

Problems in Association Governance 301: Handling the Wayward Director

Washington Metropolitan Area
Corporate Counsel Association
Nonprofit Organizations Committee

1575 I St., NW

Washington, DC 20005

November 8, 2011

12:00 – 2:00 pm ET

Jeff Tenenbaum, Venable LLP, Moderator

Bob Skelton, American Society of Association Executives

Mary Jane Saunders, The Beer Institute

David Biderman, National Solid Wastes Management
Association and the Waste Equipment Technology
Association





Jeffrey S. Tenenbaum

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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer and commentator on nonprofit legal matters. Based in the firm's Washington, D.C. office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting trade and professional associations, charities, foundations, think tanks, credit and housing counseling agencies, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, the inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. He also was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. He started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill.

AREAS OF PRACTICE

Tax and Wealth Planning Antitrust

Political Law

Business Transactions Tax

Tax Controversies

Tax Policy

Tax-Exempt Organizations

Wealth Planning

Regulatory

INDUSTRIES

Nonprofit Organizations and Associations

Credit Counseling and Debt Services

Financial Services

Consumer Financial Protection

Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States

House of Representatives

BAR ADMISSIONS District of Columbia

HONORS

Listed in *The Best Lawyers in America* for Nonprofit Law (Woodward/White, Inc.) Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006
 Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004 Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

EDUCATION

J.D., Catholic University of
America, Columbus School of Law,
1996

B.A., Political Science, University
of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association
Executives

California Society of Association
Executives

New York Society of Association
Executives

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.





Bob Skelton

Bob Skelton, CAE, is the Chief Administrative Officer and In-House Counsel for ASAE & The Center for Association Leadership. Bob is responsible for Legal, Human Resources, Office Services and Conference Center operations, and is also a member of the Executive Team. Bob also serves as the senior staff liaison for ASAE & The Center's Legal Section Council and for the Ethics Committee.

Previously, Bob held several positions, including as General Counsel and/or Vice President of Human Resources for several small technology companies in various stages of their life cycle. Bob also served as Vice President – Human Resources & General Counsel for the regional subsidiary of Toyota Motor Sales, USA, and was in private practice at Webster, Chamberlain & Bean in Washington, DC.

Bob is a graduate of Union College in Schenectady, NY and The George Washington University National Law Center, and is admitted to practice in the District of Columbia, Maryland and Virginia.



Mary Jane Saunders

Mary Jane Saunders serves as general counsel for the Beer Institute, the national trade association for the brewing industry representing both large and small brewers, as well as importers and industry suppliers. Saunders brings a wealth of experience, having most recently served as general counsel for Subway Franchisee Advertising Trust Fund, the marketing and advertising arm of Subway restaurants. Prior to that, Saunders was a partner at the Washington, D.C. law firm, Venable LLP, where she drafted and negotiated complex contracts and license agreements and litigated copyright, trademark, patent, competition and other disputes. She also served as the Chair of the Trademark, Copyright and Unfair Competition Practice Group. Before joining Venable, Saunders was a Partner at the D.C. law firm, Arter & Hadden. Saunders graduated with a B.A. from Virginia Tech and earned a J.D. from the Walter F. George School of Law at Mercer University. She is a member of the Connecticut and Virginia State Bars, as well as the District of Columbia Bar. Saunders lives in McLean, Virginia with her husband and three children.



DAVID BIDERMAN

David Biderman is the Environmental Industry Associations' (EIA) General Counsel and Director of Safety. David develops the associations' positions on a variety of legal issues, including flow control and interstate. He provides frequent legal advice to staff and the association's chapters, files amicus briefs in state and federal courts on behalf of NSWMA, and supervises NSWMA's litigation activities. He is responsible for the EIA/NSWMA Safety Program, including development of the Be Safe, Be Proud safety video series and Safety Monday, the Association's weekly safety newsletter. He is the sole instructor at NSWMA's regional safety seminars and provides customized safety training for members. He is a monthly columnist for Waste Age magazine and a frequent speaker at NSWMA, SWANA and other waste industry events on legal, safety and compliance issues. He also manages NSWMA's activities in New York City, including lobbying City officials on a variety of legislative and regulatory issues.

