PHILANTHROPIC BOARDS OF DIRECTORS ON THE LINE
Roles, Realities and Prospects

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The legitimacy and viability of the nonprofit sector are dependent on the role that board members play in monitoring the activities of the organization. Recent events suggest that more needs to be done to prevent organizational crises. When nonprofit organizations "fall from grace," it is with a thunderous noise. This article explores the ideal role of boards against the reality of the failure of boards to adequately perform their legally mandated functions.

The nonprofit sector occupies a special place in American society and is imbued with the tradition of and value placed on voluntarism. An important component of organized philanthropy is that committed individuals serve as trustees, overseers, and board members. While years of experience have provided insight into the functioning of philanthropic boards, recent events suggest that much more needs to be done to elucidate their role in anticipating and preventing organizational crises.

In recent years, several scandals have shaken the philanthropic world, challenging the public's trust in these esteemed institutions and raising questions about dereliction of duty on the part of the volunteer leadership. The United Way of America and the National Association for the Advancement of Colored People (NAACP) are only two examples of nonprofits whose thunderous "fall from grace" will have a long-lasting effect on public confidence.

This article explores the ideal role of boards of charitable organizations (as defined in 26 U.S.C. 503(c)3) against the reality of the failure of several boards of directors to adequately perform their legally mandated functions. Three case studies are provided of such performance failures within the Jewish social services community. These examples are selected because of the wide media attention they generated and the fact that, in each instance, appropriate board oversight could have prevented the resulting harm to the agencies, those they serve, and the status of the agencies within the community. Because of the litigious nature of the wrongdoings, the case studies are drawn from media accounts of the incidents, rather than the personal observations of those involved. However, these media portrayals themselves indicate the vulnerabilities of nonprofits to public scrutiny and exposure. Finally, implications are drawn for the fuller exercise of fiduciary responsibility and the enhancement of board operations. This topic is of particular significance to the organized Jewish community in light of its historic base and the moral imperative of voluntarism.

THE ADMINISTRATION OF PHILANTHROPY IN CLASSIC JEWISH SOURCES

The role and responsibilities of both lay and professional leaders within the organized Jewish community are well documented in classic texts. Such discussions share a demand for high personal standards of behavior and propriety among *parnasim* or *gabbaim*, as they were known. Their position was a sacred trust, to be approached with deference and respect. In particular, the rabbis held high expectations of the ethics and integrity of charity administrators and their agents. It was imperative to avoid any conflict of interest or even a hint of impropriety among those entrusted with charitable funds.

A well-known talmudic passage (*Bava Batra* 8–9) provides details of the care taken to ensure that philanthropic service always remained above reproach. It tells us that charity was to be collected by two agents always working together. They could not separate from each other, lest there be an opportunity for malfeasance. And all currency had to be recorded "one-by-one" to ensure the honesty of the count.

As a tribute to the high regard and esteem in which they were held, a surprising degree of discretion and latitude was afforded the early *gabbai tzedakah* in the investment and allocation of philanthropic donations. Originally, no provisions were imposed to audit collections and disbursements, as the good faith of the administrator and staff was sufficient assurance. The talmudic record provides examples of this broad discretion, suggesting that character may have been held above competence in their constellation of values.

. One such example is that of Rabbi Hananiah Ben-Tradyon, who was responsible for several charitable accounts, including a fund designated for distribution only as part of the Purim celebration. Apparently, the rabbi confused this Purim fund with another, or perhaps with his own money. He made good any shortfall at his own expense and in such manner as to embarrass neither the poor nor the donor. Rabbi Hananiah is held aloft as a model, therefore, less for his administrative competence than for his exemplary personal integrity (*Avodah Zarah* 17b).

Later authorities looked upon such anecdotal records as the exception—ideal types were no longer applicable en masse. Consequently, they established provisions that would ensure more formal accounting and remove any suspicions of malfeasance that might arise. Rabbi Yacov Ben-Asher, a medieval Spanish sage, suggested that the wise administrator would do well to voluntarily submit to periodic accounting so that he stand "clean before the Lord and before Israel" (Tur: *Yoreh Deah* 257:4).

