

## When Board Members Go Rogue

<summary>Your association can suffer when directors push the boundaries of their authority. “Rogue” directors can disrupt the proper functioning of the staff and board, divert your association from pursuing its mission, and even expose it to legal liability. Here are tips for productively confronting a board member behaving badly.

By Jim Wilson

Associations function at the highest level when directors and volunteer leaders are appropriately dedicated to fulfilling their responsibilities. That explains why association executives place so much emphasis on engaging their boards. However, there can be a fine line between a director properly discharging his or her fiduciary duties to the association and exceeding his or her authority in a detrimental way.

While state laws vary, generally speaking, association directors are obligated to carry out their duties as a director in good faith, in a manner the director reasonably believes to be in the association’s best interests, and with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

A director has strategic and oversight duties to the association. In discharging them, he or she can—and, as appropriate, should—rely on the knowledge, opinions, and expertise of other qualified people, including other directors, officers, employees, and volunteers of the association, legal counsel, public accountants, and other retained experts.

Ordinarily, directors should discharge their duty of care by

- reviewing materials submitted to them prior to board meetings
- attending board meetings and participating in deliberations and discussion
- considering information received during board meetings from other directors, association staff, and retained experts.

In addition, the board may assign individual directors or a group of them to dig deeper into particular association matters, ask questions and gather related information, or express board-approved positions.

Problems can arise if directors exceed these typical functions and become overzealous by, for example, making excessive or misdirected demands on CEO and staff time or requesting excessive amounts of information. The District of Columbia Nonprofit Corporation Act of 2010 envisions such scenarios:

A director of a nonprofit corporation shall be entitled to inspect and copy the books, records, and documents of the corporation at any reasonable time *to the extent reasonably related to the performance of the director's duties as a director . . . but not for any other purpose or in any manner that would violate any duty to the corporation . . . .* (Emphasis added.)

Rogue directors can pose a risk, even potential liability, to the association if they take positions or incur obligations beyond their authority. Arguably the most famous association legal case involved such a scenario. In *American Society of Mechanical Engineers v. Hydrolevel Corporation*, the U.S. Supreme Court concluded that an association could be held liable for the unauthorized actions of its volunteers who were clothed with “apparent authority” to act on the association’s behalf. The *Hydrolevel* case involved a volunteer’s role in misinterpreting an association standard to harm a competitor. But the principles from the *Hydrolevel* decision could be invoked against associations more broadly—for example, to find contract, tort, or other liability arising out of the actions of rogue directors or volunteer leaders.

### **Changing Behavior**

The potential negative consequences of directors going rogue are many. In such a case, the CEO is placed in the awkward position of having to confront a volunteer leader about changing the behavior. Here are some practical steps that can help prevent board member misconduct or provide tools to deal with it when it arises:

**Maintain clear board policies.** Have the board adopt and follow policies that delineate board and staff areas of responsibility. Once adopted, these policies should not sit on a shelf and be forgotten. Rather, the board should periodically review them and consider how well they are being followed. Well-functioning associations have boards that set policy goals and strategic plans and have staffs to implement them. The board should not interfere with staff execution efforts. Written policies that set forth these expectations can reduce ambiguity and provide recourse if the policies are violated.

**Provide thorough board orientations.** New board members should be educated about the association’s policies, operations, and legal status before, or promptly upon, taking office. This is a great opportunity for board members to learn about their areas of authority and the allocation of responsibility between the board and staff. Orientation also provides a forum to discuss questions that new board members may have about the association and their role—questions they may be reluctant to ask at a board meeting in front of their colleagues.

**Enlist legal counsel and board leaders for help.** Frequently, director misconduct or overzealousness is unintentional; the board member may simply be uninformed about his or her proper role. These situations can be remedied with the help of the association’s legal counsel, board chair, or other volunteer leaders. Staff executives can rely on these resources, when appropriate, to avoid a direct confrontation with a director.

**Remove the rogue leader.** As a last resort, association boards can look into removing problem directors from office. This action should be undertaken carefully, with the assistance of legal counsel and following applicable law and the association’s governance documents. Failing to remove a rogue director not only could subject the CEO and other staff to long-term headaches, but it could expose the association to legal liability and other risks based on the director’s misconduct.

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