before taking action.)

If you find yourself strongly disagreeing with a decision the board is making, here are a few strategies that make a forceful point but still allow you to uphold your fiduciary responsibility:

1. Set a time in advance of the board meeting to speak with the president and/or executive director and brief them on your concerns.
2. If you are concerned about a decision being made with insufficient information, consider if there is an outside expert who could enlighten the discussion. Then, talk with the president and executive director about arranging for that expert to contribute to the discussion.
3. If the vote has arrived and you know it is unlikely to go your way, write a letter explaining your opposition. Ask that it be read during the board meeting and entered into the minutes.
4. At a minimum, ask the secretary to ensure that the minutes reflect how you voted on the issue.
5. Once a vote is final, board members are expected to move forward and work within the new parameters. If you find that is not possible, consider submitting a letter of resignation from the board with an explanation of your reasons.

More information about fiduciary responsibility can be found on the Division for Bar Services’ Governance Resource Page.
Balancing Interests on the Board

Taken from "Tales from the Boardroom," in the Spring 2013 issue of BoardLink

Ten years ago, the State Bar Board of Governors was dissatisfied with the level of representation on the board from the bar’s sections. The board addressed this problem by adding three board seats that rotated among the section chairs. Over the course of several years, section chairs attended board meetings periodically. When they participated, chairs used the opportunity to advocate for more resources and to advance their section’s particular interests. Taking their “representative” status seriously, they took a narrower, practice area-based view of issues before the board. Before long, several factions emerged on the board, complicating its ability to make prudent decisions on the entire organization’s behalf.

A few observations:

This situation is a wonderful reminder to think through the implications of governance changes before you make them. That may mean exploring how similar changes have played out at other organizations. Don’t hesitate to call on the ABA Division for Bar Services with your questions, and we can point you to other organizations that have dealt with the same challenges.

That said, it is critical for the board to be composed of a broad cross-section of members representing diversity in practice area and setting, practice stage, geography, race/ethnicity, gender and personal experience, for example. However, when a bar organization is faced with a dearth of sole practitioners or government attorneys or lawyers of color, we often find ourselves considering designated board seats to fill the gap. Designated seats may be appropriate in some situations. In other situations, they can create more problems than they solve.

In this particular bar organization, the horse is already out of the barn so the board’s only recourse is to ensure new board members in these seats understand their fiduciary responsibility. According to the ABA Guidebook for Directors of Nonprofit Corporations:

“Each director must judge what is in the corporation’s best interest, irrespective of the other entities with which the director is affiliated or sympathetic, or to which the director owes his board appointment. The law conceives of a board of directors as an entity: each member shares the same rights and the same duties and is accountable to the same constituency. Even if a director is specifically nominated or appointed by a particular group, or is chosen in part because of an association with a certain subset of the organization’s members or beneficiaries, each director shares the same fiduciary duty to act in the best interest of the entire organization.

There are situations in which a board of directors may be explicitly structured to provide for representation of certain interests. For example, a
trade association may have a board of directors composed of individuals who are selected by separate regions or states. [...] Directors may be confused about how to address situations in which the interests of their constituency and the interests of the corporation are actually or potentially in conflict. In bringing to the attention of the board the particular sensitivities and concerns of their constituency, directors may aid the whole board in fulfilling its duty of care, and add wisdom to the whole board’s deliberations. Nonetheless, the director’s duty of loyalty lies with the interests of the corporation, not to any constituent group.” (Boyd, Willard L. and Jeannie Carmedelle Frey. *ABA Guidebook for Directors of Nonprofit Corporations*, third edition, pp. 27-28.)

Individuals in designated seats are also subject to the same attendance requirements as regular board members. Be sure that candidates for board seats understand the attendance responsibility before they are selected, since attendance is a critical component of a board member’s duty of care.

Finally, planning retreats are a powerful way to help all board members think beyond their own affiliations and experiences and focus on the significant issues facing the association. Retreat participants collectively decide where the organization should focus its efforts and resources, and where it will not. Coming out of a retreat with a shared sense of purpose provides a framework for all subsequent discussions and decision-making, and helps every board member take a more expansive view.

Have you run into a similar situation? What did you do? Share your advice by contacting the editor at jennifer.lewin@americanbar.org.