Later thinkers were more insistent. They required regular financial accounting for all appointees involved with a public levy. Apparently, controversy over both the choice of *parnasim* and *gabbaim* and their ethical demeanor was not unknown. There was particular concern that any accusations regarding misappropriation be investigated fully. As the role of *gabbai* was more frequently awarded to a paid professional, it became increasingly common to place philanthropic resources under regular review, even absent suspicions of abuse. Routine accounting and disclosure soon were accepted as the norm.

Accountability was understood to be a discrete affair, entrusted to a small committee of *parnasim*—general board members. To protect the good name of the honest administrator, such reviews were to be standard and routine, rather than random, and were never to be the result of frivolous claims or accusations (Rema, *Yoreh Deah*, 257:2; Ha-Hohen, *Yoreh Deah*, 257:3; Epstein, *Orehkh Ha-Shulkhan,* 257:12).

With the public trust satisfied and their reputations secured, the *parnas* and the *gabbai* were given discretion in their work. The central demand was for integrity and commitment to their calling over personal gain. Should their activities result in a shortfall, they would be duty-bound to compensate out of their own funds. Thus, for at least the past eight centuries of Jewish philanthropy, steps were taken to assign responsibility to the modern-day equivalent of a board of directors for the ethical, moral, and legal conduct of charitable affairs.

Finally, classic Jewish texts also provide a valuable profile of the ethics and integrity expected of all who assume the mantle of *serarah*—public leadership. Such individuals are expected to discharge their responsibilities with humility and respect, avoiding willful arrogance and accepting their task as a sacred mission. To what extent are these early teachings reflected in the modern-day board of directors?

THE ROLE AND FUNCTION OF BOARDS OF DIRECTORS: THE IDEAL

Philanthropic organizations that are incorporated are required by law to create a board of directors. Agency charters and bylaws, in turn, specify the responsibilities and obligations of boards and their members. Directors are assigned responsibility for the general direction and control of these organizations (Mitton, 1974). The board is the policymaking body with a legal duty to ensure that the agency's actions are consistent with its goals and objectives. Board members accept this charge without remuneration and act in accord with their civic responsibility. Nevertheless, they are not invulnerable to legal liability.

Although the principle of charitable immunity has deep roots in common law, it is no longer sacrosanct. As one New Jersey court recently ruled:

> Due care is to be expected of all, and when an organization's negligent conduct injured another there should, in all justice and equity, be a basis for recovery without regard to whether the defendant is a private charity (*Rupp v. Brookdale Baptist Church*, 1990, p. 190).

Board members share collective responsibility for the fiscal and programmatic aspects of the organization's performance. The board is responsible to funding sources, to the community, to governmental and private regulatory bodies, and to consumers of the agency's services. It is the board that sets direction through short- and long-term planning, which may be accomplished in concert with professional staff. The board hires the chief executive officer and supervises and evaluates his or her performance. Legal and fiduciary responsibilities, however, lie with the board, not the professional staff (Gelman, 1987; 1995).

These responsibilities have been summarized as follows:

> Under well-established principles of nonprofit and corporation law, a board member must meet certain standards of conduct and attention in carrying out his or her responsibilities to the organization. These standards are usually described as the duty of care, the duty of loyalty, and the duty of obedience (Leifer & Glomb, 1992, p. 31).

The board, as a group, manages the nonprofit corporation, delegating responsibilities appropriately but remaining ultimately accountable for the agency's image and its performance (Hanson & Marmaduke, 1972). The board is legally responsible and morally accountable to the agency's various constituencies for its actions or inactions. Thus, "a board which fails in its function of both determining policy and evaluating achievement in support of those policies is negligent in performing its mandated functions" (Gelman, 1983, p. 88).

