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 Carmelle 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.