



A Message from Your Lawyer

BY GARY OVERSTREET

Im an employment defense lawyer, and I've represented many nonprofit organizations, some very large and some very small. I'd like you to assume that I'm your defense lawyer, or at least the defense lawyer for your organization. Assume further that your organization, and perhaps you too, as a board member, have just been sued in employment litigation.

As I drive to meet you for the first time, following are the thoughts I wish I'd expressed to you long before this litigation arose. They represent common problems found with board involvement in personnel decisions.

Remember Who You Are

As a practical matter, you've been recruited to the board because your talents are publicly known, and your nonprofit organization wants to grab those talents. Legally, however, the board only makes decisions, and you, as a board member, are merely one vote in that decision.

Realize Your Unusual Setting

You and your fellow board members come from different backgrounds, meet infrequently and for short periods, receive virtually no compensation, perceive your involvement as a labor of love rather than commerce, and effectively have no boss.

In this setting it's easy to act informally, rather than following your articles, bylaws, employment handbooks, and policies. And it's easy to act individually and forget that you're just one member of the board. It's common for staff members to seek you out to solve their individual problems, rather than go through the proper channels. Unfortunately and all too often, nonprofit board members assume that employment laws and employment litigation apply only to IBM and not someone like you and your nonprofit organization.

Assume Every Comment You Make Is Public

A U.S. Senator, not long ago, learned that his diary wasn't private, and he found his entries, regarding blow-drying his hair, in national publications. I suppose we would all behave better if we were, at all times, on video tape. Likely, none of us wants such a world, but, as your lawyer, I absolutely would like you to speak, at all times, as if you were on video tape. This is particularly important when speaking on a personnel matter having potential for trouble.

Comments made in board meetings, even in executive session, aren't privileged; comments between board members, in parking lots, or by telephone, aren't privileged; "confidential" conversations with your organization's executive director aren't privileged. In general, your only privileged communications are with your lawyer, your clergy, your spouse (not someone else's spouse), and your doctor. These privileges can be lost if the communication is in the presence of someone not your lawyer, clergy, spouse, or doctor.

Profanity, slurs, and informal observations that a particular employee may be nuts, are particularly hurtful. In a Disney employment lawsuit, it didn't help that a Disney executive had to admit that he had once said of the plaintiff, "I hate the midget."

Act as a Board , Not an Individual

Executive directors and other staff employees become your friends, and when these friends bring you their personal problems, it's easy to fall into giving advice rather than deferring to your organization's personnel policies and procedures for response to such problems. In litigation, plaintiffs' lawyers love to tell juries that board members neither knew of, nor followed, their organization's policies and procedures.



Comments between board members aren't privileged.

Be Sure All Members Have the Same Information

Those same plaintiffs' lawyers love to tell juries that board members were split on a decision and based their votes on different information. There's nothing wrong with being split on a decision—if everyone has the same data. But voting when even one board member lacks complete information can be fatal to a defense. Therefore, for any important personnel vote (such as termination of an executive director), don't assume that all other members have the same facts. Before voting, insist on a summary presentation, and ask all board members to identify any relevant information not contained in that presentation.

*Speak, at all times,
as if you were on video tape.*

Take the High Road

Participating as a member of a nonprofit organization is an extraordinary and fulfilling experience. However, employment litigation has become part of our world. Act in the best manner you can based on your education, experience, ability, and information. This will strengthen your position in the face of any lawsuit. As a board member, this is the only responsible course of action.

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What's in Your Board Kit?

For ideas to help improve your board and avoid litigation, see these *Nonprofit World* articles, available at www.snpo.org:

- **How Effective Is Your Board? A Rating Scale** (Vol. 8, No. 5)
- **Protect Yourself Against Employee Lawsuits** (Vol. 15, No. 2)
- **Improving Nonprofit Boards: What Works & What Doesn't?** (Vol. 15, No. 3)
- **To Write Or Not to Write: Do You Need a Personnel Handbook?** (Vol. 11, No. 3)
- **The Board's First Duty: Accountability** (Vol. 18, No. 6)
- **Bylaws: the Blueprint for Success** (Vol. 6, No. 1)
- **Does Your Board Need Liability Insurance?** (Vol. 12, No. 6)
- **Seven Creative Ways to Energize Your Board** (Vol. 11, No. 6)
- **The Most Likely Lawsuits—and How to Protect Yourself** (Vol. 19, No. 1)
- **Expectations for Nonprofit Boards Are Changing** (Vol. 19, No. 3)
- **Do You Need a Record-Saving Policy?** (Vol. 19, No. 6)
- **Reduce Your Risk of Liability** (Vol. 21, No. 3)
- **The Emperor's New Clothes, Or How to Protect Against Lawsuits and Other Chilling Surprises** (Vol. 13, No. 6)
- **What Is the Board's Role in Managing Risk?** (Vol. 15, No. 5)