Board members must, in their fiduciary role, be loyal to the organization and act in its best interest. They therefore have a legal and moral obligation to keep themselves fully informed about the agency's operations. There is no exception to this mandate, but the degree of deviation from it can be significant and costly—in dollars, reputation, service, and community good will.

The dilemma facing charitable organizations is how to attract qualified, responsible board members willing and able to serve without compensation. There is a substantial literature on leadership qualities within the not-for-profit sector and on what motivates citizens to volunteer for such duties. There is also a growing literature on the extent to which the obligation of boards is met successfully (Collin, 1987; Golensky, 1993; Howe, 1995; Kramer, 1985).

The goal of maintaining highly qualified and effective volunteer leadership was severely tested during the 1980s, when a series of lawsuits against nonprofit boards of directors raised concern about their potential and actual liability. Unfortunately, even the promise of indemnification (*New York Dock Co. v. McCollum,* 1939) and insurance (see, for example, Del. Code Ann. Tit 8, 145(g) [1983]), may not be sufficient to alleviate concerns about such liability. Insurance rates for charities have increased substantially, and many potentially willing board members have been dissuaded from accepting such responsibility.

Although there is some disagreement regarding the threat posed by litigation against not-for-profit organizations (Bradshaw et al., 1992; Jones & Alcabes, 1989; Whelley et al., 1989), the management of liability is a growing concern (Antler, 1987; Berliner, 1989; Bernstein, 1981; Besharov, 1985; Gelman, 1988; Pollack, 1992, 1993; Reamer, 1989). Unfortunately, research conducted on the liability of social service agencies is flawed by underreporting.

To this point, lawsuits against not-for-profit directors are still rare. When initiated, they tend to be brought by employees, beneficiaries, other board members, state attorneys general (e.g., *Butterworth v. Anclote Manor Hospital,* 1990), or publicly elected attorneys. But when they are initiated or when wrongdoing is identified within the organization, such information is typically made public, and this hurts the organization by causing a drop in membership, difficulty or an inability to raise funds, loss of resources or assets, and public finger-pointing.

Gelman (1988) identified six areas in which charges of negligence can involve board members: failure to manage and supervise the activities of the corporation; neglect or waste of corporate assets; conflicts of interest or self-benefit; improper delegation of authority; harm done to third parties through tort (wrongful action) and/or breach of contract; and offenses against taxing authorities. Recent revelations about organizational excesses in charitable organizations reveal that at least five of these areas—failure to manage and supervise, neglect of assets, self-benefit, improper delegation of authority, and offenses against taxing authorities—have brought organizations to the brink of disaster. Even though board members may protect themselves through indemnification and directors' and officers' liability insurance, they cannot escape charges of negligence or the wrath of communities that feel that their trust has been betrayed. The current level of dissatisfaction with many not-for-profit agencies bears a direct relationship to the perceived failure of board members to adequately monitor and evaluate individual and organizational performance.

The standard to which a director is held varies from state to state. California has provisions that express the legislature's desire to provide both structure and leeway:

> A director shall perform...and may serve, in good faith, in a manner such director believes is in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinary prudent person in a like position would use under similar circumstances (Cal. Corp. Code 309(a) [West, 1977]).

Serving on a board of directors is more than a social experience. Directors are expected to exercise reasonable and ordinary care in the performance of their duties, exhibiting honesty and good faith. The buck indeed stops with the directors.

CASE EXAMPLES

Although the scandals that rocked such national agencies as the United Way of America and the NAACP have dominated the limelight, many other not-for-profit organizations, both sectarian and nonsectarian, have experienced disruptions for similar reasons, and some of these are Jewish charitable organizations. The authors have been mindful of not including exhaustive details portraying each organization or particular board members in a poor light. Out of a sense of decorum, we have only highlighted the salient facts. The critical point is not what was done, but what was not done that could or should have prevented public exposure. Readers interested in learning more about the particulars of each scenario may find them in relevant newspapers.