Before David joined NSWMA in 1997, he practiced environmental law at Steptoe & Johnson, a Washington, D.C. law firm, where he worked for more than eight years, focusing on environmental, health and safety, and transportation issues.

David attended Johns Hopkins University where he received a B.A. in Political Science in 1985 and received his law degree from the University of Pennsylvania in 1988.

Today's Discussion

- Overview of Basic Legal Issues Affecting and Governing Associations
- Governance Legal Issues
- Board Roles and Responsibilities
 - Fiduciary Duty of Care
 - Fiduciary Duty of Loyalty
 - Fiduciary Duty of Obedience
 - Risk Management Protections



Governance Legal Issues

Hierarchy of Governing Law

- Relevant state nonprofit corporation statute
- Relevant state common law
- Articles of Incorporation
- Bylaws
- Board policies and procedures



Governance Legal Issues

State Nonprofit Corporation Law

- State nonprofit corporation statutes set forth:
 - Requirements for maintaining corporate status
 - Rights and obligations of board
 - Rights and obligations of members
 - Default provisions if not self-addressed
- Most such laws make clear that it is the corporation's board of directors that is charged with the ultimate responsibility and control over the organization



Governance Legal Issues

State Nonprofit Corporation Law—Board Role

- Roles of board members are defined by state law, Articles of Incorporation, bylaws, board policy manual, and common practice
- Board sets the mission and policy of the association and exercises strategic direction; board does not carry out day-to-day management of association
- Boards generally are only allowed to act in a meeting or by unanimous written consent
- Power of association board is generally paramount over power of members



Governance Legal Issues

Board Member Fiduciary Duties

- State statutory and common law requires that corporate board members fulfill:
 - Fiduciary duty of care
 - Fiduciary duty of loyalty
 - Fiduciary duty of obedience



Board Roles and Responsibilities

Fiduciary Duty of Care

- Standard is that of “ordinary and reasonable care,” or what would an ordinarily prudent director do in the same or similar circumstances?
 - Very subjective
 - Tied to reasonableness
- Business judgment rule—bad decisions are more easily defended than ignorance; court will not view decisions from benefit of hindsight, but, rather, from the perspective of the directors making the decisions at that time (was it an informed, reasoned decision, even if wrong?)



Board Roles and Responsibilities

Fiduciary Duty of Care

- Compliance with fiduciary duty of care:
 - Review all materials provided to you in advance of meetings
 - Ask questions
 - Avoid actions/discussions outside of the formal meeting setting
 - Be familiar with the organizations Articles of Incorporation, bylaws and procedural documents
 - Maintain confidentiality of information and documents



Board Roles and Responsibilities

Fiduciary Duty of Care

- Compliance with fiduciary duty of care, continued:
 - Rely on experts when appropriate (but such reliance does not excuse willful ignorance)
 - Ascertain that all minutes (particularly recorded votes) are accurate
 - Insist on legal/accounting/other expertise when necessary
 - Attend association meetings regularly, read publications, be involved



Board Roles and Responsibilities

Fiduciary Duty of Loyalty

- Duty of undivided allegiance
- Duty to avoid conflicts of interest (actual, potential and apparent)
 - Business dealings with association
 - Business dealings with competitors
 - Corporate opportunities doctrine
- Recusal or resignation
- Duty of confidentiality



Board Roles and Responsibilities

Fiduciary Duty of Loyalty

- Compliance with fiduciary duty of loyalty:
 - Adhere to conflict of interest policy
 - Disclose actual, apparent and potential conflicts of interest through regular disclosure statements
 - Deliberate as a board or through a committee of the board to determine appropriate responses to and management of actual, apparent and potential conflicts of interest



Board Roles and Responsibilities

Fiduciary Duty of Obedience

- Articles of Incorporation, bylaws and other governing documents must be followed
- Applicable laws and regulations must be followed



Board Roles and Responsibilities

Risk Management Protections

- Directors and officers liability insurance coverage
- Indemnification of directors and officers through bylaws and by state nonprofit corporation statute
- The “corporate shield” itself



Questions?

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