United Jewish Community in New Jersey

A committee of the Council of Jewish Federations (CJF), an umbrella group that oversees the operations of local and regional federations in the United States and Canada, conducted an investigation at the request of the board president of the United Jewish Community (UJC) in New Jersey following acrimonious debate within the board over the agency's financial controls or lack thereof. The concerns surfaced after the retirement of UJC's executive vice president, who had served the organization for seventeen years, and after a change in lay leadership. The investigation, conducted in conjunction with a KPMG Peat Marwick audit, addressed fifteen allegations of improprieties involving the administration and allocation of agency resources. Nine of the allegations that received extensive attention in the press and were identified in the auditor's report as needing attention were the following:

1. failure to follow proper process in determining the compensation and benefits of the executive vice president
2. improper payment to the executive vice president of accrued vacation pay in the amount of $115,373.72 nine months before his retirement
3. inadequate controls on expense reimbursements
4. provision of loans to the executive vice president without compliance with applicable New Jersey statutes
5. charging UJC with personal expenses of the executive vice president and members of his family, e.g., health insurance for adult children and travel
6. failure to adequately record details of those who attended missions and failure to document whether funds advanced on behalf of attendees were reimbursed
7. ongoing acceptance of large pledges that were not paid and were eventually written off without appropriate review or oversight
8. use of interest from domestic resettlement programs and Operation Exodus funds for a supplemental retirement plan for the executive vice president
9. lack of consistent procedure for signing checks (Editor, 1995; Shuman & Alex, 1995).

The special report of the UJC noted that

> Attention to detail was frequently neglected when record keeping and process got in the way of the hectic pace of fund raising....Too frequently, matters relating to management were determined on an ad hoc basis without adequate record keeping or referral to the Executive Committee or Board of Trustees. In some sense, the UJC was run with the informality of a small business....There was inattention to detail, spur of the moment decision making, and occasional shooting from the hip in dealing with rules and proprieties (Editor, 1995, p. 7).

The report also concluded that the volunteer leadership of the federation did not execute proper oversight in its operations. Gary Rosenblatt, editor and publisher of the *Jewish News,* commented, "The United Jewish Community Federation of Bergen County, NJ, has, in effect, accused itself of financial mismanagement over a period of years" (Rosenblatt, 1995, p. 2).

According to Dr. Ron Meier, who succeeded the former executive vice president,

> Our major flaw...was in not recognizing some time ago that the system of internal control and management here did not keep pace with the sophisticated growth of campaign fund raising....Decisions were made by a president or officer, or too few people.

There were not enough checks and balances (Rosen, 1995, p. 6).

As a result of the findings of the CJF investigation, Meier indicated that UJC will take "more than 20 different steps to strengthen administration and internal controls and oversight" (Rosen, 1995, p. 6). These steps include the following:

- A special Implementation Committee was created to ensure that the entire "management report" adopted by the board would be implemented in a complete and expeditious manner.
- Sensitive financial matters have been turned over to a new accounting firm that will advise on any corrective actions to be taken to rectify past errors.
- The Personnel Committee has adopted a policy that prohibits employees from accruing unused vacation time from year to year.
- The By-Laws Committee recommended changes in procedures for determining compensation and benefits of the executive vice president by establishing an Executive Compensation Committee, which will report to the Board.
- The Board is required to approve any future loans.

These steps, if implemented with diligence will set UJC on a more positive course and will ensure appropriate Board oversight.

However, despite efforts by the UJC to acknowledge limitations in its oversight practices and to institute greater controls, the upset within the community continues. The press is a vehicle for the exchange of allegations, denials, accusations, and protestations reflecting the perspective of all those who believe that they have acted responsibly and in the interest of the community.

Toronto's Jewish Community Centers

Community leaders traded accusations of financial mismanagement following the near bankruptcy of Toronto's three Jewish Community Centers and the dismissal of 31 employees, including its long-time executive director. The JCCs were forced to file for bankruptcy protection from creditors who were owed an estimated $15 million. They owed the Bank of Montreal almost $9.5 million in mortgage payment arrears and owed Revenue Canada approximately $700,000 in unremitted payroll deductions (Lungen, 1994b), The Jewish Federation of Greater Toronto borrowed $5 million for a rescue operation that gave it overall control of the JCC's finances and management. The JCC officers and board of directors resigned en masse as part of the rescue plan. As a result of the crisis, the United Way suspended its $43,000 a month funding to the JCCs, which serve more than 18,000 individuals with an annual budget of $10 million.

The following circumstances seem to have contributed to the current financial crisis that had been brewing for a long time.

- expansion of facilities and programs without adequate financial support (Hurst, 1994)
- depletion of endowments to finance operations
- discrepancies between income and the cost of providing services that added to the growing deficit (Gordon, 1994)
- failure to adequately oversee and monitor the organization's books (Hurst, 1994; Lungen, 1994a,b)

One commentator noted, "Some critics claim that both the JCC management as well as the Federation's leadership are to be faulted for the fiscal crisis" (Gordon, 1994, p. 3).

The failure of the board of directors to exercise sufficient budget oversight has left this community in turmoil. Failure of the board to avoid or remedy its financial problems at an earlier stage reflects its inadequacy in fulfilling its mandated responsibilities. Fortunately, remedial steps have been taken to prevent a reccurrence. Howard English, a spokesperson for the federation, noted, "It will be important for the Federation to maintain more supervision over the financial health of organizations that it finances. This experience has taught us lessons for the future" (Gordon, 1994, p. 3). Clearly, one lesson is that the qualifications of board members must be examined carefully and their roles and responsibilities communicated, understood, and re-emphasized. Clearly, direction and oversight are within the domain of the board.

Jewish Community Center of Greater Washington

In 1994, the executive director of the Jewish Community Center of Greater Washington (located in the affluent suburb of Rockville, Maryland) and three of his aides were accused of embezzling nearly $1 million from the organization. A year later, during a criminal investigation, the money was repaid (Moorar, 1995). JCC officials negotiated a deal wherein, in exchange for returning the money, they would ask prosecutors not to file criminal charges. However, the State Attorney General's office was not bound by this request, and criminal charges were filed. The former JCC executive director pleaded guilty to seven felony charges related to embezzlement charges. In October 1995, he was ordered to serve seven years in prison—a stiff penalty that exceeds Maryland's sentencing guidelines. The presiding judge, however, stated that the penalty was warranted: "I see you as the person who created all this, who masterminded it...who institutionalized it," the judge said of the former JCC executive (Beyers, 1995).

The situation at the JCC has been described as "unexpectedly complex" (Moorar, 1995, p. D3). The embezzlement was alleged to have occurred over a nine-year period, during which time the staff were active in real estate transactions, acting on their own behalf. The money was taken by misusing corporate credit cards and expense allowances, excessive pension benefits, and undisclosed ownership in and payments from companies that were contracted to provide vending machines and cleaning services to the JCC (Moorar, 1995). These companies were alleged to be JCC employee-owned private firms that were used as conduits for personal enrichment (Greenberg, 1994).

The four staff members were asked to resign in 1994 after an audit by a new accounting firm uncovered massive monetary fraud and deception in the misappropriation of nearly $750,000 over a nine-year period (Kay, 1994). Another $150,000 was later found to be missing. An intensive investigation revealed that JCC money had been used to pay personal credit card bills; duplicate pay checks had been issued; management staff had contracted with employee-owned private companies to do JCC maintenance work (with possible profit-splitting); and, among other charges, the executive director was enrolled in duplicate pension plans.

The JCC has an annual budget of $7.5 million and provides an array of services to its membership and the community, including senior citizen housing, nursery and day care programs, a summer camp for children, meals for the elderly, and adult education programs. During the nine-year period in which these financial improprieties occurred, the JCC was forced to cut back on some of its programs because of an accumulating deficit (Greenberg, 1994).

The responsibility for this debacle has been laid directly at the feet of the former executive director and his aides. Indicative of this blame is the comment of the JCC vice president and general counsel: "It's traumatic when someone you've known and worked with, who seems to have the same goals and mission you do, turns out to be something different" (Greenberg, 1994, p. 4). Or, as Greenberg (1994) writing about "thieves in the temple" notes, "The social worker is an American icon, idealistic and selfless and altruistic to a fault—or so we like to think" (p. 4).

The JCC Board of Directors has worked to restore the confidence of its members, who feel "hurt and betrayed" (Moorar, 1995). Financial controls have been instituted to ensure that this type of situation does not arise again. A new executive director has been hired, the money has been recovered, and the JCC is now back on sound financial footing.

WHAT WENT WRONG?

In each of the above case illustrations, the boards of directors failed in their collective duty to oversee and manage the affairs of the organizations. They abdicated their responsibility by delegating, purposefully or by default, their obligation to supervise the executive director and to hold him or her accountable. The board's faith in the skill, competence, and character of the executive allowed time to pass and inadequate and/or nonexistent controls to become the norm.

An executive director is an employee of the organization and serves at the pleasure of the board. He or she is a professional who should be knowledgeable about people, management techniques, service provision, evaluation, fund raising, and conflict resolution and should excel as a politician and communicator (Carlton-LaNey, 1987; Gummer, 1984). The executive implements board policy and guides staff in formulating strategies designed to achieve organizational objectives, drawing on the energy, expertise, and resources of the board members by involving them and keeping them informed (Blythe & Goodman, 1987; Bradshaw et al., 1992; Gelman, 1983; Heimovics & Herman, 1990). Ethical behavior by both executives and board members is integral to the effective functioning of an organization (O'Neil, 1992). Finally, the executive does not become the organization, nor does he or she have the right to tap the agency's resources for personal benefit.

Although the literature reflects varying views about the multifaceted relationship between the board and the executive director, it is clear that they must work together in partnership (Blau & Scott, 1995; Robins & Blackbrun, 1974; Senor, 1965; Wiehe, 1978; Zander, 1993). But even in a partnership, it is the board that is responsible for evaluating the executive and the agency's operations at regular intervals. Although the executive director is delegated authority for the agency's day-to-day operations, laws and the agency's charter invest the board with the power and authority to make policy (Bubis & Dauber, 1987; Conrad & Glen, 1976; O'Connell, 1976). In other words, the ultimate responsibility for the agency resides with the board.

In each of the instances cited above, the boards were ultimately held accountable. Each paid the penalty of a public airing of allegations of wrongdoing, and each suffered the wrath of their respective communities. Each will continue to suffer a tarnished reputation. Lessons were learned, but each situation could have been prevented. Are these isolated cases, or are they suggestive of a larger problem of governance in nonprofits? We suggest that many nonprofits totter on the brink of serious problems, if not disaster. Symptoms include the following:

- the lack of clearly identified roles for board and staff
- absentee or ineffective governance
- board members who fail to keep abreast of organizational developments
- inability or unwillingness of the board to take a stand or make decisions
- board agendas set by the executive
- rubber stamping of the executive's recommendations without discussion
- failure of the board to regularly evaluate the performance of the agency, the executive, and its own performance
- lack of turnover of board members
- board members' isolation from staff, programs, clients, and the community

The key therefore is the degree to which the board fulfills its mandated role. Although the board can draw on the executive's expertise and knowledge, it cannot and must not allow its legal responsibility to be diluted or co-opted.

The events cited above are part of a larger phenomenon of violation of the public trust by not-for-profit organizations.

The primary lesson to be learned is the need for boards to remain ever vigilant in their oversight responsibilities. In addition, greater attention is needed to the effectiveness of existing strategies for the recruitment, training, evaluation, and retention of board members. It is possible that what is perceived as dereliction of duties or abdication of responsibility is more a matter of lack of appropriate training of board members in their roles and the failure of boards to monitor their own performance.

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